§Law in Context

British Government and the Constitution

SIXTH EDITION

COLIN TURPIN
AND ADAM TOMKINS

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British Government and the Constitution

The first five editions of this well-established book were written by Colin Turpin. This new edition has been prepared jointly by Colin Turpin and Adam Tomkins. This edition sees a major restructuring of the material, as well as a complete updating. New developments such as the Constitutional Reform Act 2005 and recent case law concerning the sovereignty of Parliament, the Human Rights Act, counter-terrorism and protests against the Iraq War, among other matters, are extracted and analysed. While it includes extensive material and commentary on contemporary constitutional reform, Turpin and Tomkins is a book that covers the historical traditions and the continuity of the British constitution as well as the current tide of change. All the chapters contain detailed suggestions for further reading. Designed principally for law students, the book includes substantial extracts from parliamentary and other political sources, as well as from legislation and case law. As such it is essential reading also for politics and government students. Much of the material has been reworked and with its fresh design the book provides a detailed yet accessible account of the British constitution at a fascinating moment in its ongoing development.

Colin Turpin is a Fellow of Clare College and Reader Emeritus in Public Law at the University of Cambridge.

Adam Tomkins is the John Millar Professor of Public Law at the University of Glasgow. His previous books include *Public Law* (2003), *Our Republican Constitution* (2005) and *European Union Law: Text and Materials* (2006).

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British Government and the Constitution

Text and Materials

Sixth edition

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‘Government without a Constitution is power without a right’
Thomas Paine, *Rights of Man* (1792)

To Monique, our sons and grandchildren **CCT**

To Lauren and Oliver **AT**

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Part II Government

Preface

This book is concerned with the organisation, powers and accountability of government in the British constitution. It has been written from a lawyer's perspective, modified by an awareness that the British constitution is far from being exclusively the handiwork of lawyers. Judges and other practitioners of the discipline of law have made a notable contribution to it, but so have political philosophers, controversialists of many hues, party organisations, peers, rebels in and out of Parliament and the legions of special interests. Yet lawyers sometimes pretend that the constitution is theirs, teaching and writing about it in myopic isolation.

We have written this book in the conviction that the law student will arrive at an incomplete and fragmentary view of the constitution unless encouraged to take account of ideas, practices and relationships that occur outside the strict limits of the *law* of the constitution. The law student has much to learn from writers and practitioners in politics, government and public administration, just as students of these subjects can enrich their studies by learning something of the values, constraints and possibilities of the law. If asked a question, say, about the power of Parliament, a lawyer and a political scientist may give very different answers. But they are describing the same institution, and for a full understanding of its place in the constitution each of them needs to take the other's perspective into account.

We have set out in this book to present essential features of British government and the constitution in a way that offers a wider range of views to students of law and we hope also to students of politics and government. The materials in the book are taken not only from law reports, statutes and legal works but from a variety of official and unofficial publications and from the writings of political scientists, parliamentarians and other commentators on the constitution and the practice of government. We have tried in this way to show the variegated texture of a constitution which consists not only of rules – legal, quasi-legal and customary or conventional – but of ideas, habits of mind and shared understandings: a constitution continually reshaped in the daily practice of politics and administration as well as by the deliberate law-making of legislators and judges.

The student of the British constitution soon finds that there are present in it

two opposite principles: a principle of change and a principle of continuity. Until quite recent times, studies of the constitution generally over-emphasised the latter principle, presenting the constitution as something stately and settled, secure in its foundations, strong in its continuity and consistent in its slow evolution. By contrast, a good deal of the more recent literature focuses overly on the changing constitution at the expense of the continuing, the historical and the traditional. For all the reform we have seen to the British constitution in the last thirty years or so, there is much that remains of the old order (see further chapter 1). The 'venerable constitution' is still, in all sorts of respects, an apt description. What is needed – and what we hope we have provided here – is a balanced account that addresses both the elements of change and continuity that we find at the heart of the British constitution today.

The first five editions of this book were written by Colin Turpin. This is the first edition to have been jointly prepared by Colin Turpin and Adam Tomkins. We have both worked on each of the chapters and take joint responsibility for them all. Readers of earlier editions will find much that is familiar here but, for this edition, the book has been extensively revised and reworked, as well as updated. Some chapters are new to this edition, others have been substantially restructured, and the order in which the chapters appear has been altered to make clearer sense, we hope, of today's constitutional law and practice. The book is divided into four parts. Part I (chapters 1–5) deals with the fundamental ideas that govern the constitution (democracy, sovereignty, the rule of law and so forth) and with the multiplicity of sources, both domestic and European, that now contribute to it. In this Part, too, readers will find consideration of constitutional reform and of the structures of devolution that have transformed British government, at least in some parts of the United Kingdom, since 1998. Part II (chapters 6–7) is concerned with central government, with its institutions, personnel and powers. Part III (chapters 8–10) focuses on the various ways in which British government is subject to forms of accountability. In this Part we consider, in turn, the relative roles of the people, of Parliament and of the courts of law in this regard. When we come to the courts (in chapter 10) both the law of judicial review and the principles of liability are discussed. Part IV (chapter 11) considers the extent to which, and the means by which, the British constitution seeks to secure a degree of personal liberty. This is an element of the constitution that has been sorely tested in recent years in the face of a series of apparent threats to national and international security. We consider in some detail the ways in which British constitutional law has responded to this challenge.

Colin Turpin gives especial thanks to Monique for her constant encouragement and practical help with work on the book. Once again he is grateful to the Master and Fellows of Clare College for collective, friendly stimulus and to the students whose enthusiasm, alertness and scepticism make the whole enterprise of teaching and writing about law exciting and worthwhile.

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We would both like to acknowledge what a pleasure it has been to work with our publishers at Cambridge University Press. In this regard we are particularly grateful to Finola O'Sullivan, Sinéad Moloney, Elizabeth Davison and Wendy Gater.

We have endeavoured to state the legal and constitutional position as at 1 November 2006, although we have been able to take into account subsequent developments in one or two instances.

Colin Turpin
Adam Tomkins

December 2006

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Abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
AMS	additional member system
AV	alternative vote
BJ Pol S	British Journal of Political Science
CFSP	common foreign and security policy
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
Cm	Command Paper (1986–present)
Cmd	Command Paper (1919–1956)
CML Rev	Common Market Law Review
Cmnd	Command Paper (1956–1986)
COREPER	Committee of Permanent Representatives
CPAG	Child Poverty Action Group
Crim LR	Criminal Law Review
DUP	Democratic Unionist Party
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEC	European Economic Community
EHRLR	European Human Rights Law Review
EL Rev	European Law Review
EU	European Union
FPTP	first past the post
HC	House of Commons Paper
HC Deb	House of Commons Debates
HL	House of Lords Paper
HL Deb	House of Lords Debates
HRA	Human Rights Act 1998
ICLQ	International and Comparative Law Quarterly
IPPR	Institute for Public Policy Research
JHA	justice and home affairs
JLS	Journal of Law and Society

JMC	Joint Ministerial Committee
JR	Judicial Review
JUSTICE	British section of International Commission of Jurists
LQR	Law Quarterly Review
LS	Legal Studies
MEP	Member of the European Parliament
MLR	Modern Law Review
MSP	Member of the Scottish Parliament
NDPB	non-departmental public bodies
NEDC	National Economic Development Council
NILQ	Northern Ireland Legal Quarterly
NLJ	New Law Journal
OJLS	Oxford Journal of Legal Studies
PL	Public Law
PPB	party political broadcast
PR	proportional representation
Pub Adm	Public Administration
QMV	qualified majority voting
QUANGO	quasi-autonomous non-governmental organisation
SDLP	Social Democratic and Labour Party
SIAC	Special Immigration Appeals Commission
Stat LR	Statute Law Review
STV	single transferable vote
TEU	Treaty on European Union
UUP	Ulster Unionist Party

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Part I
Constitution, state and beyond

1

The British constitutional order

Contents

1 Nature of the British constitution

Almost every country in the world has a written constitution which is a declaration of the country's supreme law. All other laws and all the institutions of such a state are subordinate to the written constitution, which is intended to be an enduring statement of fundamental principles. The absence of this kind of supreme instrument in the governmental system of the United Kingdom often perplexes the foreign inquirer, who may wonder where our constitution is to be found, and indeed whether we have one at all.

What, then, do we mean when we speak of the British constitution? Plainly there exists a body of rules that govern the political system, the exercise of public authority, the relations between the citizen and the state. The fact that the main rules of these kinds are not set out in a single, formal document does make for some difficulty in describing our constitution, although even in a country with a written constitution we soon discover that not all the arrangements for its government are to be found there: many elements of the constitution will have to be looked for elsewhere than in the primary document labelled 'the Constitution'. (The formal constitution may even be misleading, for we are warned by a Frenchman, Léon Duguit, that 'the facts are stronger than

constitutions', and by an American, Roscoe Pound, that the 'law in books' is not necessarily the same as the 'law in action'.) But at all events a written constitution is a place where a start can be made. Lacking this, how do we set about describing the British constitution?

We might begin in a specific way by taking note of particular rules and practices that are observed in the working of the political system – for example, the rule that a Parliament can continue for no more than five years before dissolution (Parliament Act 1911, section 7), or the practice by which ministers of the Crown answer Questions in the House of Commons. Rules and practices such as these, relating to the government of the country, are of great number and variety: if it were possible to make a complete statement of them, that could no doubt be presented as a formal description of the British constitution. (It would include much that elsewhere would be put into a written constitution and much more that would be left out.) We should then have the material for a definition of the British constitution, which might run something like this:

> a body of rules, conventions and practices which describe, regulate or qualify the organisation, powers and operation of government and the relations between persons and public authorities.

But such a definition, even if formally adequate, would fail to reveal some important features of the constitution.

Shifting our point of view slightly, we might think next of the institutions and offices which constitute the machinery of British government. An institutional description of the constitution would include Parliament, the government and the courts, the monarchy and the civil service, devolved assemblies and administrations in Scotland, Wales and (subject to circumstances) Northern Ireland, and such offices as those of the Parliamentary Ombudsman, the Comptroller and Auditor General, and the Director of Public Prosecutions. Of course these institutions and offices are themselves to be explained by reference to rules and practices which constitute them or define their powers and activity. But we do not think of them simply as bundles of rules. Rather, they have what might be described as their own reality and momentum – often loaded with history and tradition – in what is sometimes called 'the living constitution'.

Reflecting further on the constitution, there would come to mind certain ideas, doctrines or organising principles which have influenced or inspired the rules and practices of the constitution, or which express essential features of our institutions of government or of relations between them. There can be no true understanding of the British constitution without an appreciation of the role within it of such commanding principles as those of democracy, parliamentary sovereignty, the rule of law, the separation of powers and ministerial responsibility (on each of which, see chapter 2).

We also have to think of the ways these various institutions and ideas are now required to operate in the context of globalisation and of the rise to prominence

of international and supranational organisations such as the Council of Europe, with its influential European Convention on Human Rights, and the European Union, with its vast and continually growing body of Community law (on both of which, see chapter 5).

Until now we have spoken rather loosely of 'rules and practices' of the constitution, and we need to be more definite. The *legal* rules that make up part of the constitution are either statutory rules or rules of common law. Many of the more important practices of the constitution also have the character of rules and, like legal rules, may give rise to obligations and entitlements. These non-legal rules are called conventions. (The nature of conventions and their relation to law is one of the fundamental problems of the constitution, and is more fully explored in chapter 3.)

As already indicated, the attempt might be made to enumerate all the rules relating to the system of government in a comprehensive statement of the contents of the British constitution (although it would not remain up to date for long). A problem that would arise in doing this would be that of deciding whether rules were sufficiently connected with the machinery of government to count as part of the constitution. Should the statement include the rules and practices relating to the control of immigration, or the organisation of the armed forces, or the administration of social security? This sort of question would have to be answered rather arbitrarily, for there are no natural boundaries of the system of government or of the constitution. As S Finer, V Bogdanor and B Rudden have commented (*Comparing Constitutions* (1995), p 40) the British constitution is 'indeterminate, indistinct and unentrenched'. Moreover, much of it would remain so even if it were codified.

Unsurprisingly, no comprehensive list or statement of the kind under consideration has been attempted, but Albert Blaustein and Gisbert Flanz (eds), *Constitutions of the Countries of the World*, present us with a list of constitutional *statutes* of the United Kingdom (in 1992) which names over 300 statutes, ranging from Magna Carta 1215 and the Bill of Rights 1689 to more recent statutes such as the Parliament Acts 1911 and 1949, the Crown Proceedings Act 1947, the Parliamentary Commissioner Act 1967, the European Communities Act 1972, the Race Relations Act 1976 and the British Nationality Act 1981. The 2006 edition of *Blackstone's Statutes in Public Law and Human Rights* includes extracts from 120 statutes, of which 74 were passed within the last twenty years. Whether this is a reliable indication of how much the British constitution has changed in recent times is a matter we shall consider later in this chapter.

A comprehensive list of constitutional rules would not tell us what is distinctive in the British constitution or what is of especial value. For the constitution is not mere machinery for the exercise of public power, but establishes an *order* by which public power is itself to be constrained. Some constitutional rules express social or political values that are thought important to preserve, or that help to maintain a balance between different institutions of government, or safeguard minorities or protect individual rights. These rules, we may say,

have 'something fundamental' about them, and are distinguishable from much that is circumstantial, temporary, simply convenient or merely mechanical in the constitution.

This distinction, however, is not straightforward. There is often disagreement about what is vital in the constitution and what is inessential. It is easy to fall into a very conservative way of regarding the constitution and to categorise what is old and traditional in our rules and practices as necessarily to be cherished and preserved, although no longer conformable to a changed society, a transformed public consciousness and new conceptions of justice and morality. There is a contrary tendency to view the whole constitution in an instrumental way, holding all its rules to be equally malleable or dispensable in the interest of immediate political ends or administrative convenience.

Profound changes in society and politics in the past century created stresses in Britain's historical constitution, but a lack of consensus, together with official inertia or satisfaction with the status quo, for long inhibited thoroughgoing constitutional reform. The response to revealed defects was to adjust or tinker with the constitutional mechanism, sometimes without due deliberation or debate, rather than to redesign the system. Towards the close of the twentieth century questions were increasingly raised about the suitability of the constitution to the political realities of the post-industrial, multi-racial, multi-party, relatively non-deferential and egalitarian (if still unequal) society which Britain had become. We find Samuel Beer observing that 'the new stress on participant attitudes and behaviour collides with values anciently embedded in the political system' (*Britain Against Itself* (1982), p 112). Constitutional rules which had seemed deeply rooted were coming under critical scrutiny – for example, the electoral system, rules for maintaining governmental secrecy, and the law and conventions which regulate the working of Parliament. Government was seen to be over-centralised and insufficiently controlled. In response to such criticisms and dissatisfactions the Blair Government, taking office in 1997, launched an ambitious – but not comprehensive – project of constitutional reform, which we consider in the final section of this chapter. The still uncompleted reform project has given a renewed impetus to constitutional debate and it is timely for us to ask, what in the British constitution has outlived its usefulness, what needs reform, and what expresses fundamental values that it is important to maintain and strengthen?

(a) Fundamentals and fluidity

It may be expected that Parliament, the government and the courts should have a particular concern for rules that reflect fundamental values, upholding them against prejudice or transient passions and departing from them only on the strength of open and principled argument.

Unfortunately this expectation is sometimes disappointed. The abrogation by Parliament of long-established rules that may be deemed fundamental is not

always supported by full investigation or convincing justification. This criticism has been made, for instance, of the abolition by the Criminal Justice Act 1988 of the defendant's right of peremptory challenge of jurors (see Gobert [1989] *Crim LR* 528) and also of the abolition by the Criminal Justice and Public Order Act 1994 of an accused person's 'right of silence', which had 'stood out as one of the proudest boasts of Britain's commitment to civil liberties' (Geoffrey Robertson, *Freedom, the Individual and the Law* (7th edn 1993), p 32; see further Birch [1999] *Crim LR* 769). Proposed legislation to restrict the right to trial by jury – regarded by Lord Denning as 'the bulwark of our liberties' (*Ward v James* [1966] 1 QB 273, 295) – attracted similar criticism, and the Government was compelled to make significant concessions to overcome opposition in the House of Lords and secure the enactment of the Criminal Justice Act 2003.

By the Anti-terrorism, Crime and Security Act 2001 Parliament authorised the indefinite detention without trial of non-British nationals who were suspected of being international terrorists. To forestall challenges to the adoption of this power, the Government derogated from Article 5(1) of the European Convention on Human Rights (the right to liberty and security of person). Derogation is allowed by the Convention (Article 15) if strictly necessary in the event of a 'public emergency threatening the life of the nation'. In *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, it was held by the House of Lords that the Government's derogation on this ground went beyond what was strictly necessary and was unlawful. It was further held that section 23 of the Act, the provision for detention, was incompatible with Article 5(1) of the Convention. The case resulted in Parliament relegislating, replacing the scheme of indefinite detention without trial with a system of 'control orders', themselves deeply controversial from a human rights point of view (see the Prevention of Terrorism Act 2005). (These matters are more fully considered in chapters 5 and 11.)

Judicial decisions, too, may undo what had been thought fundamental. Here follows an example of judicial subversion of a fundamental rule – although happily it was only a temporary aberration, and after a time the rule was restored.

The writ of habeas corpus (meaning, 'thou shall have the body brought into court'), for securing a judicial inquiry into the legality of a person's detention, has its origin in early common law and a series of Habeas Corpus Acts. Section 3 of the Act of 1816 provides that when a writ of habeas corpus has been issued, and the custodian of the person detained has made a return to the writ, showing cause for the detention, the court may 'examine into the truth of the facts set forth in such return'. The efficacy of the writ of habeas corpus will often depend in practice on the onus of proof, and the courts established the rule (surely implicit in section 3 of the Habeas Corpus Act 1816) that the custodian must prove, to the satisfaction of the court, the circumstances alleged to justify the detention. This rule, in assuring effective protection of the right of the individual to personal freedom, certainly has the appearance of 'something fundamental': it is not confined to habeas corpus proceedings and was

expressed as follows by Lord Atkin in *Eshugbayi Eleko v Government of Nigeria* [1931] AC 662, 670:

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.

However in a number of cases arising under the Immigration Act 1971 the courts reversed the rule as to onus of proof in habeas corpus proceedings, holding that the onus was on the applicant to establish that his or her detention was unlawful. It was further held that this onus could be discharged only by showing that the immigration authority – immigration officer or Secretary of State – had *no reasonable grounds* for reaching the conclusions on which the detention was based. (See in particular *R v Secretary of State for the Home Department, ex p Choudhary* [1978] 1 WLR 1177; *Zamir v Secretary of State for the Home Department* [1980] AC 930.) The effect of these rulings upon the administration of immigration law was, as Templeman LJ observed in *R v Secretary of State for the Home Department, ex p Akhtar* [1981] QB 46, 52, to deny 'the effective recourse of an individual to the courts which administer justice in this country'. Must we not say of this judicial deviation, in which the courts overturned the rule of the Habeas Corpus Act and robbed the individual of an effective remedy for unlawful detention, that it violated fundamental constitutional principle? In *Khawaja v Secretary of State for the Home Department* [1984] AC 74, the House of Lords restored the true principle, holding that the burden of proof rested on the custodian, and that the issue was not whether there were reasonable grounds for the decision to detain, but whether the detention could be justified in law. (See further Newdick [1982] *PL* 89, [1983] *PL* 213.)

(b) Constitutional safeguards

To whom are we to look for the defence of what is fundamental in the constitution – for the preservation of 'constitutionalism'? In the first place, the courts have a cardinal role to play in upholding fundamental principle, although, as we have seen, they have themselves a power to reinterpret or displace constitutional rules, which itself calls for vigilance: *quis custodiet ipsos custodes*? (who will guard the guardians?). We rely upon the courts to maintain fundamental legal rules against excessive zeal or malpractice of administrators and others who exercise public power, but their role as constitutional guardians is necessarily limited. They are restricted, as regards legislation, by the doctrine of parliamentary sovereignty (see chapter 2); and they work within a tradition (itself resting on a fundamental idea of the constitution) of judicial restraint, for they are, after all, unelected, largely unaccountable, and not especially qualified to resolve issues of political judgement and policy. In recent years the courts have, however, found a new boldness in developing the principles of judicial review, and an eminent

constitutional lawyer declares that they have brought about a 'renaissance of administrative law' in asserting their power to control public authorities (Sir William Wade, *Constitutional Fundamentals* (rev edn 1989), ch 5). The balance between a proper judicial restraint and a legitimate judicial activism remains a critical feature of the constitution. (See further chapters 10 and 11.)

Secondly, we depend on the political actors themselves to observe the 'rules of the game': ministers, civil servants and parliamentarians operate in a framework of generally well-understood procedures which are designed to make the governmental machine work, not merely efficiently but with respect for fundamentals. A veteran parliamentarian showed an awareness of this in remarking, 'We have no constitution in this country: we have only procedure – hence its importance' (Mr St John-Stevas, HC Deb vol 991, col 721, 30 October 1980). Procedures, it is true, may not hold up in a time of crisis. Admitting this, JW Gough nevertheless asked whether, in 'a time of crisis or of embittered emotions', we should be 'any safer with laws, even with fundamental laws and a written constitution' (*Fundamental Law in English Constitutional History* (1955), p 212). The observance of procedures is checked in certain respects by parliamentary select committees – such as the Public Accounts Committee and the Select Committee on Standards and Privileges – and by the Comptroller and Auditor General, the Committee on Standards in Public Life, the Parliamentary Ombudsman and the Commissioner for Public Appointments. (See further chapter 9.)

Thirdly, and in the last resort, we depend on the force of public opinion, pronounced in the general verdicts of elections and expressed in more specific ways through the media, political parties and private interest groups and organisations of many kinds. A valuable role is performed by those organisations, such as Liberty (the National Council for Civil Liberties), that exist for the purpose of defending individual rights. (See further chapter 8.)

2 The constitution and the state

Constitutionalism is not necessarily assured by a democratic governmental system with a supportive political culture: there must also be an appropriate and effective *institutional* structure. This is underlined by Daniel Franklin and Michael Baun (*Political Culture and Constitutionalism: A Comparative Approach* (1995), p 222):

> Even where a strong cultural consensus in favour of constitutionalism exists . . . the problem of institutional design – in the sense of creating governmental institutions that are both workable and legitimate – remains. Political culture, it appears, is a necessary, but not a sufficient, condition for democratic constitutionalism.

The institutional structure may seem to rest upon the idea of the state, for definitions of the constitution often focus on the concept of the state and

its organs. For example, Hood Phillips and Jackson's *Constitutional and Administrative Law* (8th edn 2001), p 5, defines a constitution as:

> the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulate the relations of the various state organs to one another and to the private citizen.

Regarded from the perspective of international law the United Kingdom is undoubtedly a state, but our constitutional system has been constructed largely without the use of the concept of the state. In Britain there is no legal entity called 'the state' in which powers are vested or to which allegiance or other duties are owed. The non-admission of the idea of the state helps to explain the tardy and partial development, in Britain, of a system of public law. As Kenneth Dyson remarks (*The State Tradition in Western Europe* (1980), p 117), there was 'no conception of the state to which principles and rules could be attributed', and ordinary private law occupied much of the field in which relations between public officers and private citizens were conducted (among many examples, see *Entick v Carrington* (1765) 19 St Tr 1029 and *Malone v Metropolitan Police Commissioner* [1979] Ch 344, both considered in chapter 2). For issues savouring more of policy than of property, the courts were inclined to resign to Parliament the function of controlling governmental action. It has been said, too, that the absence of a concept of the state has frustrated 'the development of a rational-legal theory of the constitution' and has excluded from our constitutional culture 'the notion of an authority higher than the government of the day' (P Madgwick and D Woodhouse, *The Law and Politics of the Constitution of the United Kingdom* (1995), p 75; see further Mitchell, 'The causes and effects of the absence of a system of public law in the United Kingdom' [1965] *PL* 95 and Laborde, 'The concept of the state in British and French political thought' (2000) 48 *Political Studies* 540).

The written constitutions of many countries are founded on the idea of the state as expressing the whole political organisation of the people. We find, for instance, the following provisions in the Constitution of Ireland of 1937.

The Constitution of Ireland

> Article 4. The name of the State is *Éire*, or, in the English language, *Ireland*.
>
> Article 5. Ireland is a sovereign, independent, democratic state.
>
> Article 6. (1) All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State . . .
>
> (2) These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.
>
> Article 9. (2) Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.

A number of the fundamental rights defined by the Irish Constitution are expressed in terms of guarantees or obligations assumed by the state. For instance, the state 'guarantees liberty for the exercise' inter alia of 'The right of the citizens to express freely their convictions and opinions' (Art 40(6)(1)).

The idea of the state is familiar enough in English political thought, and even lawyers have to deal with such expressions as 'offences against the state', 'act of state', and the 'interests of the state'. On the other hand, as Sedley LJ remarked in *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628, [3], 'the law of England and Wales does not know the state as a legal entity'. Accordingly, there is no single legal definition of the state for all purposes and the courts have had to decide, in various contexts, whether a particular public body is an organ of the state. In *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, it was argued that the NSPCC, a voluntary charity incorporated by royal charter and authorised by statute to bring care proceedings for the protection of children, was not part of 'the state' and accordingly could not rely on 'public interest immunity' (a prerogative immunity of the Crown's) as justifying its refusal to disclose the identity of its informants. Lord Simon of Glaisdale disposed of this argument in the following words (pp 235–6):

> '[T]he state' cannot on any sensible political theory be restricted to the Crown and the departments of central government (which are, indeed, part of the Crown in constitutional law). The state is the whole organisation of the body politic for supreme civil rule and government – the whole political organisation which is the basis of civil government. As such it certainly extends to local – and, as I think, also statutory – bodies in so far as they are exercising autonomous rule.

(See further on Crown prerogatives chapters 6 and 7.)

In *Foster v British Gas* [1991] 2 AC 306 the House of Lords, applying criteria laid down by the European Court of Justice, ruled that the British Gas Corporation (a nationalised industry, the predecessor of British Gas plc) was sufficiently identified with the state (it had been set up by the state with special powers to provide a public service under the control of the Secretary of State) to be bound by the terms of an EC Directive addressed to the United Kingdom and other Member States of the European Community (see further chapter 5).

The phrase 'the interests of the state' occurs in the Official Secrets Act 1911, and was considered in the following case.

Chandler v Director of Public Prosecutions [1964] AC 763 (HL)

The appellants had attempted to enter and immobilise an airfield, which was a 'prohibited place' within the meaning of the Official Secrets Act 1911, as a demonstration of opposition to nuclear weapons. They were charged with conspiracy to commit a breach of section 1 of the Act, which makes it an offence to enter any prohibited place 'for any purpose prejudicial to the safety or interests

of the State'. It was argued for the appellants that what they had intended to do was not *in fact* prejudicial to the safety or interests of the state, and further that it was their *purpose* to benefit and not to harm the state. Counsel argued also that the word 'State' in the Act meant the inhabitants of the country and not the organs of government.

> **Lord Reid:** . . . Next comes the question of what is meant by the safety or interests of the State. 'State' is not an easy word. It does not mean the Government or the Executive. 'L'Etat c'est moi' was a shrewd remark, but can hardly have been intended as a definition even in the France of the time. And I do not think that it means, as counsel argued, the individuals who inhabit these islands. The statute cannot be referring to the interests of all those individuals because they may differ and the interests of the majority are not necessarily the same as the interests of the State. Again we have seen only too clearly in some other countries what can happen if you personify and almost deify the State. Perhaps the country or the realm are as good synonyms as one can find and I would be prepared to accept the organised community as coming as near to a definition as one can get.

Lord Hodson also took the state to mean 'the organised community' (p 801).

> **Lord Devlin:** . . . What is meant by 'the State'? Is it the same thing as what I have just called 'the country'? Mr Foster, for the appellants, submits that it means the inhabitants of a particular geographical area. I doubt if it ever has as wide a meaning as that. I agree that in an appropriate context the safety and interests of the State might mean simply the public or national safety and interests. But the more precise use of the word 'State', the use to be expected in a legal context, and the one which I am quite satisfied . . . was intended in this statute, is to denote the organs of government of a national community. In the United Kingdom, in relation at any rate to the armed forces and to the defence of the realm, that organ is the Crown.

In the view of all their Lordships, the interests of the state were in this matter identical with those of the Crown or at all events were determined by the Crown – in effect, by the government of the day. Lord Pearce, for example, said (p 813):

> In such a context the interests of the State must in my judgment mean the interests of the State according to the policies laid down for it by its recognised organs of government and authority.

Consequently it could not be argued that the military dispositions decided upon by the *government* were not in the interests of the *state*. The arguments for the appellants having failed in this and other respects, their convictions were confirmed. (See further Thompson [1963] *PL* 201.)

In *R v Ponting* [1985] Crim LR 318 McCowan J, in directing the jury on the meaning of 'the interest of the State' in section 2(1) (since repealed) of the Official Secrets Act 1911, followed Lord Pearce in saying that the expression

meant the policies of the state laid down for it by the recognised organs of government and authority. This ruling neutralised Ponting's argument, in defending a charge of disclosure of official information in breach of section 2(1), that he had acted in the interest of the state as an institution distinct from the government of the day. (The jury nevertheless acquitted Ponting in a verdict welcomed by many observers, including Lord Denning: see HL Deb vol 461, col 563, 20 March 1985. On the *Ponting* case see further N MacCormick, *Questioning Sovereignty* (1999), ch 3.)

If the interests of the state and of the government are in law to be considered the same, the possibility remains that those interests may differ from what is in the real interest of the community as a whole. This was perceived by Lord Radcliffe, when he said, in *Glasgow Corpn v Central Land Board* 1956 SC (HL) 1, 18–19, that 'The interests of government . . . do not exhaust the public interest'. That the interests of the government may have to yield to the wider public interest is clearly shown by the '*Spycatcher*' case, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, where the desire of Mrs Thatcher's Government to ban the publication of the memoirs of a former Security Service (MI5) officer, Peter Wright, was weighed against the broader public interests of freedom of expression and open government. These latter interests were (eventually) held to prevail over the declared interest of the government of the day (see further chapter 11). It might make for a better understanding of constitutional relationships if we had a coherent concept of the state, clearly distinguished from those who exercise power within it.

Legal argument about the nature of the state and its relation to the government is sometimes rather narrow, and may cause us to lose sight of wider political realities. These receive their due in the following passage.

Ralph Miliband, *The State in Capitalist Society* (1969), pp 49–54

There is one preliminary problem about the state which is very seldom considered, yet which requires attention if the discussion of its nature and role is to be properly focused. This is the fact that 'the state' is not a thing, that it does not, as such, exist. What 'the state' stands for is a number of particular institutions which, together, constitute its reality, and which interact as parts of what may be called the state system.

The point is by no means academic. For the treatment of one part of the state – usually the government – as the state itself introduces a major element of confusion in the discussion of the nature and incidence of state *power*, and that confusion can have large political consequences. Thus, if it is believed that the government is in fact the state, it may also be believed that the assumption of governmental power is equivalent to the acquisition of state power. Such a belief, resting as it does on vast assumptions about the nature of state power, is fraught with great risks and disappointments. To understand the nature of state power, it is necessary first of all to distinguish, and then to relate, the various elements which make up the state system.

It is not very surprising that government and state should often appear as synonymous for it is the government which speaks on the state's behalf. It was the state to which Weber was referring when he said, in a famous phrase, that, in order to be, it must 'successfully claim the monopoly of the legitimate use of physical force within a given territory'. But 'the state' cannot claim anything: only the government of the day, or its duly empowered agents, can. Men, it is often said, give their allegiance not to the government of the day but to the state. But the state, from this point of view, is a nebulous entity; and while men may choose to give their allegiance to it, it is to the government that they are required to give their obedience. A defiance of its orders is a defiance of the state, in whose name the government alone may speak and for whose actions it must assume ultimate responsibility.

This, however, does not mean that the government is necessarily strong, either in relation to other elements of the state system or to forces outside it. On the contrary, it may be very weak, and provide a mere façade for one or other of these other elements and forces. In other words, the fact that the government does speak in the name of the state and is formally *invested* with state power, does not mean that it effectively *controls* that power. How far governments do control it is one of the major questions to be determined.

A second element of the state system which requires investigation is the administrative one, which now extends far beyond the traditional bureaucracy of the state, and which encompasses a large variety of bodies, often related to particular ministerial departments, or enjoying a greater or lesser degree of autonomy – public corporations, central banks, regulatory commissions, etc – and concerned with the management of the economic, social, cultural and other activities in which the state is now directly or indirectly involved. The extraordinary growth of this administrative and bureaucratic element in all societies, including advanced capitalist ones, is of course one of the most obvious features of contemporary life; and the relation of its leading members to the government and to society is also crucial to the determination of the role of the state.

Formally, officialdom is at the service of the political executive, its obedient instrument, the tool of its will. In actual fact it is nothing of the kind. Everywhere and inevitably, the administrative process is also part of the political process; administration is always political as well as executive, at least at the levels where policy-making is relevant, that is to say in the upper layers of administrative life. . . . Officials and administrators cannot divest themselves of all ideological clothing in the advice which they tender to their political masters, or in the independent decisions which they are in a position to take. The power which top civil servants and other state administrators possess no doubt varies from country to country, from department to department, and from individual to individual. But nowhere do these men *not* contribute directly and appreciably to the exercise of state power. . . .

Some of these considerations apply to all other elements of the state system. They apply for instance to a third such element, namely the military, to which may, for present purposes, be added the para-military, security and police forces of the state, and which together form that branch of it mainly concerned with the 'management of violence'.

In most capitalist countries, this coercive apparatus constitutes a vast, sprawling and resourceful establishment, whose professional leaders are men of high status and great influence, inside the state system and in society . . .

Whatever may be the case in practice, the formal constitutional position of the administrative and coercive elements is to serve the state by serving the government of the day. In contrast, it is not at all the formal constitutional duty of judges, at least in Western-type political systems, to serve the purposes of their governments. They are constitutionally independent of the political executive and protected from it by security of tenure and other guarantees. Indeed, the concept of judicial independence is deemed to entail not merely the freedom of judges from responsibility to the political executive, but their active duty to protect the citizen *against* the political executive or its agents, and to act, in the state's encounter with members of society, as the defenders of the latters' rights and liberties. . . . But in any case, the judiciary is an integral part of the state system, which affects, often profoundly, the exercise of state power.

So too, to a greater or lesser degree, does a fifth element of the state system, namely the various units of sub-central government. In one of its aspects, sub-central government constitutes an extension of central government and administration, the latter's antennae or tentacles. In some political systems it has indeed practically no other function. In the countries of advanced capitalism, on the other hand, sub-central government is rather more than an administrative device. In addition to being agents of the state these units of government have also traditionally performed another function. They have not only been the channels of communication and administration from the centre to the periphery, but also the voice of the periphery, or of particular interests at the periphery; they have been a means of overcoming local particularities, but also platforms for their expression, instruments of central control and obstacles to it. For all the centralisation of power, which is a major feature of government in these countries, sub-central organs of government, notably in federal systems such as that of the United States, have remained power structures in their own right, and therefore able to affect very markedly the lives of the populations they have governed.

Much the same point may be made about the representative assemblies of advanced capitalism. Now more than ever their life revolves around the government; and even where, as in the United States, they are formally independent organs of constitutional and political power, their relationship with the political executive cannot be a purely critical or obstructive one. That relationship is one of conflict *and* cooperation.

Nor is this a matter of division between a pro-government side and an anti-government one. *Both* sides reflect this duality. For opposition parties cannot be wholly uncooperative. Merely by taking part in the work of the legislature, they help the government's business. . . .

As for government parties, they are seldom if ever single-minded in their support of the political executive and altogether subservient to it. They include people who, by virtue of their position and influence, must be persuaded, cajoled, threatened or bought off.

It is in the constitutionally-sanctioned performance of this cooperative and critical function that legislative assemblies have a share in the exercise of state power. That share is rather less extensive and exalted than is often claimed for these bodies. But . . . it is not, even in an epoch of executive dominance, an unimportant one.

These are the institutions – the government, the administration, the military and the police, the judicial branch, sub-central government and parliamentary assemblies – which

make up 'the state', and whose interrelationship shapes the form of the state system. It is these institutions in which 'state power' lies, and it is through them that this power is wielded in its different manifestations by the people who occupy the leading positions in each of these institutions – presidents, prime ministers and their ministerial colleagues; high civil servants and other state administrators; top military men; judges of the higher courts; some at least of the leading members of parliamentary assemblies, though these are often the same men as the senior members of the political executive; and, a long way behind, particularly in unitary states, the political and administrative leaders of sub-central units of the state. These are the people who constitute what may be described as the state elite.

No matter how centralised government in the United Kingdom may be (and, even after devolution, British government remains remarkably centralised) it would be misleading, as Miliband shows, simply to identify central government with the state (see further Loughlin, 'The state, the Crown and the law', in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999)).

3 Constitutional law beyond the state

A number of commentators have in recent years argued that the traditional focus in constitutional studies (both legal and political) on the state is no longer appropriate or that, at the least, such a focus needs now to be supplemented with additional perspectives. Gavin Anderson, for example, urges that we need to do no less than to 'reconfigure our understandings of constitutional law and constitutional rights according to . . . [a new] paradigm that enables us to understand better, and respond to, the challenges facing constitutionalism in an age of globalization' (*Constitutional Rights after Globalization* (2005), p 3).

The state, it is claimed, is coming under pressure both internally and externally. On the one hand the devolutionary forces of regionalism and localism are investing sites of constitutional authority within the state with increasing power. In the United Kingdom, for example, we can no longer understand the fullness of our constitutional arrangements if we confine our attention to matters in London, Westminster and Whitehall. The Scottish Parliament in Holyrood and the National Assembly for Wales in Cardiff Bay are essential institutions not only if you are studying British constitutional law in Scotland or Wales but so, too, if you are studying it in England. On the other hand, the forces of globalisation (in the economic, political, social, cultural and legal spheres) and the rise to constitutional prominence of both international and supranational organisations such as the World Trade Organisation, the United Nations, the Council of Europe and the European Union (among a number of others) requires us to shift our gaze also beyond national borders. To this end recent years have seen a voluminous literature with such suggestive titles as J Camilleri

and J Falk, *The End of Sovereignty*? (1992), S Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996) and S Strange, *The Retreat of the State* (1996), while a number of EU lawyers have written articles that talk of such things as 'post-national constitutionalism' and the need to find 'constitutional substitutes' (see eg, Shaw (1999) 6 *Jnl European Pub Policy* 579 and Chalmers (2000) 27 *Jnl Law and Soc* 178).

Two different sets of claims are made in this literature. The first, more moderate, is that even if the state continues to be the primary site of constitutional authority, the way in which it operates is now *conditioned* by both sub-state and super-state forces. The second, bolder, claim is that, in some senses at least, the state is no longer the primary site of constitutional authority and has been replaced in that regard by a combination of sub-state and super-state forces. The following extract surveys the issues.

Martin Loughlin, *Sword and Scales* (2000), pp 141–5

The nation-state is a relatively modern phenomenon. Its emergence has been traced to the period after the Treaty of Westphalia of 1648, an era in which the western world was divided into more clearly delineated jurisdictions and the modern map of Europe began to take shape. But the idea of the nation-state which emerged in modern European history is not one in which a close congruence between ethnicity and the structure of government has been forged. Given the circumstances in which states have been formed, such congruency is almost never realized. Rather, nation-states are best viewed as 'imagined communities' [Benedict Anderson] or 'groups which *will* themselves to persist' [Ernest Gellner]. They exist despite differences of race and language, and largely because they are united by 'common sympathies' [JS Mill] or a history of common suffering . . . This is what might be called a civic conception of the nation-state. The French, for instance, constitute a nation-state, whether their ancestors were Gauls, Bretons, Normans, Franks, Romans or whatever. Similarly, the English, Irish, Scots and Welsh – notwithstanding their ethnic differences – have been forged into the nation-state of the United Kingdom. In this civic conception, the nation-state can be seen as a device through which class, ethnic and religious tensions within a defined territorial unit can be managed.

These nation-states present themselves as independent units in the international arena. From . . . the mid-eighteenth century, it has generally been accepted that the fundamental principle of international law is that of the formal equality of states, a principle which in turn yields those of independence and territorial integrity. These principles of the independence, equality and territorial integrity of sovereign states form the basis for the conduct of international relations . . .

[C]ertain structural changes are occurring in the international arena which appear to challenge the traditional role of the nation-state in political and economic affairs. These structural changes involve the twin processes of integration and fragmentation. Although these processes seem to be pulling in opposite directions, both present threats to the position of the nation-state as the predominant actor in . . . political affairs.

The process of integration is the result of the global impact of economic and technological change. The world which we inhabit is now genuinely global. It has been noted, for example, that today even illiterate labourers working in the deepest recesses of tropical rain forests understand that their livelihoods are not determined by forces operating at the level of their localities or even within the territorial borders of their states, but by the vagaries of world markets and the habits, tastes and capacities of consumers in distant countries. But this observation now applies not only to the cocoa labourers of Ghana but also to workers in the semi-conductor plants of Scotland and north-east England. With the emergence of global markets we see the growth in scale and power of transnational corporations and also the establishment of a variety of international organizations trying to respond to the regulatory issues which are presented. This process of world-wide economic integration necessitates a reconfiguration of the international political arena.

The process of fragmentation is, to some extent, a by-product of economic and political integration. With the growth of world markets, for example, the trend has been towards the regionalization of economies, and some of these regional entities (e.g., Singapore/Indonesia or Vancouver/Seattle) have become linked primarily to the global economy rather than to their host nation-states. In response to these economic trends, which have contributed to the resurgence of issues of ethnic identity, more extensive powers of government have been given to regional bodies within the nation-state. This has occurred throughout Europe, notably in the autonomous regions of Spain and the *Länder* of Germany and as the recent establishment of a Welsh Assembly and a Scottish Parliament indicates, this process has also affected governmental arrangements within the United Kingdom . . . Fragmentation undermines the traditional structures of the nation-state and has prompted the reconfiguration of the national political system. Such contemporary trends of integration and fragmentation are commonly viewed as responses to one powerful phenomenon – globalization.

Since the end of the Second World War, there has been a spectacular growth in transnational investment, production and trade. In turn, this has led to the establishment of global financial markets as the major US, European and Japanese banks have become locked into an international circuit regulating the flow of capital. The major transnational corporations which have emerged now account for a large proportion of the world's production and these corporations, able to disperse their centres of production, are no longer bounded by the territories of any particular State.

Many of these changes have been driven by technological development. A revolution has occurred in transportation and communications systems and, in conjunction with the microchip revolution and the digitalization of information, this has had a profound impact on economic activity. Production is now much less tied to specific localities; enterprises increasingly possess the capacity to shift capital and labour at low cost and high speed. Money is now able to circulate around the world through invisible networks, in vast quantities and at high velocity. These developments – universalized communication, supersonic transportation, hi-tech weaponry and the like – have presented a series of serious challenges to the nation-state. The success of the modern State over the last two hundred years has been based mainly on its ability to promote economic well-being, to maintain physical security and to foster a distinctive cultural identity of its citizens. Yet it is precisely these claims which are now being undermined by [the forces of globalisation].

Having surveyed the issues, Loughlin's verdict is that, powerful as the simultaneously integrationist and fragmentary forces of globalisation may be, the state will survive them, and will survive them intact (pp 145–6):

> Globalization has created a world of greater interdependence. Nevertheless, although the phenomenon seems to undermine the power of the nation-state, it is unlikely to lead to its demise. Indeed, there seems little doubt but that the modern State will remain the primary form of political organization for the foreseeable future . . .
>
> The State is still the principal agency for managing the economy and promoting the welfare of its citizens. The critical point for our purposes is that, as a result of structural changes, the State must acknowledge that, to be effective, it must be prepared to work with other powerful agencies. To be successful, the State must be able to harness the immense power now located in private corporations and it must also work in tandem with a range of supra-national governmental bodies. The State, in short, is obliged to share power.

Loughlin's analysis is supported by Helen Thompson, who comes to a similar conclusion: ('The modern state and its adversaries' (2006) 41 *Government and Opposition* 23, 26, emphasis in the original):

> [F]or the modern state to be heading towards crisis, or significant long-term change, at least one of three things would have to be true: first, consent to particular and *reasonably long-established* sites of authoritative rule is breaking down either through large-scale resistance to the rule of law, or through the rejection of the rules of rule of such a state by a significant section of the political community constituted by it, and those who command the state's power cannot contain such developments; secondly, *previously capable* states are unable to command coercive power against those over whom they rule and against their external enemies; thirdly, the laws and demands of international institutions and organizations have enforceable claims against *historically sovereign* states.

In a compelling overview, Thompson argues that while each of these three phenomena has occurred at least somewhere in the world in recent times, there is no overall pattern that may be attributable to overarching forces of globalisation. She argues, for example, that the 'most crucial coercive powers that states enjoy are to tax and to command military forces' and that the evidence 'does not suggest that states are actually taxing less than they did . . . Neither can it be plausibly claimed that the coercive power of well-established states to tax is diminishing . . . [and] Even more clearly, the ability of previously capable states to mobilize armed force has been unimpaired by the end of the Cold War' (pp 30–3). While she concedes that not all states today 'enjoy the same degree of external sovereignty as they did at the end of the 1970s' (p 34):

> such intervention in the internal affairs of nominally sovereign states does not represent a move beyond Westphalia. In the spirit of Westphalia, powerful states have long tried to curtail the activities of other states as states.

According to Thompson, and contrary to popular myth, the Peace of Westphalia (1648) 'did not result in external state sovereignty against all other states'. Rather, it 'legitimized the sovereignty of powerful modern states and the right of those states to impose limits on the statehood of defeated and aspiring states. It defined an external world in which sovereignty depended on power and in which distinctions were made between strong and weak states' (pp 25–6). Seen in this light, the policies of contemporary institutions such as the World Bank and the IMF, where tough conditions are imposed on states in the developing world, conditions that increasingly speak to constitutional values such as 'good governance', 'accountability' and 'transparency', are not so much a break from the Westphalia model as its continuation by new means: 'An international economy in which indebted states find that richer states succeed in controlling their economic decision-making and the parameters of their internal politics is repeating past history' (p 36). Thompson's conclusions are as follows (pp 39–40):

> Whilst the internal authority of some poorer states has certainly buckled under the pressure of economic liberalization, it is the external sovereignty of many poor and small states that has diminished most significantly, leaving them unable to resist the demands of other states and international institutions without inviting their own destruction. This is not because of anything that can sensibly be called 'globalization'. Neither does it mean that the modern state is heading towards a general crisis. Rather it suggests that the number of modern states that can lay claim to effective external sovereignty is diminishing towards the numbers seen in the more distant past. We are returning to some aspects of an older political world in which empire – the rule of a state over territory where it does not, at least at the moment of subjugation, recognize the subjects as its own – was central to the language and practice of politics. The modern state and empire have long been historical bedfellows.

In a lengthy and thoughtful analysis Neil Walker examines a variety of critiques of modern constitutionalism, including those associated with globalisation and post-nationalism. He suggests (as does Gavin Anderson, *Constitutional Rights after Globalization* (2005)) that what is needed to account for constitutionalism in today's world is a developed sense of 'constitutional pluralism' ('The idea of constitutional pluralism' (2002) 65 *MLR* 317). Walker says, first, that any successful notion of constitutionalism must (p 334):

> continue to take the state seriously as a significant host to constitutional discourse. Even those who would most urgently contend that constitutionalism has to encompass post-national trends or that constitutionalism is an increasing irrelevance or obstacle to understanding or steering forms of social and political organisation, would hardly deny the state its place in the constitutional scheme.

He goes on to suggest, however, that:

> almost equally uncontroversially, a revised conception of constitutionalism should of course then also be open to the discovery of meaningful constitutional discourse and processes in non-state sites . . . Even for those who are most sceptical or pessimistic about the viability of constitutionalism beyond the state, their position is based either upon an incapacity to imagine the form in which such post-state constitutionalism might be effectively articulated and institutionalised or upon an unwillingness to concede that the time is yet ripe for such an enterprise, rather than upon a refusal *in principle* to contemplate that a constitutional steering mechanism, or its functional equivalent, might be appropriate for significant circuits of transnational power.

Be this as it may, in this book we focus in most of our chapters on British constitutional law and practice, albeit that we aim to explain and demonstrate how the British constitution accommodates – sometimes relatively smoothly, but sometimes not – sites of constitutional authority both within the United Kingdom (see especially chapter 4) and beyond its borders (see especially chapter 5). In this, perhaps it may be said that we are siding with John Dunn's judgement (in *The Cunning of Unreason* (2000), p 66) that, in the United Kingdom at least, 'Only massive selective inattention could stop anyone recognizing that states today remain (as they have been for some time) the principal institutional site of political experience'.

4 Constitutional reform

It has become a truism that in recent years the United Kingdom has been 'going through a period of profound constitutional change' (D Oliver, *Constitutional Reform in the United Kingdom* (2003), p v). We have noted above that the 'New Labour' Government that took office in Britain in 1997 did so on a series of manifesto commitments: to modernise the composition of the House of Lords and the procedures of the House of Commons; to enact freedom of information legislation designed to lead to more open government; to devolve power to Scotland and Wales; to reform local government; to establish a directly elected 'strategic authority' and mayor for London; to strengthen regional government in England; to enact human rights enforceable in UK courts; and to continue to work on a bipartisan basis for sustained peace and reform in Northern Ireland (Labour Party Manifesto, *Because Britain Deserves Better* (1997), pp 32–5).

A number of these policies were relatively newly adopted by the Labour Party, whose traditional hostility to a Bill of Rights, for example, was founded on a fear that a conservative judiciary would use its provisions to defeat progressive or socialist legislation (see J Griffith, *The Politics of the Judiciary* (5th edn 1997) and K Ewing and C Gearty, *Freedom under Thatcher* (1990), ch 8). Others were more firmly established. Most of these policies had long been advocated by pressure

groups campaigning for constitutional reform (Charter 88, for example, or Liberty (the National Council for Civil Liberties), or the Campaign for Freedom of Information) and several of them had been subjected to detailed analysis by think tanks such as the Institute for Public Policy Research (IPPR) and the Constitution Unit, based at University College London. The latter, in particular, published a series of detailed reports on how to make devolution work, which, along with the ground-breaking work of the Scottish Constitutional Convention (on which, see chapter 4), greatly contributed to the way in which the new Labour Government was able to 'hit the ground running' and to embark on its most ambitious constitutional reforms so early in its first term.

The 1997–2001 Parliament passed legislation or introduced other measures in fulfilment of each of the Labour Party's manifesto pledges on constitutional reform. Thus, the Human Rights Act 1998 incorporated most of the substantive provisions of the European Convention on Human Rights (1950) into domestic law; the Scotland Act 1998 and the Government of Wales Act 1998 devolved power to Scotland and Wales; the 'Good Friday' or 'Belfast' Agreement led to the enactment of the Northern Ireland Act 1998, under which power was devolved to Northern Ireland; the House of Lords Act 1999 removed most of the hereditary peers from the House of Lords; a Freedom of Information Act was passed in 2000; the Greater London Authority Act 1999 created a mayor and a Greater London Authority for the nation's capital; the Local Government Act 2000 sought to give a new lease of life to local democracy; and the Regional Development Agencies Act 1998 made provision, albeit modest, for the development of aspects of economic policy on a regional basis. Meanwhile, the newly established Modernisation Committee of the House of Commons considered an array of ways in which Commons procedure could be modernised.

Since 2001 the pace of change – especially of legislative change – may have slowed somewhat, although 2005 saw the enactment of the (slightly misleadingly named) Constitutional Reform Act, which substantially reforms the powers and responsibilities of the Lord Chancellor and the judicial appointments process for England, Wales and Northern Ireland, and provides for the creation of a new Supreme Court to replace the appellate committee of the House of Lords and the judicial committee of the Privy Council. (At the time of writing it appears that the Supreme Court will not commence its work until 2009.) Also important is the Legislative and Regulatory Reform Act 2006, which concerns the relationship between the government's and Parliament's law-making powers. (The ways in which constitutional reform has been carried out since 1997 were usefully scrutinised by the House of Lords Select Committee on the Constitution, *Fourth Report: Changing the Constitution – The Process of Constitutional Change*, HL 69 of 2001–02.)

Since 1997 there has also been significant legislative change in several other areas that touch upon constitutional law and practice. The funding and conduct of political parties was (partially) reformed by the Political Parties, Elections and Referendums Act 2000; human rights and civil liberties have been substan-

tially affected by such legislation as the Crime and Disorder Act 1998, the Regulation of Investigatory Powers Act 2000, the Extradition Act 2003, the Asylum and Immigration (Treatment of Claimants) Act 2004 and the Serious Organised Crime and Police Act 2005, among several others; and there has in recent years been a raft of counter-terrorism legislation passed, including the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006. See also in this regard the Civil Contingencies Act 2004.

(This legislation and the various matters it concerns are considered throughout this book: the Human Rights Act is considered in chapters 2, 5, 10 and 11; the devolution legislation is considered in chapter 4, as is reform of local government; reforms to Parliament are considered in chapter 9; the Constitutional Reform Act is considered in chapter 2; and much of the counter-terrorism legislation is considered in chapter 11.)

Despite all this activity two points must immediately be emphasised. The first is that what is listed above cannot be taken to be a complete or even a particularly coherent project of overall constitutional reform; the second is that it is not to be implied that the constitution was somehow static or unreformed in the years before 1997. To expand on each of these points, taking them in reverse order: the Conservative Governments of 1970–74 and 1979–97 (under Prime Ministers Edward Heath, Margaret Thatcher and John Major) were not uniformly or dogmatically conservative of the constitution. On the contrary, significant constitutional reforms took place during this time. It was under Edward Heath, for example, that the United Kingdom acceded to the Treaties establishing the European Communities (see the European Communities Act 1972). There has arguably not been a measure as reforming of the British constitution as has the United Kingdom's membership of the European Community for more than a century. As we shall see in detail in chapter 5, membership of the Community has had a profound impact on our constitutional arrangements, principles and understandings. From Mrs Thatcher's time in office, three sets of constitutional changes stand out: her reforms to the civil service (especially the establishment within the civil service of 'next steps' or executive agencies: see chapter 6); the way in which her Government's extensive programme of privatisation was accompanied by a novel system of regulation; and her Government's record on civil liberties, which saw both significant legislation (such as the Police and Criminal Evidence Act 1984, the Public Order Act 1986 and the Official Secrets Act 1989) and internationally renowned activity in the form of the Government's engagement in litigation (most notoriously, but not only, in the '*Spycatcher*' affair (above, p 13). (For a forthright overview, see K Ewing and C Gearty, *Freedom under Thatcher* (1990)). Neither was the constitution left untouched by John Major's Government, as a glance at the Criminal Justice and Public Order Act 1994, the Intelligence Services Act 1994, the Asylum and Immigration Act 1996 and the Police Acts 1996 and 1997, among numerous others, will show.

Despite the constitutional significance of these various measures, however, the constitutional reforms that have occurred since 1997 are far more dramatic than anything that happened in the quarter-century following Britain's entry into the European Communities. Nonetheless, even these reforms are patchy. This is for at least three different reasons: first, it is difficult to discern an overall constitutional vision that binds the reforms together; secondly, there are aspects of the constitution that appear to remain stubbornly off the government's constitutional reform agenda (reform of the monarchy and of the electoral system for the House of Commons, for example); and thirdly, a number of the reforms that have been attempted since 1997 have either been rather half-hearted or have not worked especially well (reform of the House of Lords, regional development within England, freedom of information and devolution to Northern Ireland may all be examples, to varying extents). Let us examine each of these claims a little further.

(a) No overall agenda? The coherence of constitutional reform

The post-1997 reform programme as a whole has been said to amount to 'a new constitutional settlement, which will be looked back on as the major achievement of the new Blair Government' (Robert Hazell (ed), *Constitutional Futures* (1999), p 1). This, with respect, is surely an over-statement. Whether constitutional reform will in the future be regarded as the major achievement of the Blair Government is not for us to judge. What we can say is that, no matter how significant the various reforms, they do not amount to 'a new constitutional settlement'. On the contrary, there is a good deal of the present constitution that continues to operate much as it has done for decades and decades (see further below). It may be that we have an ancient constitution, newly reformed in part. What we do not have is a new constitution. (For a contrary view, see A King, *Does the United Kingdom Still Have a Constitution*? (2001).)

It would be better, perhaps, to think in terms of there having been discrete constitutional *reforms* (in the plural) rather than a single programme of constitutional reform. As Dawn Oliver suggests (in *Constitutional Reform in the United Kingdom* (2003), p 3):

> there has been no master plan . . . No coherent 'vision' of democracy or citizenship or good governance or constitutionalism has informed the various actors who have brought about the changes . . . The reforms have often been introduced as pragmatic responses to political pressures and perceived problems, on an ad hoc, incremental basis.

In *The Politics of the British Constitution* ((1999), ch 4) Michael Foley chronicles how the leading advocates for each of the major planks of constitution reform in the late 1990s were different from one another. Those pushing for a Bill of Rights were not the same as those who desired to see Scottish devolution. Those campaigning for greater freedom of information were not the same as

those who advocated reform of Parliament, and so forth. But it was not only the identity of the campaigners that was different: the methods they used, the reasons they set out and the eagerness of the Labour Party to accept the argument varied across each of the main areas of constitutional reform. It is well known, for example, that the Labour Party was already committed to Scottish devolution before Tony Blair become its leader (in 1994, following the sudden death of John Smith) and that Mr Blair, while not himself free of reservations about the desirability and attractiveness of Scottish devolution, felt that this was one policy that he could not safely unpick – especially, perhaps, while he was doing battle with his party over 'Clause IV', the now removed provision of the Labour Party's constitution that committed it to public ownership (see further Walker, 'Constitutional reform in a cold climate', in A Tomkins (ed), *Devolution and the British Constitution* (1998), ch 5 and N Johnson, *Reshaping the British Constitution* (2004)).

Nonetheless, it may be that a number of themes can be said to run through the various post-1997 reforms. In her thoughtful account of constitutional reform, Dawn Oliver locates three such themes at its core: democracy, citizenship and good governance (*Constitutional Reform in the United Kingdom* (2003), esp chs 2, 3 and 19). A number of constitutional reforms touch on aspects of democracy. Electoral reform and reforms to the composition of the House of Lords may enhance representative democracy, while devolution and greater freedom of information may help to develop opportunities to participate more effectively in government (see further on democracy and the constitution, chapter 2). While the electoral system used for elections to the House of Commons has not been reformed since 1997, the first-past-the-post system is no longer the only electoral system used in the United Kingdom: elements of systems of 'proportional representation' are used for elections to the Scottish Parliament, to the Welsh Assembly and to the European Parliament (see further chapter 8). In 1997 the Government appointed an independent commission (under the chairmanship of Lord Jenkins) to review the voting system for the House of Commons (see Cm 4090/1998, discussed in chapter 8), but its recommendations have not been carried forward, and this is an aspect of constitutional reform that has not gone as far as campaigners wanted.

Citizenship – or, at least, a certain liberal conception of citizenship – may be said to have been enhanced through the enactment of provisions that confer new constitutional rights on individuals (and corporations). The Human Rights Act 1998 and the Freedom of Information Act 2000 may be said to be important in this regard (see too, in Scotland, the Freedom of Information (Scotland) Act 2002, which, in some respects is rather stronger than the Westminster Act). (For a critical appraisal of the 'thinness' of the human-rights-based, liberal conception of citizenship, see Bellamy, 'Constitutive citizenship versus constitutional rights', in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (2001), ch 2; for a more positive appraisal, see D Oliver, *Constitutional Reform in the United Kingdom* (2003), ch 6). Britain's

post-1997 rights legislation has strongly privileged civil and political rights over economic and social rights, an 'imbalance' that has been condemned by writers such as Ewing ('Social rights and constitutional law' [1999] *PL* 104; see also C Fabre, *Social Rights under the Constitution: Government and the Decent Life* (2000)). The rights which are incorporated into UK law by the Human Rights Act comprise the following: the right to life; freedom from torture, inhuman or degrading treatment; freedom from slavery or servitude; the right to liberty and to security of the person; the right to a fair trial; freedom from retroactive criminal law; the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly and association; the right to marry; freedom from discrimination; the right to peaceful enjoyment of property; the right to education; the right to free elections; and freedom from the death penalty. Social and economic rights, such as the right to work, the right to a decent wage, the right to social security or other welfare provision, the right to adequate health care and the right to housing, and so forth, are not included.

'Good governance', says Oliver (above, at p 47), comprises the following values: 'openness and transparency'; 'appropriate mechanisms of accountability' (whether 'political, legal, public or auditing'); 'appropriate provisions to maximise the effectiveness of government'; 'encouragement for public participation'; and 'constitutional arrangements' that promote 'legitimacy', 'trustworthiness', 'reliability', an 'absence of corruption' and 'respect for human rights'. This is a far-reaching list, and it is not clear that all of these objectives can simultaneously be achieved. Some would argue, for example, that accountability or enhanced public participation may in some instances make government less effective, not more so. Others would object that this is simply a wish-list, fine for the ivory tower but impractical – implausible, even – as a basis for the conduct of the sometimes necessarily dirty business of government. Can an effective national security policy, for example, successfully be run on the basis solely of the values listed here?

This said, it is clear that perceived deficiencies in the decision-making processes of government have motivated a number of arguments for constitutional reform. The issues are perceptively analysed in C Foster and F Plowden, *The State Under Stress* (1996); see also C Foster, *British Government in Crisis* (2005).

It may be claimed that a further theme underpinning constitutional reform – ideally, if not always in practice – is that of the revival of Parliament. The House of Commons has reformed a number of its more archaic working practices (eg, in allowing some bills to be carried over from one session to the next, instead of having to be started afresh: a reform mainly of benefit to the government). Acting on recommendations from its Modernisation Committee for strengthening the scrutiny of legislation and extending opportunities for debate, the Commons has introduced procedures for the regular programming of bills and for debates to be held in the 'parallel chamber' of

Westminster Hall. Such reforms as these may help to make the House more effective, but some argue that more radical change is needed if the House is to realise the accountability of a government that grows increasingly centralised as well as more ramified in its organisation and expansive in the range of its operations (see eg, Tomkins, 'What is Parliament for?', in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003), ch 3).

The Hansard Society Commission on Parliamentary Scrutiny examined the role and working of Parliament in its report, *The Challenge for Parliament: Making Government Accountable* (2001). The report acknowledged that Parliament alone cannot guarantee accountability and noted that 'an array of independent regulators, commissions and inspectors responsible for monitoring the delivery of government services now exists outside Parliament' (cf too the regulators overseeing the work of privatised utilities, on which see the House of Lords Select Committee on the Constitution, *Sixth Report: The Regulatory State – Ensuring its Accountability*, HL 68 of 2003–04). The central theme of *The Challenge for Parliament* was that Parliament 'should be at the apex of this system of scrutiny', providing a framework for the activities of the numerous other interrogatory and scrutiny bodies and using their investigations 'as the basis on which to hold ministers to account'. The report's forty-seven detailed recommendations (the majority relating to the House of Commons) were aimed at fostering a culture of scrutiny among MPs. The Commission believed that select committees should be 'the principal vehicle for promoting this culture of scrutiny and improving parliamentary effectiveness' and that Parliament (like the Scottish Parliament and the European Parliament) should become 'a more committee-based institution'. The report's recommendations were designed to extend the reach of the committees to the remoter agencies and outposts of government and make committee scrutiny more systematic and rigorous. The Commission insisted, however, that the chamber of the House 'should remain the forum where ministers are held to account for the most important and pressing issues of the day'. (For commentary, see Oliver, 'The challenge for Parliament' [2001] *PL* 666; see further chapter 9.)

Conversely, it is frequently claimed that a key theme underpinning a number of the post-1997 reforms has been significantly and substantially to enhance the constitutional power and authority of the judiciary, such that it is now to the courts (rather than to Parliament) that we should look to take the lead responsibility in seeking to hold government to account. Regardless of whether we should express the position in terms as bold as these, what is clear – to opponents and supporters of enhanced judicial power alike – is that the constitutional power and authority of the courts has increased markedly in recent years (and not only since 1997). While reforms such as the Human Rights Act may not have *caused* the growth in judicial power, they have certainly *contributed* to it (these matters are considered throughout this book: see, in particular, chapters 2, 5, 10 and 11).

(b) Constitutional continuity

In the excitement of the early years of the Blair Government's reforms, it was easy, perhaps, to get carried away. In the introduction to their edited collection of essays, *Constitutional Reform* (1999), Robert Blackburn and Raymond Plant stated, for example, that 'taken as a whole, the parameters and range of subjects affected [by the Government's plans in the field of constitutional reform] cover virtually the entire terrain of our constitutional structure' (p 1). This was never the case. There are, in fact, significant aspects of the British constitution that remain largely untouched by the post-1997 reforms. These include the monarchy, the prerogative powers of the Crown and the relationship between Cabinet and Prime Minister (see chapters 6 and 7); rule- and law-making by the government – delegated legislation and such like (see chapter 7); the United Kingdom's relationship with the European Union, and the impact of EU law on the constitution (see chapter 5); and the relationship between the House of Commons and the House of Lords, which has not been substantially altered since 1911. The great constitutional statutes of the past continue since 1997 as they did before to shape the constitutional order of today: Magna Carta, the Bill of Rights 1689, the Act of Settlement 1701, and so on. As we shall see throughout this book, were we to confine our attention to events and laws that occurred or have been passed only since 1997 it would result in our having an extremely odd – and untenable – view of the constitution. It is essential that students and scholars of the constitution grasp the venerable and the continuing, as well as the new and the changing, elements of our constitutional order. To privilege either over the other would be a serious error. (For recent literature that explains aspects of the importance of the past to an understanding of the contemporary constitution, see eg, E Wicks, *The Evolution of a Constitution* (2006) and A Tomkins, *Our Republican Constitution* (2005), ch 3; for those who like their constitutional history in a European setting, R van Caenegem's *Historical Introduction to Western Constitutional Law* (1995) is peerless; for a more classical treatment, the starting place remains FW Maitland, *The Constitutional History of England* (1908).)

(c) Fate and future of constitutional reform

Not all the constitutional reforms cited above have been implemented fully or, indeed, successfully. Some have been apparently abandoned (such as reform to the voting system for elections to the House of Commons). Some have been started but not carried through to completion (such as reform of the composition of the House of Lords, although in February 2007 the Government brought forward fresh proposals in this area (Cm 7027)). Some were diluted by the Government before they were brought into force, much to the anger and disappointment of campaigners (the classic example is freedom of information, where the Government's initial proposals would, if enacted, have led to legisla-

tion substantially more ambitious than the 2000 Act was allowed to be: see the Government White Paper, *Your Right to Know* (Cm 3818/1997)). Some have collapsed as a result of popular rejection (such as plans for regional assemblies in England). Some have had to be recrafted, following criticism of the original arrangements (such as Welsh devolution: see the Government of Wales Act 2006, replacing the Government of Wales Act 1998, discussed in chapter 4). And finally, some have been subject to the disappointments and vicissitudes of political life (such as devolution in Northern Ireland). As Nevil Johnson has written (*Reshaping the British Constitution* (2004), p 5):

> there are persuasive grounds for concluding that most of the reforms have not been carefully thought through, nor have they been seen in relation to each other and to much of the customary constitution that nominally at least still survives.

Predicting the future of the constitution is a treacherous exercise, and we do not propose to embark upon it here, but one thing seems clear: there will be more reform yet. Precisely what reforms we shall see, and exactly what form they will take, are matters on which we can offer no safe guidance. One question, though, is perhaps worth speculating upon: is the United Kingdom likely in the near future to adopt a written constitution, and should it do so?

(d) A written constitution?

Most of the rules of our constitution do, of course, exist in written form, *somewhere*. Lord Scarman has said that 'today our constitution is not "unwritten" but hidden and difficult to find' (*Why Britain needs a Written Constitution* (1992), p 4). Besides the great number of statutes that may be labelled as 'constitutional', the written sources of our constitution include law reports, as the repository of many common law or judge-made rules affecting constitutional powers and relationships. In addition, as we shall see, some constitutional conventions have been put on written record in the interest of clarity and for avoidance of doubt. There are also many informal but authoritative codes, memoranda, notices and other documents produced within government which direct the behaviour of ministers or officials and can be seen as belonging to the written part of our constitution, even though they do not have the status of law. Some of these documents are of great importance to the way in which government operates and some of the rules and procedures which they contain might be included in a written constitution, if we had one. As it is, documents of these kinds are easily overlooked in any attempt to enumerate the sources or written elements of the constitution. Among the more important of them are the *Civil Service Code* (rules of conduct for civil servants); the *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*; the so-called 'Osmotherly Rules', *Departmental Evidence and Response to Select Committees*; and *Government Accounting* (Treasury guidance on the financial procedures and responsibilities of government departments).

In the 1970s a written constitution, as a remedy for the perceived ills of the body politic, was urged by, among others, Hood Phillips ('Need for a written constitution' in WJ Stankiewicz (ed), *British Government in an Era of Reform* (1976)) and Lord Hailsham (*Elective Dictatorship* (1976), pp 12–14). Arguments for a written constitution were renewed in the 1990s and significant contributions to the debate were made by the publication of three draft constitutions for the United Kingdom: the 'MacDonald Constitution', drawn up by John MacDonald QC and published in a Liberal Democrat paper (Green Paper No 13, *We, The People* (1990)); Tony Benn's Commonwealth of Britain Bill, presented to the House of Commons in May 1991; and *The Constitution of the United Kingdom*, published by the Institute for Public Policy Research in 1991. (These essays in constitution-making are analysed by Oliver, 'Written constitutions: principles and problems' (1992) 45 *Parliamentary Affairs* 135. See also Cornford, 'On writing a constitution' (1991) 44 *Parliamentary Affairs* 558 and Brazier, 'Enacting a constitution' (1992) 13 *Stat LR* 104.)

The arguments for a written constitution deserve serious consideration. There is a case for giving to our most highly valued constitutional principles the special status and authority that would result from their embodiment in a constitution which was intended to endure. A more complete separation of powers might be instituted in the written constitution, reducing the power of the executive to control and direct the working of Parliament. The relations between the countries and regions of the United Kingdom could be put on a firmer and clearer basis, possibly on a federal plan. The status of local government could be confirmed and protected, preventing the sort of erosion of its independence that occurred under the Thatcher Governments (see chapter 4). The fluidity and uncertainty of some of our most important conventions might be corrected by putting them into writing. The constitution would rest upon the authority not of Parliament but of the people: a referendum could be held to approve it and be required for its amendment.

If these arguments are weighty, there is much to be said on the other side. The security that can be given to leading principles and fundamental rights by an entrenched written constitution should not be exaggerated. Certainly the constitution could be made difficult to amend – if not, much of the point of having a written constitution would be lost – but this might work as a brake on the necessary adaptation of the constitution to social change. Sir Stephen Sedley aptly remarks (in Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the British Constitution*, The Radcliffe Lectures (1997), p 88) that a written constitution:

> has to be negotiated with and by an infinite range of interests and viewpoints, among whom there will be the winners and losers dictated by the balance of power at the moment of enactment. Simply to put in writing our arrangements for the distribution and exercise of state power at a point of history where no comprehensive new consensus has emerged is to risk consolidating state power wherever it happens at that moment to reside.

Compare the following comments by Andrew Gamble (in I Holliday, A Gamble and G Parry (eds), *Fundamentals in British Politics* (1999), p 26):

> For its proponents the great virtue of the British state as a liberal state lies precisely in its undefined character, because it is this which gives it its flexibility and pragmatism, its ability to respond to new interests and demands and, by making timely concessions and accommodations, to preserve its essential institutional core intact. . . . The danger of any kind of codified constitution from this perspective is that it locks in a particular set of arrangements which may be the best available at that time, but may later be judged inappropriate and then may be very difficult to change.

Ours has traditionally been a political constitution, in which change is directed and conflicts are largely resolved through the political process (see Griffith, 'The Political Constitution' (1979) 42 *MLR* 1). When a written constitution is in place arguments about its effect are conducted in legal terms, as an exercise in interpretation, and are displaced from the political forum into the courts. As Ian Holliday remarks (in G Parry and M Moran (eds), *Democracy and Democratization* (1994), p 253), 'juridification of politics is one of the major problems created by a written constitution': much power, and much trust, are given to judges. The role which they may assume is exemplified by the history of the United States Supreme Court. Rights guaranteed by the United States Constitution were in the years 1880–1930 used by Supreme Court justices, imbued with ideas of *laissez-faire* capitalism, as weapons against progressive social welfare legislation. (See eg, *Lochner v New York* 198 US 45 (1905), in which the Supreme Court held that a statute limiting employment in bakeries to sixty hours a week and ten hours a day was invalid as an arbitrary interference with the freedom to contract guaranteed by the Fourteenth Amendment to the Constitution.) Again, the New Deal programme, undertaken by President Roosevelt to counter the results of economic depression, was substantially nullified by Supreme Court decisions in the years 1934 to 1936. In its active phases the Supreme Court has been the source of far-reaching judicial legislation, whether of a conservative or a liberal tendency, and has had a substantial influence on social and political affairs in the United States.

This is the kind of role that our courts might be given by a written constitution. It may be that we are already taking that course, with the enhanced constitutional adjudication entrusted to our courts by the Human Rights Act 1998 and the devolution legislation. Perhaps it is becoming true here, as in the United States, that the constitution 'is whatever the judges say it is' (Sedley, 'The sound of silence: constitutional law without a constitution' (1994) 110 *LQR* 270, 277). Indeed, perhaps this is the truly overarching theme of the constitutional changes we have seen in Britain not only since 1997 but since the early 1970s: namely, that we are moving from a political constitution to a law-based or perhaps even a judge-based constitution. In the chapters that follow, we will come back to this question many times.

On constitutional reform, see further V Bogdanor, *Power and the People: A Guide to Constitutional Reform* (1997); R Brazier, *Constitutional Reform* (2nd edn 1998); R Blackburn and R Plant (eds), *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (1999); P Catterall, W Kaiser and U Walton-Jordan, *Reforming the Constitution: Debates in Twentieth-Century Britain* (2000); Hazell *et al*, 'The constitution: rolling out the new settlement' (2001) 54 *Parliamentary Affairs* 190; Johnson, 'Taking stock of constitutional reform' (2001) 36 *Government and Opposition* 331; D Oliver, *Constitutional Reform in the United Kingdom* (2003); and N Johnson, *Reshaping the British Constitution* (2004).

2

The ideas of the constitution

Contents

'Successful constitutions and institutions', says Ian Gilmour (*Inside Right: A Study of Conservatism* (1978), p 70), 'are not mere pieces of machinery. If they work, it is because of the ideas and beliefs of those who try to work them.' The British constitution, having evolved over centuries, does not embody any single constitutional theory. It is the product of a long period of kingly rule,

parliamentary struggle, revolution, many concessions and compromises, a slow growth of custom, the making and breaking and alteration of many laws. Although we lack a general theory of the constitution, there has come down to us the idea of constitutionalism – of a *constitutional order* which acknowledges the necessary power of government while placing conditions and limits upon its exercise. The British version of constitutionalism has been shaped by a number of leading ideas or principles: some of these have crystallised as rules or doctrines of the constitution; others have influenced constitutional thought or have gained currency as explanations or justifications of particular features of the constitution. In this chapter we shall consider some of these commanding ideas or doctrines and their place in the modern constitution. We start with democracy and then move on to consider the sovereignty of Parliament, the rule of law, the separation of powers and accountability. It will appear that, at times, there is a conflict, or tension, between these ideas; between democracy, for instance, and parliamentary sovereignty, or between sovereignty and the rule of law. A good deal of contemporary constitutional analysis is concerned with how such conflicts, or tensions, should be resolved and worked out.

1 Democracy and the constitution

Democracy is not to be taken for granted. Neither is its contemporary acceptance as the only form of government able to claim legitimacy to rule. As John Dunn asks in his recent account of the history of democracy, *Setting the People Free: The Story of Democracy* (2005), pp 13, 15:

> Why does democracy loom so large today? Why should it hold such sway over the political speech of the modern world? What does its recent prominence really mean? When Britain and America set out to bury Baghdad in its own rubble, why was it in the name of democracy of all words in which they claimed to do so? Is its novel dominance in fact illusory: a sustained exercise in fraud or an index of utter confusion? Or does it mark a huge moral and political advance, which only needs to cover the whole world, and be made a little more real, for history to come to a reassuring end?
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> Why should it be the case that, for the first time in the history of our still conspicuously multi-lingual species, there is for the present a single world-wide name of the legitimate basis of political authority?

Democracy came late to the British constitution. Much of our constitutional architecture was constructed at a time when to accuse someone of harbouring democratic sympathies was a grave political insult. This is not to say that democracy came late to Britain in comparison with other countries. But it is to say that several key elements of the British constitution predate the emergence of democracy as an accepted form of government. Nonetheless, democracy deserves to be treated as the first of our constitutional themes since the working assumption of all the principal actors on the constitutional stage, even those who (like the

monarch and the House of Lords) are not themselves democratically elected, is that Britain is, and ought to consider itself as, a modern democracy. Even if the assumption is sometimes misplaced or over-stated, it is impossible to understand the way the contemporary British constitution works without taking on board this basic working assumption. Equally, however, like all assumptions, it is rebuttable. On no account could today's British constitutional order accurately be described as entirely or unambiguously democratic. (Valuable introductions to the idea of democracy abound. Among the better ones, see R Dahl, *On Democracy* (1998) and B Crick, *Democracy: A Very Short Introduction* (2002).)

(a) Representative democracy

Democracy may be said to have two main elements: representation and participation. As to the first, since the achievement of universal suffrage with the enactment of the Representation of the People Acts 1918 and 1928 it can be claimed that the British constitution has embodied the principle of representative democracy, at least as far as elections to the House of Commons are concerned. As it is from the House of the Commons that the government of the day is drawn, it may be said that British government is democratic, notwithstanding the fact that no one actually elects it as such. The Members of Parliament who become ministers in the government are elected as Members of Parliament, but not as ministers. Ministers are appointed by the Prime Minister, not elected to ministerial office. The Prime Minister is appointed by the monarch, who is not elected, of course, but who now appoints as Prime Minister the person most likely to be able to command majority support in the House of Commons. There had been advocates of the democratic principle before the early twentieth century, but democracy was 'still a pejorative term on both sides of the House in 1831–2' (DG Wright, *Democracy and Reform 1815–1885* (1970), p 38) and the idea of government by the whole people, as it would be understood today, was not accepted by political leaders at any time in the nineteenth century. Nonetheless, the First Reform Act of 1832 began a process by which the claims of representative democracy were progressively accommodated with the existing institutions of government. There was no sudden triumph of democracy. Even after the Third Reform Act of 1884 only about 60 per cent of the adult male population, or about 28 per cent of the total adult population, had the vote. The Representation of the People Act 1918 introduced universal adult male suffrage (on condition of six months' residence in a constituency) and gave the right to vote to women aged over thirty. The Act of 1928 lowered the voting age for women to twenty-one, which was the same as for men, and the principle of 'one man or woman, one vote' was finally achieved when the Representation of the People Act 1948 abolished the business and university franchises which had qualified certain persons to cast more than one vote.

Democracy as established in the United Kingdom is a form of that 'liberal democracy' which is particularly associated with the countries of Western

Europe, a number of Commonwealth countries and the United States. With us it occurs as a system of representative and responsible government in which voters elect the members of a representative institution, the House of Commons, and the government is largely chosen from and, in turn, accountable through the Commons to the electorate itself.

Jack Lively, *Democracy* (1975), pp 43–4

> What then are the conditions necessary for the existence of responsible government? What is needed to ensure that some popular control can be exerted over political leadership, some governmental accountability can be enforced? Two main conditions can be suggested, that governments should be removable by electoral decisions and that some alternative can be substituted by electoral decision. The alternative, it should be stressed, must be more than an alternative governing group. It must comprehend alternatives in policy, since it is only if an electoral decision can alter the actions of government that popular control can be said to be established. The power of replacing Tweedledum by Tweedledee (the 'Ins' by the 'Outs', as Bentham had it) would be an insufficient basis for such control. To borrow the economic analogy, competition is meaningless, or at any rate cannot create consumer sovereignty, unless there is some product differentiation.
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> In detail there might be a great deal of discussion about the institutional arrangements necessary to responsible government, but in general some are obvious. There must be free elections, in which neither the incumbent government nor any other group can determine the electoral result by means other than indications of how they will act if returned to power. Fraud, intimidation and bribery are thus incompatible with responsible government. . . . Another part of the institutional frame necessary to responsible government is freedom of association. Unless groups wishing to compete for leadership have the freedom to organize and formulate alternative programmes, the presentation of alternatives would be impossible. Lastly, freedom of speech is necessary since silent alternatives can never be effective alternatives. In considering such arrangements, we cannot stick at simple legal considerations; we must move from questions of 'freedom from' to questions of 'ability to'. The absence of any legal bar to association will not, for example, create the ability to associate if there are heavy costs involved which only some groups can bear. Nor will the legal guarantee of freedom of speech be of much use if access to the mass media is severely restricted.
>
> This could be summed up by saying that responsible government depends largely upon the existence of, and free competition between, political parties.

The degree of influence or control over government that is exercisable by the electorate depends upon a variety of factors, among them the electoral system adopted, party organisation and the particular concept of representation ('delegation' or 'authorisation') which the constitution embodies. These are matters to which we shall return in chapter 8.

A simple, majoritarian version of democracy would claim for the elected representatives of the people an unqualified power to act upon whatever view they might take of the public interest. In this version no individual or minority

rights or interests could legitimately be opposed to decisions supported by a majority in the elected assembly. 'We are the masters now' would be a conclusive response to opposition or protest, and the credentials of democracy might be invoked to exclude or victimise those who dissented, or were unpopular, or belonged to vulnerable minorities such as single parents, homeless young people, asylum-seekers and the impoverished underclass of the long-term unemployed.

This would surely be a narrow understanding of democracy which would empty it of much of its virtue. A democracy that admitted no restraints upon the will of the majority would be liable quickly to lose legitimacy and moral justification and would endure only as long as it commanded enough force to contain dissent and dissatisfaction. A more inclusive and more viable version of democracy accepts limitations upon majority rule in a toleration of minority values, opposition and dissent, in a willingness to share information and to consult, and in respect for fundamental individual rights and freedoms. Cass Sunstein (*Designing Democracy* (2001)) speaks in this connection of the 'internal morality of democracy', which includes a commitment to the equality of citizens, the protection of fundamental rights and processes of decision-making based on openness, consultation, receptivity to argument and the giving of reasons. Exclusive reliance on voting power in a majoritarian system disregards values such as those which are integral to a mature and fully realised democracy. They need not (and perhaps cannot entirely) be given formal expression in a written constitution, but they are standards by which the claim that our unwritten constitution is in accord with democratic principle must be judged. One question, of course, is who should do the judging: should democratic institutions be self-regulating in terms of these values, should it be the people who decide or should it be some other body, such as the courts of law? (See further Prosser, 'Understanding the British constitution' (1996) 44 *Political Studies* 473. Note too the view of Sir John Laws that the 'moral force' of democracy 'depends in large measure upon the extent to which it vindicates individual liberty' and that 'the rule of reasonableness' in the exercise of public power 'is a requirement of democracy itself': *The Golden Metwand and the Crooked Cord* (ed Forsyth and Hare 1998), pp 194–6.) Even within the idea of democracy, then, we can see a clear tension between the extent to which a constitution should give expression to the will of the majority and the extent to which it should impose limitations on the will of the majority, in the interests of openness, opposition, dissent and individual rights.

(b) Participatory democracy

The kind of liberal, representative and largely indirect democracy that is reflected in our present constitutional arrangements is neither flawless nor immutable. As such, we should be careful to consider the claims of other models of democracy.

CB Macpherson, *The Life and Times of Liberal Democracy* (1977), pp 6–8

Would it not be simpler to set up a single model of present liberal democracy, by listing the observable characteristics of the practice and theory common to those twentieth-century states which everyone would agree to call liberal democracies, that is, the systems in operation in most of the English-speaking world and most of Western Europe? Such a model could easily be set up. The main stipulations are fairly obvious. Governments and legislatures are chosen directly or indirectly by periodic elections with universal equal franchise, the voters' choice being normally a choice between political parties. There is a sufficient degree of civil liberties (freedom of speech, publication, and association, and freedom from arbitrary arrest and imprisonment) to make the right to choose effective. There is formal equality before the law. There is some protection for minorities. And there is general acceptance of a principle of maximum individual freedom consistent with equal freedom for others.

. . . It is all too easy, in using a single model, to block off future paths; all too easy to fall into thinking that liberal democracy, now that we have attained it, by whatever stages, is fixed in its present mould. Indeed, the use of a single contemporary model almost commits one to this position. For a single model of current liberal democracy, if it is to be realistic as an explanatory model, must stipulate certain present mechanisms, such as the competitive party system and wholly indirect (ie representative) government. But to do this is to foreclose options that may be made possible by changed social and economic relations. There may be strong differences of opinion about whether some conceivable future forms of democracy can properly be called *liberal* democracy, but this is something that needs to be argued, not put out of court by definition. One of the things that needs to be considered is whether liberal democracy in a large nation-state is capable of moving to a mixture of indirect and direct democracy: that is, is capable of moving in the direction of a fuller participation, which may require mechanisms other than the standard party system.

The democratic ideal is imperfectly realised in existing political institutions: the processes of government are remote from the mass of the people, who participate only indirectly and to a limited extent in public decision-making. Democratic representation, it has been said, 'has served not only as a necessary instrument of accountability, but also as a means of keeping the people at arm's length from the political process' (Beetham in D Held (ed), *Prospects for Democracy* (1993), p 60). Indeed, as Bernard Manin has demonstrated, representative government was designed by its founders to be an alternative to, and not a species of, democratic government. One of the remarkable transformations in political thought since the eighteenth century is the now commonplace acceptance of representative government as a plausible variant of democracy. (See B Manin, *The Principles of Representative Government* (1997).) As Macpherson indicates, the theory of representative democracy may be opposed – or supplemented – by one of participatory democracy which would accord a more active political role to the people. Could new institutional arrangements be devised which would provide for greater participation by the people in the working of the constitution? Active citizenship and

participation might be furthered by policies of decentralisation (devolution of power to localities), subsidiarity (decision-taking at the lowest practicable level) and improved processes of consultation, as well as by the democratisation of political parties and of the management of social institutions (schools, hospitals) and the workplace. In addition, some would argue for an extended recourse to direct democracy, in the form of referendums.

(See further C Pateman, *Participation and Democratic Theory* (1970); D Held and C Pollitt (eds), *New Forms of Democracy* (1986); I Budge, *The New Challenge of Direct Democracy* (1996); Pinkney, 'The sleeping night-watchman and some alternatives' (1997) 32 *Government and Opposition* 340; Saward, 'Reconstructing democracy: current thinking and new directions' (2001) 36 *Government and Opposition* 559.)

CB Macpherson reminds us in *The Real World of Democracy* (1972), p 4, that a liberal democracy, like any other organisation of government, is a system of power – a system 'by which power is exerted by the state over individuals and groups within it', and further that:

> a democratic government, like any other, exists to uphold and enforce a certain kind of society, a certain set of relations between individuals, a certain set of rights and claims that people have on each other both directly, and indirectly through their rights to property. These relations themselves are relations of power – they give different people, in different capacities, power over others.

Representative democracy is a great achievement, no doubt, but it does not necessarily prevent an over-centralisation of state power, the dominance of a political elite or the emergence of unaccountable private corporations wielding considerable economic power. Democracy is 'unfinished business' (P Clarke, *Deep Citizenship* (1996), p 23) and the search must go on for means of extending the democratisation of our country and institutions. Paul Hirst has argued that this may be achieved by building on voluntary associations and communities as the reinvigorated, democratically managed units of a pluralist state: *Representative Democracy and its Limits* (1990); *Associative Democracy* (1994); *From Statism to Pluralism* (1997); 'Renewing democracy through associations' (2002) 73 *Political Quarterly* 409. James Tully would go further, calling for a revised constitutionalism founded on cultural diversity and extending 'self rule' to the variety of cultures of which society is composed: *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995).

See generally J Hyland, *Democratic Theory: The Philosophical Foundations* (1995); M Saward, *The Terms of Democracy* (1998); D Judge, *Representation: Theory and Practice in Britain* (1999); D Beetham, *Democracy and Human Rights* (1999); J Dryzek, *Deliberative Democracy and Beyond* (2000); Morison, 'Models of democracy' in J Jowell and D Oliver, *The Changing Constitution* (5th edn 2004); D Held, *Models of Democracy* (3rd edn 2006). The observance of democratic principles in practice in the United Kingdom is critically

examined by S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999) and D Beetham *et al, Democracy under Blair* (2003). For a different perspective, see G Graham, *The Case Against the Democratic State* (2002).

Questions about the nature and vitality of British democracy are raised by new developments and arguments concerning the electoral system, referendums, the role of pressure groups and the organisation of political parties. (See in more detail chapter 8.)

2 Parliamentary sovereignty

For Dicey, the greatest British constitutional lawyer of the nineteenth century, whose magisterial *Law of the Constitution* was first published in 1885, it was 'the very keystone of the law of the constitution' that Parliament is the sovereign or supreme legislative authority in the state.

Dicey, *The Law of the Constitution* (1885), pp 39–40

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

The legislative supremacy of Parliament, increasingly asserted in the sixteenth and seventeenth centuries, was assured by Parliament's victory in the Civil Wars of the 1640s and by the so-called 'glorious' revolution of 1688–89, which, among other things, established the primacy of statute over prerogative. Academic lawyers, drawing on works of political science, subsequently embraced it as orthodox doctrine, and the courts propounded it as law. It was at once historical reality, constitutional theory and a fundamental principle of the common law. In accordance with this principle the courts have held that statutes enacted by Parliament must be enforced, and must be given priority over rules of common law, over international law binding upon the United Kingdom, over the enactments of subordinate legislative authorities, and over earlier enactments of Parliament itself. 'Parliamentary sovereignty' was, as we have seen, Dicey's phrase, and it has become widely accepted. But while convenient shorthand, it is not the most accurate label that could have been chosen. What the doctrine establishes, as the quotation from Dicey's *Law of the Constitution* reveals, is the legal supremacy of *statute*, which is not quite the same thing as the sovereignty of *Parliament*. It means that there is no source of law higher than – ie more authoritative than – an Act of Parliament. Parliament may by statute make or unmake any law, including a law that is violative of international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it.

For the avoidance of doubt, it should be added that it is only Acts of the Westminster Parliament that enjoy this legal status. Acts of the Scottish Parliament are not legally supreme; nor are the measures adopted by the other devolved institutions in Wales and Northern Ireland. Courts may strike down Acts of the Scottish Parliament if they violate the terms of the Scotland Act 1998 or if they are incompatible with Convention rights or with EU law. In Dicey's terms, the Scottish Parliament has the power to make or unmake only those laws which it is authorised by the Scotland Act 1998 to make or unmake; and, further, courts are recognised as having a right to override or set aside the legislation of the Scottish Parliament in the circumstances as laid down in the Scotland Act. While we are on the subject of Scotland, the references to 'the English constitution' and to 'the law of England' in Dicey's quotation should not go unnoticed. The doctrine of the sovereignty of Parliament has not always been accepted by Scots lawyers as warmly as it has been received in England. There is a body of opinion in Scots law that the Westminster Parliament is not free to legislate in contravention of the terms on which the Union of Scotland and England was settled in 1707. That Union, so the argument goes, abolished the old Scottish and English Parliaments and replaced them with a new British Parliament in Westminster, the new Parliament being subject to the terms of its creation as laid out in the Acts (or Treaties) of Union. This argument was accepted, albeit *obiter*, by the Lord President of the Court of Session (Lord Cooper) in the famous case of *MacCormick v Lord Advocate* 1953 SC 396 but it is by no means clear that Lord Cooper stated the Scots law position accurately. We consider these matters in more detail in chapter 4.

The sovereignty of (the Westminster) Parliament is a doctrine whose cardinal importance to the British constitution would be difficult to exaggerate. As the 'keystone' of the constitution (as Dicey expressed it), what is meant is that the doctrine is no less than 'the central principle' of the system, 'on which all the rest depends' (to quote from the definition offered in the *Oxford English Dictionary*). While it is elemental, however, in a comparative sense it is also quite unusual. Most constitutional orders do not confer supremacy on statute. Most constitutional orders confer supremacy on the constitutional text itself, a text that normally binds not only judges and governments but also Parliaments. The British constitution is unusual in not stating that Acts of Parliament are subject to constitutional limitations. This unusualness has caused a good number of commentators and, in recent times, also some judges to suggest that, notwithstanding the fundamental role that the doctrine has played in the past, the time has come for it to be at least reconsidered, if not discarded altogether. We will explore some of these arguments in the pages that follow.

In this part of the chapter, first we consider the Diceyan orthodoxy and, in particular, the way in which it was accepted in the leading twentieth-century case law. Then we move on to examine the impact on the sovereignty of Parliament of the break-up of the British Empire. When Dicey wrote, the Westminster Parliament made laws not only for Britain but for a large number of colonies and Dominions across the globe. How may the territorial extent

of parliamentary sovereignty be reduced? If Parliament may make or unmake any law whatsoever, could it make a law granting independence to a colony and subsequently repeal that law, withdrawing the grant of independence and reasserting British rule over the territory? In the third section we consider the question of whether Parliament is able to bind its successor Parliaments. Is every Parliament equally sovereign, or may Parliament today limit the way in which Parliament tomorrow may make laws? In the final section of this part, we consider three contemporary challenges to the doctrine of parliamentary sovereignty: the challenge that comes from the United Kingdom's membership of the European Union, the challenge that comes from the inclusion since 1998 within our legal system of fundamental rights, and the challenge that may be beginning to come from the common law itself.

(a) Diceyan orthodoxy

Both the positive and the negative aspects of Dicey's formulation of the sovereignty of Parliament are illustrated by the following cases.

Cheney v Conn [1968] 1 All ER 779 (Ungoed-Thomas J)

A taxpayer appealed against an assessment to income tax made under the Finance Act 1964. One of the grounds of the appeal was that, since the money would be used in part for the construction of nuclear weapons, and since (it was argued) such use was contrary to international law, the illegal purpose to which the statute was being applied invalidated the assessment. This argument failed; in dealing with it Ungoed-Thomas J said:

> What the statute itself enacts cannot be unlawful, because what the statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.

That statute prevails over treaties binding on the United Kingdom was reaffirmed by the House of Lords in *R v Lyons* [2002] UKHL 44, [2003] 1 AC 976, Lord Hoffmann saying:

> The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not.

On the other hand, the courts acknowledge a duty to *interpret* statutes, if possible, as being in conformity with international law and treaty obligations, and we shall see that this interpretative power may be very far-reaching (below, pp 62–6).

The supremacy of statute has also been sustained in a negative way by a consistent judicial disclaimer of any power of interference with Acts of Parliament. In *Manuel v Attorney General* [1983] Ch 77, 86, Sir Robert Megarry V-C said:

> I am bound to say that from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires. Of course there may be questions about what the Act means, and of course there is power to hold statutory instruments and other subordinate legislation ultra vires. But once an instrument is recognised as being an Act of Parliament, no English court can refuse to obey it or question its validity.

Plainly the instrument before the court must be recognised as being an Act of Parliament. In *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, 562, Lord Donaldson MR, after allowing for the impact of European Community Law upon parliamentary sovereignty, said:

> Parliament has a limitless right to alter or add to the law by means of primary legislation, enacted by the full constitutional process of debate and decision in both Houses on first and second readings of the Bill, committee and report stages and third readings, followed by Royal Assent. The result is a statute and in relation to statutes the only duty of the judiciary is to interpret and apply them.

Resolutions of one or of both Houses of Parliament do not have the force of law. Accordingly in *Bowles v Bank of England* [1913] 1 Ch 57, Parker J held that a resolution of the House of Commons was not enough to empower the Crown to levy income tax: only an Act of Parliament could authorise taxation.

But if an Act is expressed to have been enacted by Queen, Lords and Commons, the courts will not inquire whether it was properly passed, or represents the will of Parliament. This was affirmed in a famous dictum of Lord Campbell in *Edinburgh and Dalkeith Railway Co v Wauchope* (1842) 8 Cl & Fin 710. In this case it had been argued in the court below that a private Act of Parliament was inoperative because notice to those affected by it had not been given as required by parliamentary standing orders. (Private Acts commonly affect private rights and are subject to a special parliamentary procedure.) Although this argument was abandoned in the House of Lords, Lord Campbell expressed a clear view on the point:

> [A]ll that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

Some years later in *Lee v Bude and Torrington Junction Rly Co* (1871) LR 6 CP 576 there was again a challenge to the validity of a private Act, this time on the ground that the promoters of the Act had fraudulently misled Parliament as to the facts and the promoters' true purposes. In rejecting this argument, Willes J said:

> Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.

Despite these unequivocal rulings the question of the validity of a private Act was once more argued in the courts in an important case in the 1970s.

British Railways Board v Pickin [1974] AC 765 (HL)

In Acts of Parliament by which the old railway companies acquired land for laying railway lines it was provided that, if the lines should be discontinued, the land taken was to revert to the adjoining landowners. In 1968 the British Railways Board promoted a private bill which would extinguish the rights of reverter; it was passed as the British Railways Act 1968. Pickin, who had acquired land adjoining a railway line that had been discontinued, brought an action in which he asserted that the relevant provision (section 18) of the Act of 1968 was invalid and ineffective to deprive him of his rights in the track. The Act, he maintained, had been improperly passed through Parliament as an unopposed private bill, in that notice had not been given to affected landowners as required by standing orders, and Parliament had been misled by false statements in the preamble to the bill that notices and plans of the land had been published.

On the application of the Railways Board these contentions were ordered to be struck out of the pleadings as an abuse of the process of the court, but they were restored by the Court of Appeal as raising a triable issue. The Board's appeal against this decision was allowed by a unanimous House of Lords.

> **Lord Reid:** . . . The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution, but a detailed argument has been submitted to your Lordships and I must deal with it.
>
> I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

> The respondent's contention is that there is a difference between a public and a private Act. There are of course great differences between the methods and procedures followed in dealing with public and private Bills, and there may be some differences in the methods of construing their provisions. But the respondent argues for a much more fundamental difference. There is little in modern authority that he can rely on. The mainstay of his argument is a decision of this House, *Mackenzie v Stewart* in 1754.

The Court of Appeal had been persuaded that in *Mackenzie v Stewart* the House of Lords had refused to give effect to a private Act obtained by fraud. Lord Reid re-examined this old and ill-reported case, and concluded that it had been decided by putting a particular construction upon the Act in question, and not by holding it invalid. Lord Reid continued:

> The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an inquiry into the manner in which they had performed their functions in dealing with the Bill which became the British Railways Act 1968. . . .
>
> For a century or more both Parliament and the courts have been careful not to act so as to cause conflict between them. Any such investigations as the respondent seeks could easily lead to such a conflict, and I would only support it if compelled to do so by clear authority. But it appears to me that the whole trend of authority for over a century is clearly against permitting any such investigation.
>
> The respondent is entitled to argue that section 18 should be construed in a way favourable to him and for that reason I have refrained from pronouncing on that matter. But he is not entitled to go behind the Act to show that section 18 should not be enforced. Nor is he entitled to examine proceedings in Parliament in order to show that the appellants by fraudulently misleading Parliament caused him loss. I am therefore clearly of opinion that this appeal should be allowed.

The House of Lords expressly approved what had been said by Lord Campbell in *Wauchope*'s case and by Willes J in *Lee*'s case (as quoted above). Lord Simon of Glaisdale relied in particular upon the privilege of Parliament declared in Article 9 of the Bill of Rights 1689 as disallowing any questioning of parliamentary proceedings. (See below, p 129.) He also drew attention to a practical consideration:

> [I]f there is evidence that Parliament may have been misled into an enactment, Parliament might well – indeed, would be likely to – wish to conduct its own inquiry. It would be unthinkable that two inquiries – one parliamentary and the other forensic – should proceed concurrently, conceivably arriving at different conclusions; and a parliamentary examination of parliamentary procedures and of the actions and understandings of officers of Parliament would seem to be clearly more satisfactory than one conducted in a court of law – quite apart from considerations of Parliamentary privilege.

Lord Morris was mindful of Parliament's character as the supreme judicial body in the land – a medieval conception not yet quite extinct:

> It would be impracticable and undesirable for the High Court of Justice to embark upon an inquiry concerning the effect or the effectiveness of the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed.

Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262

The normal procedure for the enactment of statute is that a Bill must be 'read' and passed three times by each House – Commons and Lords – and will then receive the royal assent (see in more detail chapter 9). Thus, Acts of Parliament are formally made by the Crown, the Lords and the Commons acting together. Since the Parliament Act 1911, however, the Commons and the Crown have enjoyed a limited power to legislate without the consent of the House of Lords. If the Commons passes a Bill which is then repeatedly rejected by the Lords, after a certain period the bill may none the less proceed to receive the royal assent (and thereby become an Act) despite the opposition of the House of Lords. The effect of the Parliament Act 1911 was, for most bills, to replace the Lords' veto over legislation with a power to delay the legislation. The one exception written into the statute is that a bill to extend the life of a Parliament (ie, to postpone a general election) continues to require the assent of both Houses. These arrangements were amended by the Parliament Act 1949, which reduced the length by which the House of Lords may delay a bill from two years to one year (much shorter periods of delay apply to 'money bills', such as the government's budget, but that need not concern us here). The 1949 Act was itself passed under the Parliament Act procedure. Since 1949, only four Acts have been passed using this procedure: the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004.

In *Jackson v Attorney General* [2005] UKHL 56 a challenge was launched to the constitutional validity of the Hunting Act 2004 and the Parliament Act 1949. *Jackson* is a very important case in the developing law of the sovereignty of Parliament, and we shall consider it in detail later in this chapter. For now, what concerns us is solely the point raised in *Wauchope, Lee* and *Pickin*: namely, do the courts have the jurisdiction to examine whether a purported statute is properly a statute? The Attorney General did not seek to argue that the challenge to the 1949 and 2004 Acts was non-justiciable. The Government knew that the hunting legislation was controversial and considered that a clear verdict from the courts as to its validity was preferable to there being any continuing doubt about the matter. Accordingly, he conceded that the courts did have jurisdiction. The courts accepted, albeit in some instances with qualification, that he was right to do so.

Lord Bingham: . . . Like the Court of Appeal . . . I feel some sense of strangeness at the exercise which the courts have (with the acquiescence of the Attorney General) been invited to undertake in these proceedings. The authority of *Pickin v British Railways Board* [1974] AC 765 is unquestioned, and it was there very clearly decided that 'the courts in this country have no power to declare enacted law to be invalid' (per Lord Simon of Glaisdale at p 798). I am, however, persuaded that the present proceedings are legitimate, for two reasons. First, in *Pickin*, unlike the present case, it was sought to investigate the internal workings and procedures of Parliament to demonstrate that it had been misled and so had proceeded on a false basis. This was held to be illegitimate . . . [his Lordship cited the quotation from Lord Campbell in *Wauchope* and continued]. Here, the courts look to the parliamentary roll and sees bills (the 1949 Act, and then the 2004 Act) which have not passed both Houses. The issue concerns no question of parliamentary procedure such as would, and could only, be the subject of parliamentary inquiry, but a question whether, in Lord Simon's language, these Acts are 'enacted law'. My second reason is more practical. The appellants have raised a question of law which cannot, as such, be resolved by Parliament. But it would not be satisfactory, or consistent with the rule of law, if it could not be resolved at all. So it seems to me necessary that the courts should resolve it, and that to do so involves no breach of constitutional propriety.

Lord Nicholls: . . . These proceedings are highly unusual. At first sight a challenge in court to the validity of a statute seems to offend the fundamental constitutional principle that courts will not look behind an Act of Parliament and investigate the process by which it was enacted. Those are matters for Parliament, not the courts. It is for each House to judge the lawfulness of its own proceedings. The authorities establishing this principle can be found gathered in *Pickin v British Railways Board* [1974] AC 765 . . . In the present case the claimants do not dispute this constitutional principle . . . Their challenge to the lawfulness of the 1949 Act is founded on a different and prior ground: the proper interpretation of section 2(1) of the 1911 Act. On this issue the court's jurisdiction cannot be doubted. This question of statutory interpretation is properly cognisable by a court of law even though it relates to the legislative process. Statutes create law. The proper interpretation of a statute is a matter for the courts, not Parliament, This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognisance (jurisdiction) over its own affairs.

The House of Lords unanimously upheld the validity of both the Parliament Act 1949 and the Hunting Act 2004. Along the way several of their Lordships commented on various aspects of the sovereignty of Parliament. We shall examine a number of these comments later in this chapter (pp 71–4).

(b) Territorial extent of sovereignty: post-colonial independence

Britain is still an imperial power. To this day it continues to possess a number of 'overseas territories', as they are now called. Matters of imperial law continue to come before the British courts. *R (Bancoult) v Secretary of State for the Foreign*

and Commonwealth Office [2001] QB 1067 (on which, see Tomkins [2001] *PL* 571), *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2006] EWHC (Admin) 1038 and *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Quark Fishing* [2005] UKHL 57 are three recent examples, the former cases concerning an appalling (and ongoing) episode in the government of the British Indian Ocean Territory (otherwise known as the Chagos Islands) and the latter case concerning South Georgia and the South Sandwich Islands. That said, however, it is of course the case that the vast majority of the nations formerly included within the British Empire have now obtained their independence (from the British Parliament, if not always from the Crown – many countries in the Commonwealth continue to recognise the Queen as head of state). Post-colonial independence poses a number of legally difficult questions for the doctrine of parliamentary sovereignty. The granting of independence to a former colony requires legislative power to be transferred from Westminster to the newly independent state. How may this be achieved? We saw above that, as Dicey explained, Parliament 'may make or unmake any law whatever'. Suppose that Parliament passes a statute granting independence to a former colony or Dominion. What would be the legal effect of a later Parliament repealing that legislation, and reasserting its right to make laws for the territory?

First, it may be argued (with equivocal support from Dicey, *The Law of the Constitution* (1885), p 69 note) that Parliament can surrender its sovereign authority over particular territory to some other body of persons. The Statute of Westminster 1931 may be thought to have accomplished this. The Statute removed existing limitations of the competence of Dominion Parliaments and reinforced this conferment of legislative power with a provision, in section 4, intended to give a legal underpinning to the convention (itself reaffirmed in the preamble to the Statute) that the United Kingdom Parliament should not legislate for a Dominion without its consent. Section 4 provides:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

(The 'Dominions' to which the Act applied in 1931 were Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland, all of them at that time autonomous members of the British Commonwealth, owing a common allegiance to the Crown.)

In more recent times Acts have been passed to transfer sovereign authority to former colonies and dependencies which have gained independence. In most of these independence Acts the renunciation of legislative competence was

not qualified by a 'request and consent' provision such as that in section 4 of the Statute of Westminster. For example, the Zimbabwe Act 1979, section 1(2), provided:

> On and after Independence Day Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Zimbabwe; and no Act of the Parliament of the United Kingdom passed on or after that day shall extend, or be deemed to extend, to Zimbabwe as part of its law.

In a heaven of orthodoxy inhabited by lawyers it is held that the transfers of sovereignty effected by the Statute of Westminster and the independence Acts are in strict law only conditional, in that Parliament can at any time repeal or disregard these enactments and resume its entire legislative authority over the countries concerned. This was, indeed, the view expressed in an *obiter* dictum of Lord Sankey, with reference to the application of section 4 of the Statute of Westminster to the Dominion of Canada, in *British Coal Corpn v R* [1935] AC 500, 520:

> It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard s 4 of the Statute.

But he went on to say:

> But that is theory and has no relation to realities.

The position taken by Lord Sankey as a matter of 'abstract law' was countered by the assertion of a South African judge (Stratford ACJ in *Ndlwana v Hofmeyr* 1937 AD 229, 237) that 'Freedom once conferred cannot be revoked'. This was echoed by Lord Denning in *Blackburn v Attorney General* [1971] 1 WLR 1037, 1040:

> We have all been brought up to believe that, in legal theory, one Parliament cannot bind another and that no Act is irreversible. But legal theory does not always march alongside political reality. Take the Statute of Westminster 1931, which takes away the power of Parliament to legislate for the Dominions. Can any one imagine that Parliament could or would reverse that Statute? Take the Acts which have granted independence to the Dominions and territories overseas. Can anyone imagine that Parliament could or would reverse those laws and take away their independence? Most clearly not. Freedom once given cannot be taken away. Legal theory must give way to practical politics.

These constitutional issues arose in the following case.

Manuel v Attorney General [1983] Ch 77, 95 (Sir Robert Megarry V-C)

The Canada Act 1982, making provision for a new constitution of Canada, had been passed by the United Kingdom Parliament on a request submitted by the Senate and the House of Commons of Canada with the agreement of nine of the ten provincial governments. The claimants were Canadian Indian Chiefs whose complaint was that the new constitution took away the special protection which had been accorded to the rights of the Indian peoples of Canada under the prior constitutional arrangements. They sought a number of declarations claiming that (1) the United Kingdom Parliament had no power to amend the constitution of Canada so as to prejudice the Indian nations of Canada without their consent; (2) the Canada Act 1982 was ultra vires and void. The defendant, the Attorney General, moved that the statement of claim be struck out as disclosing no reasonable cause of action.

Sir Robert Megarry: . . . On the face of it, a contention that an Act of Parliament is ultra vires is bold in the extreme. It is contrary to one of the fundamentals of the British Constitution. . . . As was said by Lord Morris of Borth-y-Gest [in *British Railways Board v Pickin*, above] it is not for the courts to proceed 'as though the Act or some part of it had never been passed'; there may be argument on the interpretation of the Act, but 'there must be none as to whether it should be on the Statute Book at all'. . . .

Mr Macdonald [counsel for the claimants] was, of course, concerned to restrict the ambit of the decision in *Pickin v British Railways Board*. He accepted that it was a binding decision for domestic legislation, but he said that it did not apply in relation to the Statute of Westminster 1931 or to the other countries of the Commonwealth. . . . [This point] is founded upon the theory that Parliament may surrender its sovereign power over some territory or area of land to another person or body. . . . After such a surrender, any legislation which Parliament purports to enact for that territory is not merely ineffective there, but is totally void, in this country as elsewhere, since Parliament has surrendered the power to legislate; and the English courts have jurisdiction to declare such legislation ultra vires and void.

Before I discuss this proposition, and its application to Canada, I should mention one curious result of this theory which emerged only at a late stage. In response to a question, Mr Macdonald accepted that as the theory applied only to territories over which Parliament had surrendered its sovereignty, it did not affect territories over which Parliament had never exercised sovereignty. Thus if one adapts an example given by Jennings [*The Law and the Constitution* (5th edn 1959)] at pp 170, 171, an English statute making it an offence to smoke in the streets of Paris or Vienna would be valid, though enforceable only against those who come within the jurisdiction, whereas an English statute making it an offence to smoke in the streets of Bombay or Sydney would be ultra vires and void, and an English court could make a declaration to this effect. At this stage I need say no more than that I find such a distinction surprising.

The claimants had argued that the Statute of Westminster had transferred sovereignty to Canada, subject only to section 7 of the Statute by which the

United Kingdom Parliament retained power to enact amendments to the Canadian Constitution (contained in the British North America Acts). This power could be exercised (in what was argued to be the true meaning of section 4, set out above) only on condition that the actual request and consent of the Dominion had been forthcoming, and such consent must be expressed by all the provincial legislatures and by the Indian nations of Canada as well as by the federal Parliament. No such general consent of the Dominion had been given, and without it the United Kingdom Parliament could not legislate for Canada on any subject.

Sir Robert Megarry: . . . In the present case I have before me a copy of the Canada Act 1982 purporting to be published by Her Majesty's Stationery Office. After reciting the request and consent of Canada and the submission of an address to Her Majesty by the Senate and House of Commons of Canada, there are the words of enactment:

> 'Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:'

There has been no suggestion that the copy before me is not a true copy of the Act itself, or that it was not passed by the House of Commons and the House of Lords, or did not receive the Royal Assent. . . . The Canada Act 1982 is an Act of Parliament, and sitting as a judge in an English court I owe full and dutiful obedience to that Act.

I do not think that, as a matter of law, it makes any difference if the Act in question purports to apply outside the United Kingdom. I speak not merely of statutes such as the Continental Shelf Act 1964 but also of statutes purporting to apply to other countries. If that other country is a colony, the English courts will apply the Act even if the colony is in a state of revolt against the Crown and direct enforcement of the decision may be impossible: see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645. . . . Similarly if the other country is a foreign state which has never been British, I do not think that any English court would or could declare the Act ultra vires and void. No doubt the Act would normally be ignored by the foreign state and would not be enforced by it, but that would not invalidate the Act in this country. Those who infringed it could not claim that it was void if proceedings within the jurisdiction were taken against them. Legal validity is one thing, enforceability is another. Thus a marriage in Nevada may constitute statutory bigamy punishable in England (*Trial of Earl Russell* [1901] AC 446), just as acts in Germany may be punishable here as statutory treason: *Joyce v Director of Public Prosecutions* [1946] AC 347. Parliament in fact legislates only for British subjects in this way; but if it also legislated for others, I do not see how the English courts could hold the statute void, however impossible it was to enforce it, and no matter how strong the diplomatic protests.

I do not think that countries which were once colonies but have since been granted independence are in any different position. Plainly once statute has granted independence to a country, the repeal of the statute will not make the country dependent once more; what is done is done, and is not undone by revoking the authority to do it. . . . But if Parliament then passes an Act applying to such a country, I cannot see why that Act should not be in

> the same position as an Act applying to what has always been a foreign country, namely, an Act which the English courts will recognise and apply but one which the other country will in all probability ignore.

Sir Robert Megarry accordingly held that the claimants' statement of claim disclosed no reasonable cause of action. He concluded:

> Perhaps I may add this. I have grave doubts about the theory of the transfer of sovereignty as affecting the competence of Parliament. In my view, it is a fundamental of the English constitution that Parliament is supreme. As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its own omnipotence. Under the authority of Parliament the courts of a territory may be released from their legal duty to obey Parliament, but that does not trench on the acceptance by the English courts of all that Parliament does. Nor must validity in law be confused with practical enforceability.

The claimants appealed. The Court of Appeal was content to assume in favour of the claimants (while expressly refraining from deciding) the correctness of the proposition 'that Parliament can effectively tie the hands of its successors, if it passes a statute which provides that any future legislation on a specified subject shall be enacted only with certain specified consents'. But was this what Parliament had done in enacting section 4 of the Statute of Westminster? The judgment of the court (delivered by Slade LJ) proceeded on the basis that precise compliance with section 4 was necessary if the Canada Act 1982 was to be valid and effective. The attack on the validity of the Act failed. The Court of Appeal construed section 4 of the Statute of Westminster as requiring no more than a declaration in an Act that the Dominion had requested and consented to it. The court thereby avoided having to decide the constitutional issues, whether Parliament can effectively renounce its sovereign legislative power in respect of a particular territory, and whether it can make the consent of some other body necessary for the validity of its Acts. On the other hand the judgment of Sir Robert Megarry at first instance had left no room for doubt as to the answers to these questions. (For further analysis, see Hadfield [1983] *PL* 351 and G Marshall, *Constitutional Conventions* (1984), ch XII.) Parliament has since expressly renounced, without qualification, its surviving legislative competences in respect of Canada (in the Canada Act 1982, s 2) and Australia (Australia Act 1986, s 1).

(c) Continuing sovereignty and the 'new view'

Let us now put to one side the unlikely prospect of legislation by the United Kingdom Parliament purporting to alter the law of a state such as Zimbabwe or Canada to which it has ostensibly made an unqualified transfer of legislative sovereignty.

The wider question remains, which has important practical implications, whether Parliament can bind itself (including succeeding Parliaments) either as to the content of future legislation or as to the manner and form in which future legislation must be passed. As we shall see, consideration of this question takes us into the treacherous waters of what the legal basis of the doctrine of parliamentary sovereignty is. The sovereignty of the United Kingdom Parliament has traditionally been held to be of that transcendent kind that cannot be limited even by Parliament itself.

Godden v Hales (1686) 11 St Tr 1165 (KB)

Herbert CJ: . . . [I]f an act of parliament had a clause in it that it should never be repealed, yet without question, the same power that made it, may repeal it.

Professor HLA Hart holds that the rule of parliamentary sovereignty is part of what he calls the 'rule of recognition' of our legal system. This is the fundamental or ultimate rule of the system which states the criteria for identifying valid rules of law: unlike all the other rules the rule of recognition is binding simply because it is accepted by the community, in particular by its judges and officials. The rule of recognition sustaining our constitutional system is said to include the proposition that Parliament cannot bind itself.

HLA Hart, *The Concept of Law* (2nd edn 1994), pp 149–50

Under the influence of the Austinian doctrine that law is essentially the product of a legally untrammelled will, older constitutional theorists wrote as if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation. That Parliament is sovereign in this sense may now be regarded as established, and the principle that no earlier Parliament can preclude its 'successors' from repealing its legislation constitutes part of the ultimate rule of recognition used by the courts in identifying valid rules of law. It is, however, important to see that no necessity of logic, still less of nature, dictates that there should be such a Parliament; it is only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity. Among these others is another principle which might equally well, perhaps better, deserve the name of 'sovereignty'. This is the principle that Parliament should *not* be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would then at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows to it. The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is, after all, only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all

matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the exercise of which can only be enjoyed once. These two conceptions of omnipotence have their parallel in two conceptions of an omnipotent God: on the one hand, a God who at every moment of his existence enjoys the same powers and so is incapable of cutting down those powers, and, on the other, a God whose powers include the power to destroy for the future his omnipotence. Which form of omnipotence – continuing or self-embracing – our Parliament enjoys is an empirical question concerning the form of rule which is accepted as the ultimate criterion in identifying the law. Though it is a question about a rule lying at the base of a legal system, it is still a question of fact to which at any given moment of time, on some points at least, there may be a quite determinate answer. Thus it is clear that the presently accepted rule is one of continuing sovereignty, so that Parliament cannot protect its statutes from repeal.

The rule of recognition, which affirms the continuing sovereignty of Parliament, may change over time; political developments may eventually – or even suddenly – cause the courts to give obedience to a modified or new rule of recognition. But while it stands it has, as Hart says, a 'unique authoritative status'. The rule of parliamentary sovereignty is not alterable by Parliament acting alone.

HWR Wade, 'The basis of legal sovereignty' [1955] *CLJ* 172, 187–9

But to deny that Parliament can alter this particular rule [that the courts will enforce statutes] is not so daring as it may seem at first sight; for the sacrosanctity of the rule is an inexorable corollary of Parliament's continuing sovereignty. If the one proposition is asserted, the other must be conceded. Nevertheless some further justification is called for, since there must be something peculiar about a rule of common law which can stand against a statute.

The peculiarity lies in this, that the rule enjoining judicial obedience to statutes is one of the fundamental rules upon which the legal system depends. That there are such rules, and that they are in a very special class, is explained with great clarity by Salmond [*Jurisprudence* (10th edn 1947), p 155]:

> 'All rules of law have historical sources. As a matter of fact and history they have their origin somewhere, though we may not know what it is. But not all of them have legal sources. Were this so, it would be necessary for the law to proceed *ad infinitum* in tracing the descent of its principles. It is requisite that the law should postulate one or more first causes, whose operation is ultimate and whose authority is underived. . . . The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. . . . It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of. *No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.*'

Once this truth is grasped, the dilemma is solved. For if no statute can establish the rule that the courts obey Acts of Parliament, similarly no statute can alter or abolish that rule. The rule is above and beyond the reach of statute, as Salmond so well explains, because it is itself the source of the authority of statute. This puts it into a class by itself among rules of common law, and the apparent paradox that it is unalterable by Parliament turns out to be a truism. The rule of judicial obedience is in one sense a rule of common law, but in another sense – which applies to no other rule of common law – it is the ultimate *political* fact upon which the whole system of legislation hangs. Legislation owes its authority to the rule: the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.

For the relationship between the courts of law and Parliament is first and foremost a political reality. Historical illustrations of this are plentiful. When Charles I was executed in 1649 the courts continued to enforce the Acts of the Long Parliament, the Rump, Barebones' Parliament, and the other Commonwealth legislatures. For a revolution took place, and the courts (without any authority from the *previous* sovereign legislature) spontaneously transferred their allegiance from the King in Parliament to the kingless Parliaments. In other words, the courts altered their definition of 'an Act of Parliament' and recognised that the seat of sovereignty had shifted. This was a political fact from which legal consequences flowed. But in 1660 there was a counter-revolution: Charles II was restored, and it was suddenly discovered that all Acts passed by the Commonwealth Parliaments were void for want of the royal assent. The courts, again without any prior authority, shifted their allegiance back to the King in Parliament, and all the Commonwealth legislation was expunged from the statute book. The 'glorious revolution' of 1688 was, in its legal aspect if in no other, much like the revolution of 1649, for the courts, recognising political realities but without any *legal* justification, transferred their obedience from James II to William and Mary. Had the Jacobite rebellions of 1715 and 1745 succeeded, the courts might once again have held all intervening legislation – including the Bill of Rights and Act of Settlement – void for lack of the assent of the proper monarch. The fact that William and Mary's Parliament had passed Acts confirming their title to the Crown and its own legislative authority would obviously not have availed in the least.

What Salmond calls the 'ultimate legal principle' is therefore a rule which is unique in being unchangeable by Parliament – it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact.

The 'revolution' which, in the view of Sir William Wade, is required for any change in the ultimate legal principle of parliamentary sovereignty, may be a gradual event rather than a sudden political convulsion.

Sir William Wade, *Constitutional Fundamentals* (rev edn 1989), p 37

> I have never suggested that no shift in judicial loyalty is possible. One has only to look at the shifts which took place in seventeenth-century England, in eighteenth-century America and in the twentieth-century dissolution of the British Empire, latterly in particular in Zimbabwe. These shifts are revolutions, breaks in continuity and in the legal pedigree of legislative power. Even without such discontinuity there might be a shift of judicial loyalty if we take into account the dimension of time. Suppose that Parliament were to enact a Bill of Rights entrenched by a clause saying that it was to be amended or repealed only by Acts certified to be passed by two-thirds majorities in both Houses. Suppose also that Parliament scrupulously observed this rule for 50 or 100 years, so that no conflicting legislation came before the courts. Meanwhile new generations of judges might come to accept that there had been a new constitutional settlement based on common consent and long usage, and that the old doctrine of sovereignty was ancient history, to be classed with the story of the Witenagemot, Bonham's case, the Rump, Barebones' Parliament and the Jacobite pretenders. The judges would then be adjusting their doctrine to the facts of constitutional life, as they have done throughout history.

If a Bill of Rights with entrenched provisions such as Sir William Wade supposes (and unlike the Human Rights Act 1998 which, not being entrenched, is reconcilable with the orthodox doctrine of parliamentary sovereignty) were to be introduced with general political and popular support, it might perhaps in a much shorter time than fifty or a hundred years establish itself in the British political culture and be recognised by the judges as having worked a change in the ground rules of the constitution.

It is argued by some constitutional theorists (whose position derives an arguably gratuitous advantage from being sometimes described as the 'new view' of parliamentary sovereignty) that the orthodox doctrine of sovereignty does not prevent Parliament from binding itself as to the 'manner and form' (as opposed to the content) of future legislation. (See eg, RFV Heuston, *Essays in Constitutional Law* (2nd edn 1964), ch 1.) According to this view, Parliament could effectively provide that an Act might be repealed or amended only by a specified majority in both Houses, or only with the approval of the electorate in a referendum, or only by the use of a prescribed verbal formula in the amending Act. The 'new view' that such self-imposed procedural limitations would be binding on Parliament relies largely on Commonwealth cases, of which the following is an example.

Harris v Minister of the Interior 1952 (2) SA 428 (Appellate Division of the Supreme Court of South Africa)

The South Africa Act 1909, an Act of the United Kingdom Parliament, joined together four colonies as the Union of South Africa, and created the Parliament of the Union. This was initially a non-sovereign legislature which by reason of

the Colonial Laws Validity Act 1865 had no general power to legislate inconsistently with United Kingdom statutes extending to South Africa. But section 152 of the South Africa Act empowered the Union Parliament to 'repeal or alter any of the provisions of this Act'.

Those who framed the South Africa Act were concerned to protect and entrench existing voting rights, in particular the rights of the 'Cape Coloured' voters of the former Cape Colony. Accordingly section 35(1) of the Act provided that no Act of the Union Parliament should disqualify any person in the Cape Province as a voter by reason of his race or colour, unless the bill:

> be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses.

Section 35 was itself entrenched in a proviso to section 152, by which any repeal or alteration of section 35, or indeed of section 152, could be effected only by the same method of a bill passed by a two-thirds majority in a joint sitting of both Houses.

In 1948 a National Government came into power and initiated an intensified policy of white supremacy under the name of apartheid. By that date South Africa had, as a result of constitutional convention and the Statute of Westminster 1931, shed its colonial status and was acknowledged to be an independent and sovereign state within the Commonwealth. In 1951 the Union Parliament passed by a simple majority, the two Houses sitting separately, a Separate Representation of Voters Act (Act 46 of 1951) which deprived Cape Coloured voters of their existing voting rights, by providing for their registration on a separate voters' roll. Some of the disqualified voters brought proceedings to challenge the validity of the Act.

The argument of counsel for the Government was that the Union Parliament, having acquired full legislative sovereignty as a result of the Statute of Westminster, was free to disregard the limitations contained in sections 35 and 152 of the South Africa Act 1909.

A unanimous Appellate Division held that the Separate Representation of Voters Act was null and void.

> **Centlivres CJ:** . . . It is common cause that Act 46 of 1951 was passed by the House of Assembly and the Senate sitting separately and assented to by the Governor-General and that it was not passed in conformity with the provisions of sec. 35(1) and sec. 152 of the South Africa Act. . . .
>
> If Act 46 of 1951 had been passed before the Statute of Westminster, it is clear . . . that that Act would not have been a valid Act, as it was not passed in accordance with the procedure prescribed by secs 35(1) and 152. . . .
>
> The effect of sub-sec (1) of sec 2 [of the Statute of Westminster] is that the Colonial Laws Validity Act no longer applies to any law made . . . by the Union Parliament. Consequently

the Union Parliament can now make a law repugnant to a British Act of Parliament in so far as that Act extends to the Union. . . . [I]t is clear that when [the Statute of Westminster] refers to a law made by a Dominion, such law means in relation to South Africa a law made by the Union Parliament functioning either bicamerally or unicamerally in accordance with the requirements of the South Africa Act.

[The judge referred to the argument of counsel for the Government that the effect of the Statute of Westminster was that the Union was a sovereign state and that all fetters binding the Union Parliament had fallen away, and continued:]

A State can be unquestionably sovereign although it has no legislature which is completely sovereign. As Bryce points out in his *Studies in History and Jurisprudence* legal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under . . . the proviso to sec 152. Such a division of legislative powers is no derogation from the sovereignty of the Union and the mere fact that that division was enacted in a British Statute (viz, the South Africa Act) which is still in force in the Union cannot affect the question in issue.

. . . The South Africa Act, the terms and conditions of which were, as its preamble shows, agreed to by the respective Parliaments of the four original Colonies, created the Parliament of the Union. It is that Act and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers.

. . . [T]he Statute of Westminster has left the entrenched clauses of the South Africa Act intact, and, that being so, it follows that . . . courts of law have the power to declare Act 46 of 1951 invalid on the ground that it was not passed in conformity with the provisions of secs 35 and 152 of the South Africa Act. . . . To hold otherwise would mean that courts of law would be powerless to protect the rights of individuals which were specially protected in the constitution of this country.

(The judicial vindication in this great case of the rule of law and the rights of individuals was countered by further measures taken by the National Government which succeeded eventually in removing the Cape Coloured voters from the common roll. The whole course of the constitutional battle is considered by G Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957), ch II and by C Forsyth, *In Danger for their Talents* (1985), pp 61–74.)

The *Harris* case is a demonstration of the principle that a Parliament may be sovereign and yet be subject to requirements of manner and form for the legally effective expression of its will. But this does not justify us in concluding that the United Kingdom Parliament can impose legally binding requirements of manner and form upon itself. The Union Parliament owed its existence to the South Africa Act, which therefore had a special status as the constituent instrument of that Parliament. Only when functioning in accordance with the procedural requirements of the constituent Act could it be said that the Union

Parliament functioned at all. Other Commonwealth cases that are invoked in support of the 'new view' of parliamentary sovereignty, such as *Attorney General for New South Wales v Trethowan* [1932] AC 526 and *Bribery Comr v Ranasinghe* [1965] AC 172, also depend upon the special authority of the instrument containing the limiting provisions. In the constitution of the United Kingdom, on the other hand, as the Privy Council observed in *Ranasinghe*'s case, 'there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers'.

As regards requirements of manner and form imposed by the United Kingdom Parliament upon itself, the following case gives no encouragement to exponents of the 'new view'.

Ellen Street Estates Ltd v Minister of Health [1934] 1 KB 590 (CA)

The Acquisition of Land (Assessment of Compensation) Act 1919 laid down the principles on which compensation was to be assessed for the compulsory acquisition of land for public purposes. Section 7(1) said that the provisions of any Act authorising compulsory acquisition 'shall . . . have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect'. On one view section 7(1) is correctly construed as applying only to past enactments, but it was argued in this case that it applied also to later Acts and that, as a consequence, inconsistent provisions in the Housing Act 1925 were of no effect. It was not disputed that a later Act could amend the 1919 Act, but it was contended that only express provision in the later Act would achieve this: in effect, Parliament had in 1919 bound its successors as to the *form* of any amendment of the provisions of its enactment of that year. The Court of Appeal held, however, that even if section 7(1) of the Act of 1919 was intended to apply to later Acts, it could not control future Parliaments, and the the Housing Act 1925 therefore overrode those provisions of the 1919 Act with which it was inconsistent.

Scrutton LJ: . . . Such a contention involves this proposition, that no subsequent Parliament by enacting a provision inconsistent with the Act of 1919 can give any effect to the words it uses. . . . That is absolutely contrary to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in terms the previous Act . . . and it can do it also in another way – namely, by enacting a provision which is clearly inconsistent with the previous Act.

Maugham LJ: . . . The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the legislature.

The same conclusion on this point had been reached earlier by the Divisional Court in *Vauxhall Estates Ltd v Liverpool Corpn* [1932] 1 KB 733. These cases are not necessarily conclusive of the matter: in each of them the 'manner and form' question arose in a specific and narrow context and in neither case was the nature of parliamentary sovereignty examined in depth. The 'new view' continues to find support, for instance, in a thoughtful analysis by PP Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 *Yearbook of European Law* 221. An unqualified acceptance of the new view would, however, bestow a dangerous power upon any government looking for a way to shore up partisan legislation against being overturned by a future Parliament of a different political composition.

Several members of the House of Lords commented on the 'manner and form' argument in their opinions in *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 (for the background to which, see above). All such comments were *obiter*, and none resolves the matter definitively. Even after *Jackson* there can be no certainty as to whether the manner and form argument is, or is not, part of the law governing the Westminster Parliament. The clearest support in *Jackson* for the manner and form argument comes from Lord Steyn [81]; the clearest criticism of the manner and form argument comes from Lord Hope [113] (but see also Baroness Hale of Richmond [161–163], who says that the question 'is for another day').

Lord Steyn: . . . The word Parliament involves both static and dynamic concepts. The static concept refers to the constituent elements which make up Parliament: the House of Commons, the House of Lords, and the Monarch. The dynamic concept involves the constituent elements functioning together as a law making body. The inquiry is: has Parliament spoken? The law and custom of Parliament regulates what the constituent elements must do to legislate: all three must signify consent to the measure. But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. Such redefinition could not be disregarded. Owen Dixon neatly summarised this idea in 1935: '. . . The very power of constitutional alteration cannot be exercised except in the form and manner which the law for the time being prescribes. Unless the legislature observes that manner and form, its attempt to alter its constitution is void. It may amend or abrogate for the future the law which prescribes that form or that manner. But, in doing so, it must comply with its very requirements.' See 'The Law and the Constitution' (1935) 51 *LQR* 590, 601. This formulation can be traced to the majority judgment in *Attorney General for New South Wales v Trethowan* (1931) 44 CLR 394.

Lord Hope: . . . it is a fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. There are no means whereby, even with the assistance of the most skilful draftsman, it can entrench an Act of Parliament. It is impossible for Parliament to enact something which a subsequent statute dealing with the same subject matter cannot repeal.

It may be that no single theory of parliamentary sovereignty is unequivocally established in our constitution, doing service for every occasion. TRS Allan, 'Parliamentary sovereignty: Lord Denning's dexterous revolution' (1983) 3 *OJLS* 22, argues that the 'fundamental' rule about parliamentary sovereignty is in fact indeterminate: it does not specify whether sovereignty is 'continuing' or 'self-embracing'. It is therefore for the judges to decide on the effectiveness of any self-imposed limitation of manner and form as and when the question arises, and they may respond in the future to a perceived 'readiness of the political climate for change' in upholding such a limitation in a particular context.

(d) Sovereignty reappraised: three contemporary challenges

(i) Membership of the European Union

When the United Kingdom joined the European Community (now the European Union) in 1972 it was already an established principle of the Community legal order that laws issuing from it, within the area of Community competence, should have supreme authority in all the Member States. To this end the European Court of Justice insisted that the Member States had, in transferring powers to the Community, necessarily limited their own sovereign authority (see Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585). Accordingly, the European Communities Act 1972 (the legal instrument governing the status of EU law in the United Kingdom) provides that UK legislation – including Acts of Parliament – is to have effect *subject to* authoritative provisions of Community law. The significance of this provision was illustrated in the *Factortame* litigation, the leading case in the United Kingdom on the relationship between the sovereignty of Parliament and the claims of EU law to legal supremacy. *Factortame* is considered in detail in chapter 5. The effect of this provision may seem equivalent to a transfer of (a portion of) Parliament's sovereignty to the Community, but since the European Communities Act is, like any other Act, in principle repealable by Parliament, the restriction of sovereignty effected by it is not irreversible: we may say that sovereignty has been lent rather than given away. But perhaps, as Lord Sankey said about the Statute of Westminster and its application to Canada, 'that is theory and has no relation to realities'. What is clear is that, to the extent to which sovereignty has been transferred to the European Union it has been transferred only in limited fields. As we shall see in more detail in chapter 5, the European Union has the power to legislate only in specific, defined fields. Outwith those fields, there is no question of legislative supremacy having been transferred from Parliament to the European Union. That said, however, it is equally clear that within those fields regulated by EU law, even if Parliament remains *theoretically* sovereign in that it may repeal the European Communities Act 1972, the environment in which Parliament legislates has changed such that, *in practice*, it tends no longer to 'make or unmake any law whatever', but to make or unmake law in a way that is compatible with and, in

this sense, conditioned by the United Kingdom's membership of the European Union. Whether this constitutes a revolutionary alteration to the rule of recognition or a mere evolution of legal principle is a matter of (hotly contested) interpretation. For the former view, see Sir William Wade, 'Sovereignty – revolution or evolution?' (1996) 112 *LQR* 568; for the latter, see TRS Allan, 'Parliamentary sovereignty: law, politics and revolution' (1997) 113 *LQR* 443. These matters are considered more fully in chapter 5.

(ii) Incorporation of fundamental rights

If the European Communities Act 1972 poses the first contemporary challenge to the orthodoxy of parliamentary sovereignty, the second comes from the Human Rights Act 1998. By this Act Parliament incorporated into domestic law most of the substantive rights enshrined in the European Convention on Human Rights (ECHR). The first thing to say about the ECHR is that it is not part of EU law. The ECHR was developed under the auspices of a quite separate international body, the Council of Europe. It is very important to keep the Council of Europe and its ECHR separate from the European Union. The ECHR is enforced by the European Court of Human Rights, which is in Strasbourg; the law of the European Union is enforced by the European Court of Justice, which is in Luxembourg. As a matter of international law the United Kingdom has been bound by the terms of the ECHR since its inception in the 1950s. This means that litigants could complain to the European Court of Human Rights if they felt their rights were being violated by the United Kingdom. But it was not until the Human Rights Act 1998 came into force in 2000 that litigants could make such arguments in the domestic courts. The relationship between fundamental rights, judicial review and parliamentary sovereignty was summarised in the following way in an important ruling by Lord Hoffmann.

R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 (HL)

Lord Hoffmann: . . . Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights . . . But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The following Convention rights are incorporated into domestic law under the Human Rights Act: the right to life, freedom from torture, freedom from slavery, the right to liberty, the right to a fair trial, the right to privacy, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, the right to marry, freedom from discrimination, the right to property and the right to education, as well as others (see, in more detail, chapter 11). Sections 3 and 4 of the Human Rights Act govern the relationship between these Convention rights and Acts of Parliament. Section 3(1) provides that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Section 4 provides that, if a court is satisfied that a provision of primary legislation is incompatible with a Convention right, the court 'may make a declaration of that incompatibility'. Such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given' (section 4(6)(a)). Thus, courts in the United Kingdom do not have the power, even after the Human Rights Act, to strike down Acts of Parliament which they deem to be incompatible with Convention rights. All they may do is 'declare' the incompatibility. It is then a matter for Parliament to decide whether it wishes to continue with the legislation, to amend it or to replace it.

We will consider these matters in greater detail in chapter 11. For now what is important are the implications of these provisions for the sovereignty of Parliament. The key issue is: when should the courts use section 4 and when should they use section 3? Suppose that the courts are faced with a statutory provision they consider to be incompatible with a Convention right. Depending on the wording of the provision and on the nature of the incompatibility, it may be that the court has a choice. Either it could use its power under section 3 to interpret the provision so as to make it compatible with Convention rights; or it could declare the provision to be incompatible. The more the courts use section 4 the more the matter will remain one for Parliament. Conversely, by using section 3 to stretch or perhaps even to change the meaning of legislation, the more it will be the case that Parliament legislates subject to the interpretation imposed by the courts. In other words, an over-use of section 3 will lead to the Human Rights Act becoming a greater restriction on the sovereignty of Parliament. There is already a considerable body of case law (and attendant academic commentary) on this issue. Early tensions within the Appellate Committee of the House of Lords were revealed in *R v A* [2002] 1 AC 45, where Lord Steyn considered that the only limit on the use of section 3 was where the provision in question expressly contradicted a Convention right. Other members of the House of Lords hearing the appeal were not prepared to go so far, and Lord Steyn's position was criticised by Lord Nicholls in *Re S* [2002] 2 AC 291. In *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 Lord Steyn seems to have relented somewhat, as he stated that 'section 3(1) is not available where the suggested

interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute'. In *Bellinger v Bellinger* [2003] 2 AC 467, the House of Lords declined to interpret a provision of the Matrimonial Causes Act 1973 to include single-sex marriages when one of the parties had undergone a gender reassignment. Lord Nicholls stated that:

> the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law.

For these reasons, the issue should be one for Parliament, not for the courts, and the House of Lords granted a declaration of incompatibility under section 4. If *Re S, Anderson* and *Bellinger* seemed to indicate that the more robust approach proposed by Lord Steyn in *R v A* was not to be preferred, the following case has once again cast doubt upon the matter, and has reopened the question of how far section 3 of the Human Rights Act may be used by the courts to force a rethinking of traditional understandings of the sovereignty of Parliament.

(See further Bennion, 'What is "possible" under section 3(1) of the Human Rights Act 1998?' [2000] *PL* 77; Marshall, 'The lynchpin of parliamentary intention: lost, stolen, or strained?' [2003] *PL* 236; Kavanagh, 'The elusive divide between interpretation and legislation under the Human Rights Act 1998' (2004) 24 *OJLS* 259 and Kavanagh, 'Statutory interpretation and human rights after *Anderson*: a more contextual approach' [2004] *PL* 537.)

Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557

This case concerned a claim of discrimination, contrary to Articles 8 and 14 of the European Convention on Human Rights, in the application of the Rent Act. The background was as follows: on the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. Marriage is not essential for this purpose. A person who was living with the original tenant 'as his or her wife or husband' is treated as the spouse of the original tenant (Rent Act 1977, Schedule 1, para 2(2), as amended by the Housing Act 1988). In *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 the House of Lords decided that this provision did not include persons in a same-sex relationship. The question in *Ghaidan v Godin-Mendoza* was whether this reading of the provision survived the coming into force of the Human Rights Act 1998. The House of Lords ruled that it did not. The majority reinterpreted the provision under section 3 of the Human Rights Act. Lord Millett, on the other hand, ruled that a declaration of

incompatibility under section 4 should have been granted. It is instructive to compare the two approaches. Lord Nicholls was one of the judges in the majority.

Lord Nicholls: . . . One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities . . . This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed . . . [T]he interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3 . . .

[T]he intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of the legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must . . . 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

[His Lordship referred to *Bellinger v Bellinger*, cited above, and continued:] No difficulty arises in the present case. Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the . . . extension of security and tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt the application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.

Lord Millett: . . . I agree with all my noble and learned friends . . . that [the] discriminatory treatment of homosexual couples is incompatible with their Convention rights and cannot be justified by any legitimate aim . . .

The question [of whether section 3 or section 4 should be used] is of great constitutional importance, for it goes to the relationship between the legislature and the judiciary, and hence ultimately to the supremacy of Parliament. Sections 3 and 4 of the Human Rights Act were carefully crafted to preserve the existing constitutional doctrine, and any application

of the ambit of section 3 beyond its proper scope subverts it. This is not to say that the doctrine of parliamentary supremacy is sacrosanct, but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.

[His Lordship proceeded to outline two sorts of cases in which use of section 3 would be inappropriate:] In some cases (*Re S* and *Anderson* [cited above] are examples) it would have been necessary to repeal the statutory scheme and substitute another. This is obviously impossible without legislation, and cannot be achieved by resort to section 3. In other cases (*Bellinger* is an example) questions of social policy have arisen which ought properly to be left to Parliament and not decided by the judges.

[S]ection 3 requires the court to read legislation in a way which is compatible with the Convention only 'so far as it is possible to do so'. It must, therefore, be possible, *by a process of interpretation alone*, to read the offending statute in a way which is compatible with the Convention. This does not mean that it is necessary to identify an ambiguity or absurdity in the statute . . . before giving it an abnormal meaning in order to bring it into conformity . . . [The court] can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must 'strive to find a *possible* interpretation compatible with Convention rights' (citing Lord Steyn in *R v A*). But it is not entitled to give it an impossible one, however much it would wish to do so. In my view section 3 does not entitle the court to supply missing words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute.

(iii) Challenge of common law radicalism

Notwithstanding the undoubted importance of the European Communities Act 1972 and the Human Rights Act 1998, it may be that the most potent challenge to the continuing status of parliamentary sovereignty as the 'keystone' of the British constitution comes not from any legislation that Parliament has passed but from the common law. The past fifteen years or so have seen a remarkable renaissance in what might be called common law radicalism. There have been common law radicals in previous centuries. Sir Edward Coke (1552–1634), the most famous and the most innovative common lawyer of the early seventeenth century, Chief Justice under James I turned parliamentarian and leading author of the Petition of Right (1628) was one such, who more than left his mark on constitutional law. Common law radicals believe that the entire constitution, including the doctrine of the sovereignty of Parliament, is based on the common law. The recent renaissance of common law radicalism has seen several judges and academic commentators arguing, for example, that the common law includes a 'higher-order law', to which even legislation is subject (Sir John Laws, 'Law and democracy' [1995] *PL* 72).

So far has the argument developed that some discern an 'emerging constitutional paradigm, no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in

Parliament and the Crown in its courts' (Sir Stephen Sedley [1995] *PL* 386, 389). In a series of remarkable dicta in the 1980s a New Zealand judge, Cooke J (who later became Lord Cooke of Thorndon), questioned whether the Parliament of New Zealand (acknowledged as possessing a legal sovereignty like that of the United Kingdom Parliament) could lawfully override certain fundamental, common law rights. For instance, in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, 398 he said: 'I do not think that literal compulsion [to answer questions from an official], by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them.' Along similar lines, albeit extra-judicially, Lord Woolf MR has said (in '*Droit public* – English style' [1995] *PL* 57, 69) that if Parliament 'did the unthinkable' in depriving the High Court of its role in reviewing the legality of executive action:

> then I would say that the courts would also be required to act in a manner which would be without precedent. Some judges might choose to do so by saying that it was an unrebuttable presumption that Parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of Parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept. They are no more than are necessary to enable the rule of law to be preserved.

In 2003–04 the Government did indeed propose the 'unthinkable'. Its Asylum and Immigration (Treatment of Claimants etc) Bill included a clause that would have ousted judicial review in almost all asylum cases. This was greeted with uproar. Lord Woolf CJ stated in a widely publicised lecture that the provision 'was fundamentally in conflict with the rule of law' and that 'if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution', a written constitution, his Lordship implied, that would not include the doctrine of parliamentary sovereignty among its provisions. (See Lord Woolf, 'The rule of law and a change in the constitution' (2004) 63 *CLJ* 317, 328–9.) Two former Lord Chancellors, including Lord Irvine of Lairg (who had, until 2003, been a member of the government that was now proposing the measure) made it clear that they would denounce it in the House of Lords. In the event, the Government dropped the clause before the measure could be debated in the Lords. The Act as passed does not include it, although it does contain a range of measures designed to make it more difficult to gain the assistance of the courts in seeking asylum in the United Kingdom (for a valuable and thorough commentary, see Rawlings, 'Review, revenge and retreat' (2005) 68 *MLR* 378). In the light of this controversy, Lord Steyn has conjectured that, while the sovereignty of Parliament is 'the first principle of our constitution', if a statute should unequivocally oust the reviewing jurisdiction of the courts, 'the House of Lords may have to consider whether judicial review is a constitutional fundamental which even a sovereign Parliament cannot abolish'

('Comments' [2004] *Judicial Review* 107). As Laws LJ stated in *International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, [71]: 'In its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy'.

(The common law radicalism of which these statements are illustrative examples has not gone unchallenged: for criticism, see Griffith, 'The brave new world of Sir John Laws' (2000) 63 *MLR* 159; Poole, 'Back to the future? Unearthing the theory of common law constitutionalism' (2003) 23 *OJLS* 435 and A Tomkins, *Our Republican Constitution* (2005), ch 1.)

For now, however, what is of relevance are not the merits (or otherwise) of common law radicalism, but the challenge it poses for the sovereignty of Parliament. To this end, two cases will now be considered.

Robinson v Secretary of State for Northern Ireland [2002] UKHL 32 (HL)

Robinson concerned a challenge to the legality of the election in November 2001 of David Trimble and Mark Durkan as First Minister and Deputy First Minister, respectively, of Northern Ireland. Section 16(1) of the Northern Ireland Act 1998 provides that 'Each Assembly shall, within a period of six weeks beginning with its first meeting, elect from among its members the First Minister and the Deputy First Minister'. Section 16(3) provides that 'Two candidates standing jointly shall not be elected to the two offices without the support of a majority of the members voting in the election, a majority of the designated Nationalists voting and a majority of the designated Unionists voting'. Section 16 leaves open the question of what is to happen if the six-week period expires with no First Minister and Deputy First Minister being elected. The nearest the Act comes to answering this question is in section 32(3), which provides that 'If the period mentioned in section 16 ends without a First Minister and a Deputy First Minister having been elected, the Secretary of State *shall* propose a date for the poll for the election of the next Assembly' (emphasis added).

Since devolution to Northern Ireland under the 1998 Act commenced it has been suspended and restored on numerous occasions. When it was restored on 23 September 2001, the offices of First Minister and Deputy First Minister were vacant. The six-week period provided for by section 16(1) would therefore expire on 4 November 2001. On 2 November the Assembly held an election to fill the offices but the candidates (Messrs Trimble and Durkan) did not receive the measure of cross-community support required under section 16(3). After a number of previously non-designated members of the Assembly redesignated themselves as Unionists for the purpose of electing a First Minister and Deputy First Minister a further election was held on 6 November 2001, at which the candidates did obtain the support they needed.

Robinson, a leading member of the DUP (and a member of the Assembly), challenged the legality of this election. He argued that the Assembly had no

power to elect a First Minister and Deputy First Minister after the expiry of the six-week period and that fresh elections to the Assembly should have been called, in accordance with section 32(3). The Assembly, according to this argument, is a creature of statute and has only such powers as are conferred upon it by the 1998 Act. The Court of Appeal of Northern Ireland held, by a two-to-one majority, that the election was lawful. On appeal, the House of Lords agreed, albeit by a three-to-two majority. The contrast between the approaches of the judges in the majority and those in the minority is striking. Consider, for example, the following extracts from the opinions of Lords Bingham and Hoffmann (in the majority) and Lord Hutton (in the minority).

Lord Bingham: . . . The 1998 Act . . . was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the Unionist and Nationalist communities in shared political institutions . . . If these shared institutions were to deliver the benefits which their progenitors intended, they had to have time to operate and take root.

The 1998 Act does not set out all the constitutional provisions applicable to Northern Ireland, but it is in effect a constitution. So to categorise the Act is not to relieve the courts of their duty to interpret the constitutional provisions in issue. But the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody. [Counsel for Robinson] submitted that the resolution of political problems by resort to the vote of the people in a free election lies at the heart of any democracy and that this democratic principle is one embodied in this constitution. He is of course correct . . . But elections held with undue frequency are not necessarily productive. While elections may produce solutions they can also deepen divisions. Nor is the democratic ideal the only constitutional ideal which this constitution should be understood to embody. It is in general desirable that the government should be carried on, that there be no governmental vacuum.

Lord Hoffmann: . . . [Counsel for Robinson] politely but firmly reminded your Lordships that your function was to construe and apply the language of Parliament and not merely to choose what might appear on political grounds to be the most convenient solution. It is not for this House, in its judicial capacity, to say that new elections in Northern Ireland would be politically inexpedient . . . I unreservedly accept those principles. A judicial decision must rest on 'reasons that in their generality and their neutrality transcend any immediate result that is involved' [citing Wechsler, 'Towards neutral principles of constitutional law' (1959) 73 *Harvard LR* 1]. But I think that the construction which I favour satisfies those requirements. The long title of the [1998] Act is 'to make new provision for the government of Northern Ireland for the purpose of implementing the agreement reached at multi-party talks on Northern Ireland . . .'. According to established principles of interpretation, the Act must be construed against the background of the political situation in Northern Ireland and the principles laid down by the Belfast Agreement for a new start. These facts and documents

form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States.

Lord Hutton (dissenting): . . . My Lords, despite the attractiveness of the . . . argument based on the purpose of the Belfast Agreement, I have come to the conclusion that the appeal should succeed. The Northern Ireland Assembly is a body created by a Westminster statute and it has no powers other than those given to it by statute . . . In my opinion the wording of section 32(3) . . . makes it clear that Parliament intended that if there was not a successful election with in the six weeks' period, the Secretary of State would fix an early date for the poll . . . [T]he objective of the Belfast Agreement cannot operate to alter the meaning of the [statutory] words.

Had there been a further election to the Assembly, it was likely that the DUP (the Democratic Unionist Party, led by Ian Paisley) would have replaced Mr Trimble's UUP (the Ulster Unionists) as the largest Unionist party. Likewise, it was felt that Sinn Fein would stand a good chance of replacing Mr Durkan's SDLP as the largest Nationalist party. Coalition government was difficult enough with the more moderate UUP and SDLP as the largest parties. With the DUP and Sinn Fein as the largest parties it was considered almost unthinkable. (Since the 2003 elections to the Assembly the DUP and Sinn Fein have indeed been the largest Unionist and Nationalist parties. During all of that time (in fact, since October 2002) devolution to Northern Ireland has been suspended. An agreement was reached at St Andrews in Scotland in October 2006 that could lead to the reinstatement of devolution with effect from March 2007, but this will be subject to the ability of the DUP and Sinn Fein to work with one another in the government of Northern Ireland. These matters are discussed in greater detail in chapter 4.)

This is the political background to the dispute in *Robinson*. The question of constitutional law which the case raises is the extent to which the courts should take political background such as this into consideration when interpreting what Lord Bingham described as a constitutional statute. The majority of the House of Lords interpreted the legislation purposively, the purpose being to maintain devolved government in Northern Ireland. Why should this purpose have been privileged over other purposes embodied in the 1998 Act and in the Belfast Agreement that preceded it? Why, in particular, should it have been privileged over the value of electoral democracy? Is the fact that elections may sometimes 'deepen divisions', as Lord Bingham expressed it, a proper and relevant consideration for the court? Even if the purposive approach was appropriate in principle, what of Lord Hutton's objection that no matter how noble, no purpose should be permitted to displace the clear meaning of the statutory language in sections 16 and 32 of the Act? *Robinson* suggests that, when it comes to the interpretation of what the courts deem to be 'constitutional statutes' (whatever that may mean in our unwritten constitution), different rules

may apply from those which govern the interpretation of ordinary (ie non-constitutional) legislation. (For another case in which the notion of 'constitutional statutes' has been considered, albeit in a different context, see the decision of the Divisional Court in *Thoburn v Sunderland City Council* [2003] QB 151, discussed further in chapter 5.)

Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262

The second case to reveal something of the challenge that is posed for parliamentary sovereignty by common law radicalism is *Jackson*, the facts of which were set out above (p 46). The comments made in *Jackson* about the sovereignty of Parliament were *obiter* and, moreover, they were uttered in the context of litigation concerning statutes passed without the consent of the House of Lords. It may be, for that reason, that they prove to be of little precedential value. That said, however, their Lordships' opinions do not expressly state that their comments about parliamentary sovereignty should apply only in the context of legislation passed under the Parliament Act procedure (see Plaxton (2006) 69 *MLR* 249, 259).

In *Jackson*, as in *Robinson*, one of the matters considered was the category of 'constitutional statutes'. The Court of Appeal in *Jackson* ruled that, while neither the Parliament Act 1949 nor the Hunting Act 2004 were invalid, the Parliament Act procedure would not be available to pass *any* bill into law. A bill, for example, to abolish the House of Lords would be a change so fundamental to the constitution that it could be enacted only in the usual way (ie, with the assent of the Commons, Lords and Crown) and could not be lawfully enacted under the Parliament Act procedure (see [2005] EWCA Civ 126, [2005] QB 579). This view was comprehensively rejected by the panel of nine law lords who heard the appeal in the House of Lords. Lord Carswell did say that 'Despite the general lack of enthusiasm for the proposition espoused by the Court of Appeal, . . . I incline very tentatively to the view that its instinct may be right [and] . . . I wish to reserve my opinion on it' but his judicial colleagues in the House of Lords distanced themselves from the Court of Appeal's view, not least because when it was passed in 1911 both Houses knew well that the Parliament Act was more than likely to be used to enact measures of considerable constitutional importance: ie, the Government of Ireland Act 1914 and the Welsh Church Act 1914.

Among the most interesting *obiter* comments in *Jackson* are the following from Lords Bingham, Steyn and Hope.

> **Lord Bingham of Cornhill:** . . . The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament . . . Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.

Lord Steyn: . . . We do not in the United Kingdom have an uncontrolled constitution . . . In the European context the second *Factortame* decision made that clear: [1991] 1 AC 603. The settlement contained in the Scotland Act 1998 also points to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 created a new legal order . . . The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal.

Lord Hope of Craighead: . . . Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute . . . Step by step, gradually but surely, the English principle of the absolute sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified . . .

The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based . . .

Each of the two main parties has made use of the 1949 Act's timetable, and in subsequent legislation passed by both Houses each of these Acts has been dealt with in a way that has acknowledged its validity . . .The political reality is that of a general acceptance by all the main parties and by both Houses of the amended timetable which the 1949 Act introduced. I do not think that it is open to a court of law to ignore that reality . . .

Trust will be eroded if the [Parliament Act] procedure is used to enact measures which are, as Lord Steyn puts it, exorbitant or are not proportionate. Nevertheless, the final exercise of judgment on these matters must be left to the House of Commons as the elected chamber.

Several comments may be made about these various statements. First, as the contrast of approaches between Lord Bingham on the one hand and Lords Steyn and Hope on the other shows, their Lordships were not unanimous in terms of their thoughts about sovereignty. For Lord Bingham, outwith contexts in which the European Union was relevant (and it was not relevant here) there was no difference between the doctrine of sovereignty as it stood in 1911 and the doctrine of sovereignty now. For Lords Steyn and Hope, by contrast, even if the sovereignty of Parliament persists as a 'general' doctrine, it does so in a way that is heavily qualified both by statute and by the common law. For Lord Steyn, moreover, Dicey's account, while apparently accepted by Lord Bingham, is 'out of place in the modern United Kingdom'.

Secondly, is there not something curious about the construction of Lord Steyn's argument? At the beginning of the passage from his opinion he cites three respects in which, in his view, the sovereignty of Parliament is now

limited. These are: the United Kingdom's membership of the European Union, the devolution 'settlement' of 1998, and the incorporation by the Human Rights Act of fundamental rights into domestic law. Each of these, it is to be observed, came about as a result of legislation. Yet from this starting point his Lordship goes on to state that the sovereignty of Parliament is a 'construct of the common law', 'created' by judges and alterable by them. Even if this is correct (on which more below) does the conclusion follow from the evidence his Lordship cites? The changes he outlines were made through legislation by Parliament; not through common law adjudication by judges.

Thirdly, two of Lord Steyn's descriptions are worth noting. First, he describes the devolution legislation of 1998 as pointing to 'a divided sovereignty'. It is not at all clear what this means. The Scottish Parliament, created by the Scotland Act 1998, which his Lordship cites, is anything but a sovereign legislature, as the Scotland Act makes abundantly plain. Moreover, the existence of the Scottish Parliament has done nothing to limit the legal power of the Westminster Parliament to legislate for Scotland, even on ostensibly devolved matters: see Scotland Act 1998, section 28(7). The political reality may for the time being be that the Westminster Parliament will not legislate for Scotland on devolved matters without the consent of the Scottish Parliament, but this behaviour results from a political agreement which is not legally enforceable and has nothing to do with the legal principles that Lord Steyn is concerned with in this passage. Secondly, he describes the Human Rights Act as having created a 'new legal order'. This is obvious mimicry of the European Court of Justice, which in 1963 famously described the European Union as having created a 'new legal order of international law', a new legal order that dealt with matters of national sovereignty, for example, differently from the way in which they were understood in ordinary international law. Again, however, is his Lordship's terminology not somewhat tendentious? Lord Steyn may wish that the Human Rights Act had created a new legal order of judicial supremacy, but is the reality not that it was expressly intended to do no such thing? As we saw above, the Act seeks to *balance* Convention rights with parliamentary sovereignty, and seeks to ensure that the sovereignty of Parliament is *preserved* in the scheme of the Act (see Ewing, 'The Human Rights Act and parliamentary democracy' (1999) 62 *MLR* 79).

Fourthly, there is some difficulty in reconciling all of the statements that Lord Hope makes. He starts with the (some would say) sweeping proposition that the rule of law is the 'ultimate controlling factor on which our constitution is based'. This sounds very much like the common law radicalism of Lord Steyn and others, as outlined above. But Lord Hope goes on to make two further comments, which seem significantly to dent the extent to which he can really believe what he says about the rule of law. First, he offers as a reason for the court holding that the Parliament Act 1949 is valid that each of the two main parties has made use of the Act, that both Houses have treated legislation made under the Act as valid, that the political reality is of a 'general acceptance' of the Act's procedures and, moreover, that 'it is not open to a court of law to ignore that reality'. Secondly, and similarly, he states that the 'final exercise of judgment' as to when the Parliament

Act procedures may be used should be left to the House of Commons 'as the elected chamber', not to a court of law. Now, if the constitution really were based on the rule of law as its 'ultimate controlling factor', neither of these would be the case. Neither the 'political reality' nor the judgment of the House of Commons would stand in the way of the court stating that the rule of law had been violated. The rule of law would trump both. As it is, Lord Hope holds that the rule of law has to be conditioned by – has to give way, even? – to political reality and to the Commons' democratic superiority. Given this, how can the rule of law be the ultimate controlling factor on which the constitution is based?

Finally, and related to the previous point, what is perhaps most important about Lord Hope's opinion is the reliance he places on political fact. This brings us back to what Sir William Wade wrote about the sovereignty of Parliament half a century before *Jackson* was decided (see above, p 54). What is the source of the authority for the proposition that Acts of Parliament enjoy legal supremacy in the British constitution? Lord Steyn and the common law radicals would say that it is a rule of the common law, which, like any other rule of the common law, was created and may be altered by the courts. Wade and Lord Hope, however, take the view that its source lies in political fact – or, more precisely, in judicial recognition of political fact. As Wade argued, it was the political fact of Parliament's seventeenth-century victories over the Crown that the courts took into account when articulating the orthodoxy of parliamentary sovereignty. Similarly, the political facts of the United Kingdom's membership of the European Union and of its incorporation into domestic law of Convention rights may be recognised by the courts as conditioning the constitutional environment in which the doctrine of sovereignty now operates. This, it is submitted, is the better view. Just as the sovereignty of Parliament is a doctrine which Parliament, acting alone, would struggle to change so too is it a legal doctrine which the courts, acting alone, should not imagine they could change. As Lord Hope correctly states in *Jackson*, the doctrine of the sovereignty of Parliament results from 'a delicate balance between the various institutions . . . maintained to a large degree by the mutual respect which each institution has for the other'. Lord Hope cited with approval what Lord Reid had stated in *Pickin*: namely, that 'for a century or more both Parliament and the courts have been careful to act so as not to cause conflict between them'. As Lord Hope added, 'this is as much a prescription for the future as it was for the past'. And it is a reminder as much to the common law radicals as it is to Parliament that the doctrine of the sovereignty of Parliament is not to be abused.

(e) Conclusions

For the time being, and notwithstanding the various challenges to it outlined in the previous section, parliamentary sovereignty remains formally intact as a matter of law. That said, however, the practical realism of the doctrine may be questioned. In the first place, as Professor Lauterpacht observes, 'the reality of

that sovereignty [of the Crown in Parliament] ends where Britain's international obligations begin' ((1997) 73 *International Affairs* 137, 149). Again, who can doubt that Parliament has in reality relinquished its power to legislate for Canada and other independent Commonwealth states, notwithstanding Sir Robert Megarry's ruling in the *Manuel* case (above, pp 50–2) that sovereignty over such territories continues?

Another kind of constraint upon the exercise of sovereignty arises from the phenomenon of 'globalisation' – the growth of a global economy dominated by transnational corporations and characterised by a free movement of capital, advanced technology and communications, regulation by international agreements and agencies, and a diminished exposure to national controls. These developments place limits upon national economic policy-making and to this extent reduce the scope for the effective exercise of parliamentary sovereignty. (See Himsworth, 'In a state no longer: the end of constitutionalism?' [1996] *PL* 639 and see further chapter 1.)

Further, Parliament is limited in its legislative activity by its (or rather by the Government's) awareness of what is politically unfeasible or likely to provoke an adverse public reaction. A more 'constitutional' form of constraint consists in Parliament's recognition of *conventions* as to the use of its legislative power. These may be quite specific, for instance that Parliament should not legislate for the domestic affairs of the Channel Islands or the Isle of Man without their consent (the Islands having their own legislative authorities). Similar conventions may be emerging as to Parliament's respect for the autonomy of the elected institutions in Scotland, Wales and Northern Ireland to which legislative powers have been transferred under the devolution settlements of 1998. Broader and less precise conventions constrain Parliament from enacting oppressive laws, such as violate fundamental rights or unjustly discriminate between citizens. (The significance of conventions for sovereignty theory is explored by Elliott, 'Parliamentary sovereignty and the new constitutional order' (2002) 22 *LS* 340.)

Even if parliamentary sovereignty must be qualified in these ways, it continues to embody a considerable and wide-ranging power – within its acknowledged sphere of application it is still a power not misdescribed as supreme. It provides a party elected into office by the people with the fullest legal capacity to put its policies into effect, and in this respect serves the claims of democracy. Governments have been able to call on the sovereign power of Parliament in attacking the great issues of poverty and inequality and in establishing a welfare state, just as, in more recent years, thoroughgoing policies concerning trade unions, local government, devolution and the privatisation of public-sector undertakings were put into effect by means of the same sovereign authority. (See Ewing, 'Human rights, social democracy and constitutional reform', in C Gearty and A Tomkins (eds), *Understanding Human Rights* (1996), ch 3.)

However serviceable for realising the goals of elected governments, must a legally unlimited power be regarded as something alien to the idea of constitutionalism, creating a constant danger of arbitrary rule? It is 'Parliament's

sovereign power', said Lord Scarman, 'more often than not exercised at the will of an executive sustained by an impregnable majority, that has brought about the modern imbalance in the legal system' (*English Law – The New Dimension* (1974), p 74). Or is constitutional balance preserved by constraints on Parliament such as those we have noted above as well as by countervailing features of the democratic system: elections, opposition parties in Parliament, organised groups in civil society?

Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999)

> What is at stake is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system. If the judges were to repudiate the doctrine of parliamentary sovereignty, by refusing to allow Parliament to infringe unwritten rights, they would be claiming that ultimate authority for themselves. In settling disagreements about what fundamental rights people have, and whether particular legislation is consistent with them, the judges' word rather than Parliament's would be final. Since virtually all significant moral and political controversies in contemporary Western societies involve disagreements about rights, this would amount to a massive transfer of political power from parliaments to judges. Moreover, it would be a transfer of power initiated by the judges, to protect rights chosen by them, rather than one brought about democratically by parliamentary enactment or popular referendum.

3 The rule of law

The idea of the rule of law is rooted in the history of European political thought and constitutionalism, although with us it was first given a clear definition in Dicey's *Law of the Constitution* in 1885. Indeed, Dicey's argument in this book was that the *law* of the constitution contained two fundamental doctrines: the sovereignty of Parliament and the rule of law. (Dicey recognised, of course, that there was considerably more to the constitution than law alone, but he focused, in this book, only on its legal elements.) The sovereignty of Parliament concerns the relationship of Parliament to the law; the rule of law concerns that of the government to the law.

Edward McWhinney rightly sees the English version of the concept as a 'historically received notion' and says that it is, in essence, 'a distillation of English common law legal history from the great constitutional battles of the seventeenth century onwards' (*Constitution-making: Principles, Process, Practice* (1981), p 10. See further Jaffe and Henderson, 'Judicial review and the rule of law: historical origins' (1956) 72 *LQR* 345.) The rule of law is both a legal rule and a political ideal or principle of governance comprising values that should be reflected in the legal system and should be respected by those concerned in the making, development, interpretation and enforcement of the law. Through the courts' acknowledgement of the demands of the rule of law, it has acquired

the status of an 'overarching principle of constitutional law' (Lord Steyn, 'Democracy through law' [2002] *EHRLR* 723, 727). This has now been recognised in statute, section 1 of the Constitutional Reform Act 2005 somewhat cryptically providing that 'This Act does not adversely affect . . . the existing constitutional principle of the rule of law' (see further on the Constitutional Reform Act, below, pp 117–23).

The ideal of the rule of law has been formulated in many ways, both broad and narrow, and there is much disagreement as to the values or principles that it embraces. The argument has often focused on Dicey's classic exposition of the rule of law, and in particular on the first two meanings he gives to this expression.

Dicey, *The Law of the Constitution* (1885), pp 202–3

> [The rule of law] means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.
>
> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.

In this section we consider, first, what is probably the most basic sense of the rule of law: namely, the notion that government must act in accordance with, and not beyond, its legal powers. As we shall see, even this aspect of the rule of law has not escaped controversy in the British context. We then consider the claim of the rule of law that government should not be treated differently in law from the ways in which ordinary persons are treated. We shall see, again, that in Britain (as in fact in most other countries) the government is able to benefit from a number of legal immunities and privileges, which distinguish its legal position from that of others, albeit that important House of Lords case law has in recent years attempted to limit the range of these immunities. In the third section we consider something of the problem that executive and administrative discretion poses for the rule of law. In the final sections we outline a number of wider conceptions of the rule of law, conceptions which British constitutional law has not yet embraced, at least, not in full.

(a) Government under law

The minimum element in the rule of law is that the government is subject to the law and may exercise its power only in accordance with law. A government that claimed to be above the law and to be subject to no legal restraint in

issuing commands to give effect to its view of the public (or its own) interest, would undoubtedly be a government that did not acknowledge the rule of law. In England it was established long ago in the following case that the use of public power must be justified by law and not by the claims of state necessity.

Entick v Carrington (1765) 19 St Tr 1029 (Court of Common Pleas)

The King's messengers, armed with a warrant of the Secretary of State to arrest the plaintiff (claimant), John Entick, alleged to be the author of seditious writings, and to seize his books and papers, broke into and entered his house and took away his papers. Entick sued the officers for trespass to his house and goods, and the defendants sought to justify the legality of the warrant. Unable to find specific authority in law, they argued that such warrants had been issued frequently in the past and executed without challenge, and that the power of seizure was essential to government.

Lord Camden CJ: . . . This power, so claimed by the secretary of state, is not supported by one single citation from any law book extant. . . .

If it is law, it will be found in our books. If it is not to be found there, it is not law.

. . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing. . . . If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and [see] if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. . . .

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition, that an usage tolerated from the era of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. . . .

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law. . . .

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. . . . [W]hoever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. . . .

But still it is insisted, that there has been a general submission, and no action brought to try the right.

> I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal booksellers have been afraid to dispute. . . .
>
> It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. . . . [W]ith respect to the argument of state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

It was held that the warrant was illegal and void, and Entick was awarded damages.

The principle affirmed in this great case, that a public officer must show express legal authority for any interference with the person or property of the citizen, is still the law. But nowadays there are many statutes which authorise such interferences and some do so in very general terms. One statute of this sort, the Taxes Management Act 1970, was said by Lord Scarman in *IRC v Rossminster Ltd* [1980] AC 952, 1022, to make 'a breath-taking inroad upon the individual's right of privacy and right of property'. The Act authorises officers of the Board of Inland Revenue, acting under a search warrant, to enter premises by day or night, if necessary by force, and seize 'any things whatsoever' reasonably believed to be evidence of an offence involving serious fraud in connection with tax. The search warrant is issued by a judge who must be satisfied that there is reasonable ground for suspecting that an offence of fraud in relation to tax has been committed. The warrant in the *Rossminster* case simply followed the wording of the statute without specifying what particular offence was suspected, and the Court of Appeal ([1980] AC 967) held the warrant invalid for this reason. Lord Denning cited *Entick v Carrington* among other cases and said (974):

> When the officers of the Inland Revenue come armed with a warrant to search a man's home or his office, it seems to me that he is entitled to say: 'Of what offence do you suspect me? You are claiming to enter my house and to seize my papers.' And when they look at the papers and seize them, he should be able to say: 'Why are you seizing these papers? Of what offence do you suspect me? What have these to do with your case?' Unless he knows the particular offence charged, he cannot take steps to secure himself or his property. So it seems to me, as a matter of construction of the statute and therefore of the warrant – in pursuance of our traditional role to protect the liberty of the individual – it is our duty to say that the warrant must particularise the specific offence which is charged as being fraud on the revenue.

The House of Lords, however, reversed the Court of Appeal's ruling and held that there was nothing in the statute to require the particular offence to be stated in the warrant. Since the provisions of the statute had been complied with, there was no violation of the principle of *Entick v Carrington*. (See too Duffy

and Hunt, 'Goodbye *Entick v Carrington*: the Security Service Act 1996' (1997) 2 *EHRLR* 11.)

The requirement of the rule of law that express legal authority must be shown for interferences with individual rights was doubtless formally satisfied in this case. But is it diluted in substance, when the legal power is conferred in very wide terms which do not have to be particularised before the power is used against an individual?

Although the courts do in many cases uphold the rights of the citizen against executive action that is not justified by law, a contrary tendency in our legal system allows certain kinds of interference with private interests to be committed by a public authority without express legal justification. This is because there are in the common law relatively few positively constituted civil rights: the 'rights' of the citizen have often been no more than the residue of liberty which is beyond the limits of lawfully exercised public power. (This remains the position at common law even after the Human Rights Act 1998: see further chapter 11.) If the citizen's interest is not supported by a legally acknowledged right, a public authority may be able to act to the detriment of that interest without having to show specific legal authority for its action.

Malone v Metropolitan Police Commissioner [1979] Ch 344 (Sir Robert Megarry V-C)

The plaintiff (claimant) had been charged with handling stolen property; in the course of the trial, counsel for the Crown admitted that the plaintiff's telephone line had been 'tapped' in order to hear and record his conversations, for the purpose of criminal investigation. The tapping had been done on the authority of a warrant issued by the Home Secretary in accordance with usual practice.

The plaintiff brought proceedings against the Metropolitan Police Commissioner for declarations that the tapping was unlawful, inter alia on the ground that it was authorised neither by statute nor by common law.

Sir Robert Megarry V-C: . . . England, it may be said, is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden.

. . . If the tapping of telephones by the Post Office at the request of the police can be carried out without any breach of the law, it does not require any statutory or common law power to justify it: it can lawfully be done simply because there is nothing to make it unlawful. The question, of course, is whether tapping can be carried out without infringing the law.

. . . [T]here is admittedly no statute which in terms authorises the tapping of telephones, with or without a warrant. Nevertheless, any conclusion that the tapping of telephones is therefore illegal would plainly be superficial in the extreme. The reason why a search of premises which is not authorised by law is illegal is that it involves the tort of trespass to those premises: and any trespass, whether to land or goods or the person, that is made

> without legal authority is prima facie illegal. Telephone tapping by the Post Office, on the other hand, involves no act of trespass. The subscriber speaks into his telephone, and the process of tapping appears to be carried out by Post Office officials making recordings, with Post Office apparatus on Post Office premises, of the electrical impulses on Post Office wires provided by Post Office electricity. There is no question of there being any trespass on the plaintiff's premises for the purpose of attaching anything either to the premises themselves or to anything on them: all that is done is done within the Post Office's own domain. As Lord Camden CJ said in *Entick v Carrington*, 'the eye cannot by the laws of England be guilty of a trespass'; and, I would add, nor can the ear.

Sir Robert Megarry was also of the opinion that where tapping was carried out under warrant its lawfulness had been recognised by the Post Office Act 1969. Arguments for the plaintiff based upon alleged infringements of rights of privacy and confidentiality and breaches of the European Convention on Human Rights were also unsuccessful.

Mr Malone subsequently complained to the European Commission of Human Rights that the tapping of his telephone, considered in the context of United Kingdom law and practice, had violated the European Convention on Human Rights. The case was referred by the Commission to the European Court of Human Rights, which ruled that there had been a violation of Article 8 of the Convention (right to respect for private life and correspondence). Since the law of England failed to provide a clear delimitation of the power of interception, 'the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking' (*Malone v United Kingdom* (1984) 7 EHRR 14). Following this ruling the Government brought forward legislation to provide a 'comprehensive framework' for the interception of communications (Interception of Communications Act 1985; see now the Regulation of Investigatory Powers Act 2000). The rights conferred by Article 8 of the Convention have since been given domestic legal effect by the Human Rights Act 1998.

According to the principle affirmed by Sir Robert Megarry in the *Malone* case, the act of a public authority will be upheld if it was 'in accordance with law' in the sense that it did not infringe any law. In this respect the administration is treated like a private individual, who is free to do whatever the law does not prohibit. Is it not, however, a rather dubious constitutional principle that places government, with the great resources at its command and its responsibility for the public interest, on the same footing as the private citizen? As Tony Prosser remarks ((1996) 44 *Political Studies* 473, 476), if government is able:

> to avail itself of the same legal rights and privileges as the private citizen . . . this leaves no room for constraints on power based explicitly on responsibilities to the broader public interest or for rights owed by the state through its status as an institution transcending the chaos of particular interests.

The licence allowed to the state by the *Malone* principle was countered by Laws J in *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513, 524, in saying:

> For private persons, the rule is that you may do anything you choose which the law not does prohibit. . . . But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law. . . . The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

Surely the view of Laws J is to be preferred over that of Sir Robert Megarry in the *Malone* case, both on principle and as the more accurate distillation of the law. (Although for a different view, see Harris, 'The "third source" of authority for government action' (1992) 108 *LQR* 626; see further Cohn, 'Medieval chains, invisible inks: on non-statutory powers of the executive' (2005) 25 *OJLS* 97.)

In at least the limited sense that executive action must not contravene the law, the rule of law is a part of British law. This is not to say that the principle is always scrupulously observed by public authorities, and the rule of law is most at risk of violation in times of crisis or danger to the community. A notorious instance of disregard of the rule of law was the officially authorised but unlawful physical ill-treatment applied to detainees in Northern Ireland in 1971. (See the Compton and Parker Reports, Cmnd 4823/1971 and Cmnd 4901/1972; Brownlie (1972) 35 *MLR* 501; *Ireland v United Kingdom* (1978) 2 EHRR 25 (ECtHR).) The conflict in Northern Ireland was again to raise concern for the rule of law when allegations of the gravest nature were made that a 'shoot to kill' policy had been applied by the security forces in the 1970s and 1980s. An inquiry by Mr John Stalker, Deputy Chief Constable of Greater Manchester, into the circumstances in which seven persons were shot by members of the Royal Ulster Constabulary, met with obstruction and Mr Stalker was suspended from duty before his inquiry was completed. The facts of these and other shooting incidents, and of Mr Stalker's suspension, remained in a fog of obscurity. (See further A Jennings (ed), *Justice Under Fire* (1988), ch 5; K Ewing and C Gearty, *Freedom Under Thatcher* (1990), pp 230–5; *McKerr v United Kingdom* (2002) 34 EHRR 553.)

Subsequently the murders of the Belfast solicitor Patrick Finucane and of a number of other persons by loyalist paramilitary organisations led to allegations that members of the security forces had colluded in the murders. These allegations were investigated by Sir John Stevens, the Metropolitan Police Commissioner, who concluded that there had been collusion in the murders of Finucane and one other victim (*Stevens Enquiry, Overview and Recommendations*, 17 April 2003). An additional investigation was carried out, at the request of the British and Irish Governments, by Justice Peter Cory, a retired member of the Canadian Supreme Court, who found 'strong evidence that collusive acts were committed' by the Army, the Special Branch of the Royal Ulster Constabulary and the Security Service, and urged that a public inquiry

should be held (*Cory Collusion Inquiry Report: Patrick Finucane*, HC 470 of 2003–04). The Government responded by announcing that public inquiries would be established to investigate the issues raised by the Stevens and Cory reports (HC Deb vol 419, cols 1755–7, 1 April 2004). The inquiry into the murder of Patrick Finucane is to be conducted under the Inquiries Act 2005: concern has been expressed (by Amnesty International, Lord Saville of Newdigate and others) as to whether the procedures established by this Act can assure a properly independent and rigorous investigation.

The police, in their zeal to secure convictions, have sometimes resorted to fabrication of evidence and other malpractices, contributing to a series of grave miscarriages of justice in cases such as the 'Guildford Four', the 'Birmingham Six', the 'Bridgewater Three' and the 'Tottenham Three'. (See respectively the May Report, *The Guildford and Woolwich Bombings*, HC 449 of 1993–4; *R v McIlkenny* [1992] 2 All ER 417, *The Times*, 31 July 1997, p 4; J Griffith, *The Politics of the Judiciary* (5th edn 1997), p 211.)

In interrogating servicemen in Cyprus in 1984, the service police were found to have acted in good faith but to have committed illegalities in their concern to protect the national interest. Mr David Calcutt QC said in his Report (Cmnd 9781/1986):

> In our society, it is for Parliament and not for investigators, however genuinely and well motivated, to decide if and when, and in what circumstances, the interests of an individual should be subordinated to the interests of society as a whole.

Again, political demonstrations, industrial action and other forms of militant activism have on occasion provoked reactions from authority going beyond what is proper or legal. (See eg, S McCabe and P Wallington, *The Police, Public Order and Civil Liberties: Legacies of the Miners' Strike* (1988).)

The rule of law is undermined if the state exercises its powers in such a way as to make it impossible, or even very difficult, for persons affected to challenge the legality of the state's action. In *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin) immigration officers detained a husband and his pregnant wife at 8.30pm with a view to their being deported at 7.45am the following day. The husband and wife had no idea, prior to this time, that they were to be deported at all. They had been regularly reporting, as required, to the immigration authorities, who had not previously mentioned it to them. Munby J held that the Home Office's action was 'deliberately planned with a view to . . . the spiriting away of the claimants from the jurisdiction before there was likely to be time for them to obtain and act upon legal advice or apply to the court'. Damages were awarded to the husband and wife. Munby J added that the case revealed 'at best an unacceptable disregard by the Home Office of the rule of law, at worst an unacceptable disdain by the Home Office for the rule of law, which is as depressing as it ought to be concerning'.

The rule of law is also undermined when the state commits or connives at breaches of the law. In 1984 the Home Office issued guidelines which purported to authorise the police to install listening devices in homes and other private premises in specified circumstances in the investigation of serious crimes. There was no legal basis for such authorisation and the installation of the devices by the police with Home Office approval involved unlawful acts of civil trespass and damage to property. (See *R v Khan* [1997] AC 558.) Legal authority to enter property and plant listening devices (or seize documents) was eventually provided by Part III of the Police Act 1997. Authorisations to interfere with property may be given by a senior police officer but are subject to supervision by a judicial Commissioner. (See also the Intelligence Services Act 1994, ss 5–7 and Part II of the Regulation of Investigatory Powers Act 2000.) In *R v Loosely* [2001] UKHL 53, [2001] 1 WLR 2060 the House of Lords reconsidered the law of entrapment. A prosecution founded on entrapment is an abuse of the court's process. The House of Lords ruled that police conduct which brings about state-created crime is unacceptable and improper, and to prosecute in such circumstances is an affront to the public conscience. Lord Nicholls commenced his opinion with the following remarks:

> Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be a misuse of state power, and an abuse of the process of the courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the courts is to stand between the state and its citizens and make sure this does not happen.
>
> These propositions, I apprehend, are not controversial. The difficulty lies in identifying conduct which is caught by such imprecise words as lure or incite or entice or instigate. If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible and impermissible police conduct. But that would not be a satisfactory place for the boundary line. Detection and prosecution of consensual crimes committed in private would be extremely difficult. Trafficking in drugs is one instance. With such crimes there is usually no victim to report the matter to the police. And sometimes victims or witnesses are unwilling to give evidence.
>
> Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable.

In the following case the rule of law was strongly vindicated, and was held to prevail over the public interest in the prosecution and punishment of crime.

R v Horseferry Road Magistrates' Court, ex p Bennett [1994] 1 AC 42 (HL)

Bennett, a New Zealand citizen, was wanted for criminal offences allegedly committed by him in the United Kingdom. He was discovered to be in South Africa but proceedings for his extradition to this country were not instituted. He was, however, arrested by South African police and placed, handcuffed to the seat, on a flight to Heathrow, where he was arrested by English police officers and subsequently committed by a magistrate for trial in the Crown Court.

Bennett applied for judicial review of his committal. He contended that he had been unlawfully removed from South Africa, at the request of and in collusion with the English police, on the pretext that he was being deported to New Zealand via Heathrow.

The question that was tried as a preliminary issue was whether, on the assumption that the facts asserted by Bennett were true, he could lawfully be put on trial in England for the offences he was alleged to have committed in this country. The Divisional Court held that the courts' concern was only that a defendant should have a fair trial: there was no legal authority for the proposition that a court could prevent a prosecution because of the methods by which the police had secured the defendant's presence within the jurisdiction.

This decision was reversed by the House of Lords (Lord Oliver dissenting).

Lord Griffiths: . . . Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of their submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair: but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process.

Lord Griffiths considered the cases in which the courts had exercised a jurisdiction to prevent abuse of process and continued:

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century

has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it. . . .

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

Lord Bridge of Harwich: . . . There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance. To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is, to my mind, an insular and unacceptable view. Having then taken cognisance of the lawlessness it would again appear to me to be a wholly inadequate response for the court to hold that the only remedy lies in civil proceedings at the suit of the defendant or in disciplinary or criminal proceedings against the individual officers of the law enforcement agency who were concerned in the illegal action taken. Since the prosecution could never have been brought if the defendant had not been illegally abducted, the whole proceeding is tainted.

The matter was remitted to the Divisional Court to determine whether Bennett's factual allegations were well-founded. In *R v Horseferry Road Magistrates' Court, ex p Bennett (No 4)* [1995] 1 Cr App Rep 147 the Divisional Court was not satisfied that Bennett had been properly available for arrest at Heathrow and quashed the order committing him for trial. (See also *R v Grant* [2005] EWCA Crim 1089, [52]–[58].)

The government and other public authorities cannot always be relied upon to respect the law and observe its constraints. A state can therefore only claim to uphold the rule of law if it provides effective means for the prevention and redress of illegal action by those who wield public powers. Accordingly it is a further requirement of the rule of law that there should be independent courts or other agencies which will check and control the actions of public authorities to ensure their compliance with the law. Lord Irvine of Lairg LC emphasised this in *Boddington v British Transport Police* [1999] 2 AC 143, 161, in saying that:

It is well recognized to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings.

(This is also a demand of the separation of powers: see below.)

It is a cardinal requirement of the rule of law that the government should comply with judgments of the courts given against it. In particular it would not be consistent with the rule of law for a government to resort to retrospective legislation in order to nullify those judgments which it preferred not to obey. In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 the Burmah Oil Company claimed compensation for the wartime destruction of its installations in Burmah, which had been ordered by the British military authorities to prevent their falling into the hands of advancing Japanese forces. The destruction had been a lawful exercise of the war prerogative of the Crown, but the House of Lords held that the use of the prerogative in these circumstances imported an obligation to pay compensation. In a dissenting speech Lord Radcliffe observed that in no previous case had a court of law awarded compensation for a taking or destruction of property under the war prerogative, and that there was no clear body of legal opinion which would justify the declaration, for the first time, of a legal right to compensation.

The company's victory in this case raised the spectre of a governmental liability (to other claimants also) in a considerable amount, greatly exceeding the sum it had made available for a partial compensation of war losses, out of which many claims had already been settled. The Government then, arguing that it was necessary to maintain the integrity of its scheme of compensation, brought about the enactment of the War Damage Act 1965, which provided:

> 1. (1) No person shall be entitled at common law to receive from the Crown compensation in respect of damage to, or destruction of, property caused (whether before or after the passing of this Act, within or outside the United Kingdom) by acts lawfully done by, or on the authority of, the Crown during, or in contemplation of the outbreak of, a war in which the Sovereign was, or is, engaged.
>
> (2) Where any proceedings to recover at common law compensation in respect of such damage or destruction have been instituted before the passing of this Act, the court shall, on the application of any party, forthwith set aside or dismiss the proceedings, subject only to the determination of any question arising as to costs or expenses.

After the introduction of the bill which became the War Damage Act 1965, JUSTICE published the following statement:

> At a recent meeting of the Executive Committee of JUSTICE the members present, who included lawyers who are members of all the main political parties, considered the War Damage Bill in the context of the principles of the Rule of Law which JUSTICE is pledged to uphold.
>
> It was the unanimous view of the meeting that the passage of this Bill into law would constitute a serious infringement of the Rule of Law by which is understood the supremacy of the Courts. The refusal to meet a legitimate claim for compensation affirmed by the highest Court in the land, namely the House of Lords, is in the view of JUSTICE an action

> inconsistent with the Rule of Law and a dangerous precedent for the future. It is entirely wrong that when a litigant has won his case, legislation should be produced revising decisions retrospectively so that the successful plaintiff is deprived of his victory.
>
> The fact that a threat of legislative action was made during an early stage of the proceedings, and long after the right of legal action had arisen, so far from justifying the enactment of this Bill, makes it clear, in the opinion of JUSTICE, that both Conservative and Labour Governments have failed to recognise the over-riding need to respect the decisions of the judiciary.

The issues raised by the *Burmah Oil* case and the Government's response to it were perhaps more complex than this statement would suggest (see C Harlow and R Rawlings, *Law and Administration* (2nd edn 1997), pp 47–52), but if the executive were to make a practice of retrospectively overturning adverse judicial rulings there would be no equality before the law and no public confidence in the legal process. Since the War Damage Act 1965 there have been other instances, also of questionable propriety, of legislation retrospectively nullifying judicial decisions. (See Zellick [1985] *PL* 283, 290.)

(b) Equality before the law

'The most basic tenet of any constitutional society is the shared belief that by virtue of being citizens of a state, all persons are equal in the eyes of the law.' (D Franklin and M Baun (eds), *Political Culture and Constitutionalism* (1995), p 5.) For Dicey, as we have seen (above, p 77), the rule of law included 'equality before the law' – the equal subjection of all, including officials, to the ordinary law administered by the ordinary courts. Here Dicey directed his fire at the French system of administrative law (*droit administratif*) applied by separate administrative courts, declaring that it rested 'on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law' (*Law of the Constitution* (1885), p 329). Dicey later qualified this insular and faulty judgement: the French system was not then well understood in England but is now recognised as being fully compatible with justice and the rule of law.

Dicey was, however, on surer ground in saying that officials (and those in government) should enjoy no special exemption from obedience to the law. He was convinced that this principle was respected in England: with us, he said (p 193):

> every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

Admittedly Dicey was not here telling the whole truth for, while an official who committed a tort (or for that matter a crime) would be liable like anyone else, in Dicey's day the Crown was immune from tortious liability and so could not

be made vicariously liable for the torts of its servants. Yet Dicey was surely right to insist on a principle that officials, ministers and other public authorities should not be exempted from the rules and processes of the law and in particular should submit to the jurisdiction and comply with the decisions of the courts. Now today it is true that immunities of the executive from legal process have in general been removed – for instance, the Crown was made liable in tort by the Crown Proceedings Act 1947 – but governments may still resort to expedients for limiting their answerability to the courts, as by inducing Parliament to invest them with wide discretionary powers or to exclude some kinds of decisions from judicial control through the employment of 'ouster' clauses.

Judgments given by the courts against executive officers or bodies are generally fully respected and obeyed, but until recently there was believed to be a significant surviving immunity of ministers of the Crown from the process of law. An injunction – a judicial order requiring something to be done or not done (a mandatory or prohibitory injunction) – was not only acknowledged to be unavailable against the Crown itself but also, it was believed, could not be granted against a minister acting in his or her official capacity. The exclusion of injunctive relief in such cases was considered to be the effect, in civil proceedings, of section 21 of the Crown Proceedings Act 1947; and furthermore the view was taken in *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 that a like exclusion applied in (public law) proceedings for judicial review. Some other remedy, such as a declaration, might be available instead of a final injunction, but if urgent provisional relief was needed, there was no effective alternative to an interim (temporary) injunction.

Since ministers were thought to be immune, in their official capacities, from the coercive jurisdiction of the courts, it appeared also that there was no jurisdiction to make a finding of contempt against a minister who disregarded a court's order. Yet if an argument in these terms were to be upheld, said Lord Templeman in *M v Home Office* (below), it would 'establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War'.

M v Home Office [1994] 1 AC 377 (HL)

M, a citizen of Zaire (now Democratic Republic of Congo), arrived in the United Kingdom and claimed political asylum. His application was considered by the Asylum Division of the Home Office and rejected in the name of the Home Secretary, whereupon directions were given for his removal from the United Kingdom. An initial application by M for permission to apply for judicial review was unsuccessful, but a fresh application to a judge in chambers was made on his behalf as he was about to be put on a flight to Zaire via Paris. The judge (Garland J) adjourned the application for fuller consideration on the following day, stating that M should not be removed in the meantime. Garland J understood and formally recorded that counsel for the Home Office had given

an express undertaking to this effect, but counsel had not intended to give such an undertaking and no efforts were then made to procure M's return from Paris after the aircraft's arrival there. Informed of the departure of M's flight from Paris to Zaire, Garland J made a mandatory order requiring the Home Secretary to arrange for M's return to the jurisdiction. When this order was received and considered by the Home Secretary, Mr Baker, he decided – on legal advice that the judge had exceeded his powers – that M should not be brought back to this country.

Proceedings for contempt of court were brought against the Home Office and Mr Baker. Simon Brown J held that he had no power to make a finding of contempt against either the Home Office or Mr Baker. The Court of Appeal disagreed, holding that Mr Baker had been guilty of contempt of court, although not finding it necessary that he should be punished otherwise than in being ordered to pay the costs. Mr Baker appealed to the House of Lords.

The essential question in the case was whether the courts have jurisdiction to make coercive orders against ministers of the Crown. Lord Woolf delivered the principal speech, in which the other Law Lords concurred.

Lord Woolf first considered the prohibition in section 21(2) of the Crown Proceedings Act 1947 on granting, in any civil proceedings, an injunction against an officer of the Crown if the effect of the injunction would be 'to give any relief against the Crown which could not have been obtained in proceedings against the Crown'.

Lord Woolf: . . . [Section 21(2)] is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown prior to the Act. Applying those words literally, their effect is reasonably obvious. Where, prior to 1947, an injunction could be obtained against an officer of the Crown, because he had personally committed or authorised a tort, an injunction could still be granted on precisely the same basis as previously since . . . to grant an injunction could not affect the Crown because of the assumption that the Crown could do no wrong. The proceedings would, however, have to be brought against the tortfeasor personally in the same manner as they would have been brought prior to the Act of 1947. If, on the other hand, the officer was being sued in a representative capacity [as an authorised representative for defending civil proceedings against the Crown in terms of section 17 of the 1947 Act] no injunction could be granted because in such a situation the effect would be to give relief against the Crown. The position would be the same in those situations where proceedings would previously have been brought by petition of right or for a declaration but could now be brought against the authorised department.

There appears to be no reason in principle why, if a statute places a duty on a specified minister or other official which creates a cause of action, an action cannot be brought for breach of statutory duty claiming damages or for an injunction, in the limited circumstances where injunctive relief would be appropriate, against the specified minister personally by

any person entitled to the benefit of the cause of action. If, on the other hand, the duty is placed on the Crown in general, then section 21(2) would appear to prevent injunctive relief being granted, but as Professor Sir William Wade QC has pointed out ('Injunctive Relief against the Crown and Ministers' (1991) 107 LQR 4, 4–5) there are likely to be few situations when there will be statutory duties which place a duty on the Crown in general instead of on a named minister. In broad terms therefore the effect of the Act can be summarised by saying that it is only in those situations where prior to the Act no injunctive relief could be obtained that section 21 prevents an injunction being granted. In other words it restricts the effect of the procedural reforms that it implemented so that they did not extend the power of the courts to grant injunctions. This is the least that can be expected from legislation intended to make it easier for proceedings to be brought against the Crown.

As regards proceedings for judicial review, Lord Woolf disagreed with the view taken by Lord Bridge in *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85 (above) that injunctions could not be granted against a minister of the Crown in such proceedings. Lord Bridge's conclusion had been reached on too narrow a construction of section 31 of the Supreme Court Act 1981, which gave jurisdiction to the High Court in general terms to grant injunctions (including interim injunctions) in applications for judicial review.

Turning to the injunction granted by Garland J in the present case, Lord Woolf concluded that the judge had jurisdiction to make the order and that it was appropriately made. Notwithstanding the advice which Mr Baker had been given that the order was made without jurisdiction, it was an order of the High Court which was to have been treated as a valid order and one to be obeyed until set aside.

Lord Woolf then considered the jurisdiction to make a finding of contempt:

The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a minister of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, I do not believe there is any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a minister of the Crown in his official capacity. Lord Donaldson of Lymington MR considered that a problem was created in making a finding of contempt because the Crown lacked a legal personality. However, at least for some purposes, the Crown has a legal personality. It can be appropriately described as a corporation sole or a corporation aggregate: *per* Lord Diplock and Lord Simon of Glaisdale respectively in *Town Investments Ltd v Department of the Environment* [1978] AC 359 [below, p 000]. The Crown can hold property and enter into contracts. On the other hand, even after the Act of 1947, it cannot conduct litigation except in the name of an authorised government department or, in the case of judicial review, in the name of a minister. In any event it is not in relation to the Crown that I differ from the Master of the Rolls, but as to a government department or a minister.

Nolan LJ . . . considered that the fact that proceedings for contempt are 'essentially personal and punitive' meant that it was not open to a court, as a matter of law, to make a finding of contempt against the Home Office or the Home Secretary. While contempt proceedings usually have these characteristics and contempt proceedings against a government department or a minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequestrate the assets of the Crown or a government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt. A purpose of the courts' powers to make findings of contempt is to ensure that the orders of the court are obeyed. This jurisdiction is required to be coextensive with the courts' jurisdiction to make the orders which need the protection which the jurisdiction to make findings of contempt provides. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorised government departments or the Attorney-General. On applications for judicial review orders can be made against ministers. . . . [I]f such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt. . . .

In cases not involving a government department or a minister the ability to *punish* for contempt may be necessary. However, as is reflected in the restrictions on execution against the Crown, the Crown's relationship with the courts does not depend on coercion and in the exceptional situation when a government department's conduct justifies this, a finding of contempt should suffice. In that exceptional situation, the ability of the court to make a finding of contempt is of great importance. It would demonstrate that a government department has interfered with the administration of justice. It will then be for Parliament to determine what should be the consequences of that finding. In accord with tradition the finding should not be made against the 'Crown' by name but in the name of the authorised department (or the Attorney-General) or the minister so as to accord with the body against whom the order was made. If the order was made in civil proceedings against an authorised department, the department will be held to be in contempt. On judicial review the order will be against the minister and so normally should be any finding of contempt in respect of the order.

However, the finding under appeal is one made against Mr Baker personally in respect of an injunction addressed to him in his official capacity as the Secretary of State for the Home Department. It was appropriate to direct the injunction to the Secretary of State in his official capacity since, as previously indicated, remedies on an application for judicial review which involve the Crown are made against the appropriate officer in his official capacity. This does not mean that it cannot be appropriate to make a finding of contempt against a minister personally rather than against him in his official capacity provided that the contempt relates to his own default. Normally it will be more appropriate to make the order against the office which a minister holds where the order which has been breached has been made against that office since members of the department concerned will almost certainly be involved and investigation as to the part played by individuals is likely to be at least extremely difficult,

> if not impossible, unless privilege is waived (as commendably happened in this case). In addition the object of the exercise is not so much to punish an individual as to vindicate the rule of law by a finding of contempt. This can be achieved equally by a declaratory finding of the court as to the contempt against the minister as representing the department. By making the finding against the minister in his official capacity the court will be indicating that it is the department for which the minister is responsible which has been guilty of contempt. The minister himself may or may not have been personally guilty of contempt. The position so far as he is personally concerned would be the equivalent of that which needs to exist for the court to give relief against the minister in proceedings for judicial review. There would need to be default by the department for which the minister is responsible.
>
> . . . While [Mr Baker] was Home Secretary the order was one binding upon him personally and one for the compliance with which he as the head of the department was personally responsible. He was, therefore, under a strict liability to comply with the order. However, on the facts of this case I have little doubt that if the Court of Appeal had appreciated that they could make a finding against Mr Baker in his official capacity this is what the court would have done. The conduct complained of in this case which justified the bringing of contempt proceedings was not that of Mr Baker alone and he was acting on advice. His error was understandable and I accept that there is an element of unfairness in the finding against him personally.

Mr Baker's appeal was dismissed, save that 'the Home Secretary' was substituted as the person against whom the finding of contempt was made.

Sir William Wade remarked of this decision that it had 'put the rule of law back on the rails' (*The Times*, 17 August 1993). The case has received extensive comment. On *M v Home Office* in the Court of Appeal see Wade (1992) 142 *NLJ* 1275, 1315; (1992) 108 *LQR* 173; Marshall [1992] *PL* 7; and in the House of Lords, Allan [1994] *CLJ* 1; Gould [1993] *PL* 568; Harlow (1994) 57 *MLR* 620. For a more sceptical view of the achievements of *M v Home Office*, see A Tomkins, *Public Law* (2003), pp 51–4.

The position in Scotland was historically different and was confused by an unfortunate mix of some unhelpful English precedents being applied in Scotland and some remarkably poor drafting in the Crown Proceedings Act 1947. However, Scots law has now been (more or less) brought into line with the English law position as set out in *M v Home Office*: see *Davidson v Scottish Ministers* [2005] UKHL 74, 2005 SLT 110. See further, Tomkins, 'The Crown in Scots law' in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006).

It is to be noted that the Law Lords in *M v Home Office* did not question the continuing immunity of *the Crown itself* from judicial process. Sir Stephen Sedley has remarked that the supposition of the immunity of the Crown as executive 'groans under an unnecessary burden of history and myth' (C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998), p 262) but, even after *M v Home Office*, it remains the law, as Sedley LJ himself ruled in *Chagos Islanders v Attorney General* [2004] EWCA (Civ) 997.

(c) Discretion and the rule of law

Statutes often entrust ministers and other public authorities with discretionary power, allowing them – within whatever limits may be fixed – to choose whether or in what way to exercise the power. Can such discretion in executive decision-making be reconciled with the principle that all uses of executive power should be governed by law? Dicey was apprehensive of the danger implicit in discretion, saying that the rule of law excluded 'wide discretionary authority on the part of the government'. In this, Gavin Drewry remarks, Dicey 'gave currency to a cripplingly restricted view of public law which failed to accommodate the looming reality of a twentieth century interventionist state' ((1995) 73 *Pub Adm* 41, 46). We have today a better understanding of the necessity and value of discretionary power in many branches of public administration, in order that varying circumstances as well as the needs of justice in individual cases can properly inform the making of decisions.

Kenneth Culp Davis, *Discretionary Justice* (1971), pp 17, 42

> Rules without discretion cannot fully take into account the need for tailoring results to unique facts and circumstances of particular cases. The justification for discretion is often the need for individualized justice. This is so in the judicial process as well as in the administrative process.
>
> Every governmental and legal system in world history has involved both rules and discretion. No government has ever been a government of laws and not of men in the sense of eliminating all discretionary power. Every government has always been *a government of laws and of men*. . . .
>
> Elimination of all discretionary power is both impossible and undesirable. The sensible goal is development of a proper balance between rule and discretion. Some circumstances call for rules, some for discretion, some for mixtures of one proportion, and some for mixtures of another proportion. . . . [T]he special need is to eliminate *unnecessary* discretionary power, and to discover more successful ways to confine, to structure, and to check necessary discretionary power.

Davis was of the opinion that the degree of discretion allowed to administrative authorities was often too great and that injustice was more likely to result from discretion than from the application of rules. But rules are not always the most apt means of achieving goals of efficiency and justice, and it has been argued that the British tradition favours discretion as opposed to 'the rigidities of legal formalism': 'Administration is viewed as in the first place a discretionary activity, the benefits of which are likely to be reduced if it has to be conducted within a framework of detailed legal regulation' (Nevil Johnson, Memorandum to the Treasury and Civil Service Committee, *Fifth Report*, HC 27-III of 1993–94, Appendix 10). In particular, a discretion which is 'structured' in

a framework of published policies and fair procedures may be a more just and effective method of dealing with claims upon public resources than the application of a mass of detailed and complex rules. The system of social security provision for those in need makes use of both rules and discretion, government policy showing a preference sometimes for rules and sometimes for discretion or arriving at a blend of the two techniques, as in the making of payments from the social fund (A Ogus, E Barendt and N Wikeley's *The Law of Social Security* (5th edn 2002), ch 13).

The administrative process cannot, in any event, be understood as involving a simple choice between rules and discretion. They can work in combination, and procedures of decision-making should be constructed which are appropriate to the objectives sought and have regard for values such as fairness, efficiency, openness and accountability. (See further D Galligan, *Discretionary Powers* (1986), ch 2; K Hawkins (ed), *The Uses of Discretion* (1992); R Baldwin, *Rules and Government* (1995), ch 3.)

If discretionary power is conferred in wide and unqualified terms, there is a risk – we must concede to Dicey – that its exercise may be infected by uncertainty, inconsistency or even perversity. We may see it as a function of the rule of law to ensure that well-founded claims, individual interests and indeed civil liberties are not at the mercy of uncontrolled discretion, and generally to prevent discretionary power from degenerating into arbitrariness by insisting upon effective limits, standards and controls. How, in practice, are such limits to be established?

A statute which confers discretionary power will often specify criteria and limits to be observed by the decision-maker. Consider, for example, a statute such as the Animals (Scientific Procedures) Act 1986, which gives the Secretary of State a discretionary power to grant licences allowing the use of animals for experimental purposes. Section 5 provides that, before granting a licence, the Secretary of State must be satisfied as to a specified range of matters (eg that the purpose of the research cannot be achieved satisfactorily by any other reasonably practicable method), and must 'weigh the likely adverse effects on the animals concerned against the benefit likely to accrue' from the experiments.

Where the terms of a statute do not disclose limits upon the exercise of a power conferred by it, such limits may be imported by common law principles of fairness and legality. This is well illustrated by the following case.

R v Secretary of State for the Home Department, ex p Pierson [1998] AC 539 (HL)

In terms of section 35 of the Criminal Justice Act 1991 the Home Secretary had a discretionary power to release on licence a prisoner serving a mandatory life sentence for murder. (This power has since been removed by the Criminal Justice Act 2003: see below, p 110.) Successive Home Secretaries had adopted

and applied a policy of fixing a penal element of the sentence (the 'tariff'), intended as a period which would satisfy the requirements of retribution and deterrence, to be followed by any further period of detention considered by the Home Secretary to be necessary for the protection of the public. In a policy statement issued in 1993 the then Home Secretary announced that the tariff set at the beginning of a mandatory life sentence would be reviewed before the prisoner was released and might exceptionally be increased if it was not then believed to be adequate.

In the case of the appellant, Pierson, a mandatory life prisoner, a previous Home Secretary had in 1988, at the beginning of the sentence, fixed the tariff at twenty years on the basis that the appellant had committed double premeditated murder. This decision was subsequently communicated to the appellant who was invited (in accordance with *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531) to make representations about it. In responding the appellant objected that the two murders had been part of a single incident and that they were not alleged to have been premeditated. The Home Secretary accepted that it had been wrong to proceed on the basis of premeditation and acknowledged that the murders were part of a single incident, but decided nevertheless that twenty years was appropriate to meet the requirements of retribution and deterrence. This decision was challenged in proceedings for judicial review.

The House of Lords held that the decision to confirm a tariff period originally fixed on the basis of aggravating circumstances erroneously taken into account amounted in substance to an increase in the tariff. A majority of three Law Lords held that the decision was unlawful and must be quashed, but differed in their reasons. Lords Steyn and Hope, of the majority, held that the power conferred on the Home Secretary must be exercised in accordance with minimum standards of fairness, and did not allow him to increase the penal tariff once it had been fixed and communicated to a prisoner. In the present context the speech of Lord Steyn is of interest for its reliance on the rule of law or 'principle of legality'.

Lord Steyn held it to be a general principle of English law 'that a lawful sentence pronounced by a judge may not retrospectively be increased' and that 'a convicted criminal is entitled to know where he stands so far as his punishment is concerned'. His Lordship continued as follows.

Lord Steyn: . . . The question must now be considered whether the Home Secretary, in making a decision on punishment, is free from the normal constraint applicable to a sentencing power. It is at this stage of the examination of the problem that it becomes necessary to consider where in the structure of public law it fits in. Parliament has not expressly authorised the Home Secretary to increase tariffs retrospectively. If Parliament had done so that would have been the end of the matter. Instead Parliament has by section 35(2) of the Act of 1991 entrusted the power to take decisions about the release of mandatory life sentence prison-

ers to the Home Secretary. The statutory power is wide enough to authorise the fixing of a tariff. But it does not follow that it is wide enough to permit a power retrospectively to increase the level of punishment.

The wording of section 35(2) of the Act of 1991 is wide and general. It provides that 'the Secretary of State may . . . release on licence a life prisoner who is not a discretionary life prisoner'. There is no ambiguity in the statutory language. The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary . . .

. . . [A] general power to increase tariffs duly fixed is in disharmony with the deep rooted principle of not retrospectively increasing lawfully pronounced sentences. In the absence of contrary indications it must be presumed that Parliament entrusted the wide power to make decisions on the release of mandatory life sentence prisoners on the supposition that the Home Secretary would not act contrary to such a fundamental principle of our law. There are no contrary indications. Certainly, there is not a shred of evidence that Parliament would have been prepared to vest a general power in the Home Secretary to increase retrospectively tariffs duly fixed. The evidence is to the contrary. When Parliament enacted section 35(2) of the Act of 1991 – the foundation of the Home Secretary's present power – Parliament knew that since 1983 successive Home Secretaries had adopted a policy of fixing in each case a tariff period, following which risk is considered. Parliament also knew that it was the practice that a tariff, once fixed, would not be increased. That was clear from the assurance in the 1983 policy statement [by the Home Secretary, Mr Leon Brittan] that 'except where a prisoner has committed an offence for which he has received a further custodial sentence, the formal review date will not be put back'. What Parliament did not know in 1991 was that in 1993 a new Home Secretary would assert a general power to increase the punishment of prisoners convicted of murder whenever he considered it right to do so. It would be wrong to assume that Parliament would have been prepared to give to the Home Secretary such an unprecedented power, alien to the principles of our law . . .

. . . The correct analysis of this case is in terms of the rule of law . . .

. . . Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural. I therefore approach the problem in the present case on this basis.

It is true that the principle of legality only has prima facie force. But in enacting section 35(2) of the Act of 1991, with its very wide power to release prisoners, Parliament left untouched the fundamental principle that a sentence lawfully passed should not retrospectively be increased. Parliament must therefore be presumed to have enacted legislation wide enough to enable the Home Secretary to make decisions on punishment on the basis that he would observe the normal constraint governing that function. Instead the Home Secretary has asserted a general power to increase tariffs duly fixed. Parliament did not confer such a power on the Home Secretary.

> It follows that the Home Secretary did not have the power to increase a tariff lawfully fixed . . .
>
> It was agreed before your Lordships' House that the Home Secretary's decision letter of 6 May 1994 did communicate a decision to Mr Pierson to increase the tariff in his case. That decision was in my judgment unlawful and ought to be quashed.

An authority vested with discretionary power may itself adopt policies or rules for the exercise of its discretion. Indeed a discretionary power may be of a kind, and of such width, that it 'calls out for the development of policy as to the way it will in general be exercised' (Lord Woolf MR in *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, 432). Adoption of a policy can be helpful in preventing inconsistency or arbitrariness in the use of discretion (see *R v Secretary of State for the Home Department, ex p Yousaf* [2000] 3 All ER 649, [44]). Any policy adopted must, of course, be compatible with the purposes of the statute conferring the power. In addition, the authority must not apply its self-imposed rules in an inflexible way so as to *fetter* the discretion it is required to exercise, and must remain willing to listen to those with something new to say (see further Hilson, 'Judicial review, policies and the fettering of discretion' [2002] *PL* 111).

Again, standards and rules for the exercise of discretionary power may be formulated by other agencies, in particular by the courts (especially in developing the principles of judicial review) although the Council on Tribunals and the Parliamentary Ombudsman also have a role in the evolution of principles governing the exercise of discretion. (See D Galligan, *Discretionary Powers* (1986), ch 5.)

Finally, it is desirable that there should be machinery for the *checking* of discretionary decisions. There may be provision for scrutiny of such decisions by a supervisory authority within the administrative body itself; or statute may provide for appeal to a court or tribunal. Questions of the legality of decisions and the abuse of discretion can generally be raised by way of judicial review. (These matters are further considered in chapter 10.)

(d) The rule of law: wider conceptions?

The rule of law in its minimal sense of government according to law may seem to be a relatively unexacting principle, which is satisfied by any state that has taken the trouble to invest its officers with legal authority to do what is required of them. The rule of law in this limited sense is not inconsistent with despotic government, if the despot is scrupulous about using the forms of law. Despotic governments, however, are not generally distinguished by a punctilious observance of the law, even law of their own making and, indeed, even democratic governments do not always show a fastidious regard for legal requirements. Broader conceptions of the rule of law demand more than a mere formal

compliance by public authorities with the rules of the legal system. In this light several commentators have argued that the doctrine should be seen as including a number of other values.

In its wider sense the rule of law has been said to require, for example, that laws should be general, prospective, open, clear and stable. (See especially Joseph Raz, 'The rule of law and its virtue' (1977) 93 *LQR* 195, who sees these and other principles of the rule of law as resting on the 'basic idea that the law should be capable of providing effective guidance' and on respect for the dignity and autonomy of the individual.)

The *generality* of a legal order would distinguish it from a regime in which specific commands were issued without regard to reasoned principle – or in which, in the words of Lon Fuller, governmental power expressed itself in 'unpredictable and patternless interventions in human affairs' (*The Morality of Law* (2nd edn 1969), pp 157–8). It is impossible to conceive of a legal *system* of which this was the characteristic feature, but a government might show a tendency to act in this way in particular branches of administration.

The law should be *prospective*, and should not, as Willes J observed in *Phillips v Eyre* (1870) LR 6 QB 1, 23, 'change the character of past transactions carried on upon the faith of the then existing law'. In *Lauri v Renad* [1892] 3 Ch 402, 421, Lindley LJ held it to be a 'fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction'. Retrospective legislation is sometimes justified, as Willes J conceded in *Phillips v Eyre* (above), to avoid 'practical public inconvenience and wrong', and an element of retrospectivity is an unavoidable feature of some fiscal legislation in particular. (See further Dickinson, 'Retrospective legislation and the British constitution' 1974 *SLT* 25; Feldman (1992) 108 *LQR* 212; and *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486.) Retrospective *penal* legislation is especially offensive to the rule of law and is besides contrary to Article 7 of the European Convention on Human Rights. Our courts will interpret penal statutes as not having retrospective effect unless they are compelled by unequivocal statutory provision to hold otherwise: see *Waddington v Miah* [1974] 1 WLR 683. In *Welch v United Kingdom* (1995) 20 EHRR 247 it was held by the European Court of Human Rights that the United Kingdom had breached Article 7 by reason of the retrospective operation of confiscation orders made under the Drug Trafficking Offences Act 1986. (See also *R (Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130, [2003] 4 All ER 891.)

Laws should be *open*, that is to say, made known by sufficient publication. As Lord Diplock remarked in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279, elementary justice 'demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible'. In *Salih v Secretary of State for the Home Department* [2003] EWHC 2273, Stanley Burnton J declared it to be 'a fundamental requisite of the rule of

law that the law should be made known'. In this case the Home Secretary had discretion under statute to provide what was known as 'hard cases support' (facilities for accommodation) for failed asylum-seekers. He adopted a policy or set of criteria that he would apply for the provision of hard case support, but decided that he would neither publicise his support scheme nor inform failed asylum-seekers of the possibility of applying for support. Stanley Burnton J held that it was 'in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute'. The judge concluded that the Home Secretary's decision not to inform failed asylum-seekers of his policy on hard cases was unlawful. See also *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, in which Lord Steyn declared that a constitutional state under the rule of law 'must accord to individuals the right to know of a decision before their rights can be adversely affected'.

If laws are to be an effective and reliable guide to conduct it is evident that they should be *clear*. Expressed as a requirement of *certainty*, this was said by Lord Nicholls in *R v Secretary of State for the Environment, ex p Spath Holme Ltd* [2001] 2 AC 349, 397, to be 'one of the fundamental elements of the rule of law'. Our laws do not always measure up to this. The Law Commission observed in 1994 that 'laws which so many people have to use, often at great personal expense, remain unsimple, unmodern, inaccessible and unreformed': *Twenty-eighth Annual Report* (Law Com No 223, 1994), para 1.21. (See also the admonition to Parliament and ministers in *Merkur Island Shipping Corpn v Laughton*, below, p 444.) The European Court of Human Rights declared in *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271, that 'a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct' (see also *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [32]–[34]).

Laws should be *stable* because frequent changes in them make it difficult to know the law or to plan for the future. (See Raz, 'The rule of law and its virtue' (1977) 93 *LQR* 195, 199.)

The scope of the rule of law is debatable and for some it will include additional values, such as the recognition of certain fundamental rights of the individual against the state, whereas others would find the validation of such rights elsewhere, perhaps as necessary elements of a democratic polity. Among these others is Jeffrey Jowell, for whom 'The scope of the Rule of Law is broad, but not broad enough to serve as a principle upholding a number of other requirements of a democracy' (J Jowell and D Oliver (eds), *The Changing Constitution* (5th edn 2004), p 23). Compare TRS Allan's conception of the rule of law as embracing a recognition of the 'inherent legal value' of the autonomy of the citizen, and the 'principal civil liberties which assist in preserving the citizen's autonomy in the face of governmental authority': 'The rule of law as the rule of reason: consent and constitutionalism' (1999) 115 *LQR* 221 (see also TRS Allan, *Constitutional Justice* (2001), ch 4).

The rule of law as we have so far considered it may appear to be neutral with regard to the distribution of power in society and might not be an obstacle to a legal order designed to maintain social and economic inequality and to serve the interests of a governing elite. (Cf EP Thompson, *Whigs and Hunters* (1975), pp 258–69.) RM Unger (*Law in Modern Society* (1977)) observes that the rule of law has failed to solve the problem of power: it is, he says (p 239):

> the liberal state's most emphatic response to the problems of power and freedom. But . . . whatever its efficacy in preventing immediate government oppression of the individual, the strategy of legalism fails to deal with these issues in the basic relationships of work and everyday life.

(See also *ibid*, pp 179–81.)

The rule of law has sometimes been invoked in defence of private interests against the actions of 'interventionist' government directed to social reform and public welfare. W Friedmann (*The State and the Rule of Law in a Mixed Economy* (1971), p 95) responds as follows:

> The proposition that the rule of law in modern democracy is incompatible with any kind of economic planning by the state or . . . that the planned state 'commands people which road to take', whereas the rule of law only provides 'signposts', [FA von Hayek, *The Road to Serfdom* (1944), p 54] is of course incompatible with the reality of any contemporary democracy. It would be a useless exercise for us to attempt to define the rule of law in a way that bears no relation to the minimum functions of social welfare, urban planning, regulatory controls, entrepreneurship and other essential functions of the state in a mixed economy.

The achievement of great social ends, such as the removal of economic, racial and sexual injustice, and the provision of welfare services, is impossible without state activity and the assumption of the necessary powers. It would be a distorted conception of the rule of law that denied the validity of these ends or frustrated their accomplishment. If in recent times a new orthodoxy of the non-interventionist state, of deregulation and privatisation, has been in the ascendancy, it cannot claim the specific endorsement of the rule of law.

Among those who have argued for an enlarged conception of the rule of law, going beyond an exclusive insistence on requirements of legality and procedural fairness, the International Commission of Jurists have taken the most radical position. In a Congress held in Delhi in 1959 they declared:

> that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.

The impulse to redefinitions of this kind comes from an awareness that a neutral conception of the rule of law seems to distance lawyers and the ideals of law from the most compelling issues of our time – of poverty, social deprivation and the denial of political rights and elementary justice by authoritarian governments. The lawyers at Delhi were conscious that law is, too often, mainly of service to limited and powerful interests in unequal societies.

Others still insist on a stricter definition of the rule of law, saying with Raz ((1977) 93 *LQR* 195, 195–6): 'If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.' Can the wider objectives declared in Delhi be accommodated within a workable concept of the rule of law? (See further Craig, 'Formal and substantive conceptions of the rule of law' [1997] *PL* 467.)

(e) The rule of law and parliamentary sovereignty

For Dicey, as we have seen, the fundamental principles of the British constitution were parliamentary sovereignty and the rule of law. But Dicey, it has been objected (Jan-Erik Lane, *Constitutions and Political Theory* (1996), p 44), 'did not fully understand that his model is contradictory', for:

> If Parliament has sovereignty, then how could it be bound by the rule of law . . .? If the rule of law is the foundation of the State, then how can Parliament claim a power not bound by any legal restrictions?

Dicey was not wholly oblivious of the contradiction but believed that the rule of law was not at risk from a Parliament which was subject, in his view, to both internal and external limits to the exercise of its sovereignty. Parliament was restrained internally, he thought, by its representative character, which identified it with the interests and wishes of the electorate, and externally by the force of a public opinion which would oppose serious resistance to 'reactionary legislation'.

Today there is less confidence in the effectiveness of such constraints to reconcile parliamentary sovereignty with the rule of law. Can the dilemma be resolved only by admitting legal limits to parliamentary sovereignty, or has the rule of law to be qualified by democratic principle? (See for example the arguments in 2003–04 concerning the proposed ouster clause in the Asylum and Immigration (Treatment of Claimants) Bill, considered above, p 67). See further TRS Allan, *Constitutional Justice* (2001), ch 7 and Goldsworthy, 'Legislative sovereignty and the rule of law' in T Campbell, K Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (2001).

See generally on the rule of law TRS Allan, *Law, Liberty, and Justice*, ch 2; Jowell, 'The rule of law today' in J Jowell and D Oliver, *The Changing Constitution* (5th edn 2004); D Dyzenhaus (ed), *Recrafting the Rule of Law: The*

Limits of Legal Order (1999); TRS Allan, *Constitutional Justice* (2001); Craig, 'Constitutional foundations, the rule of law and supremacy' [2003] *PL* 92; Ekins, 'Judicial supremacy and the rule of law' (2003) 119 *LQR* 127. Ian Harden and Norman Lewis, *The Noble Lie* (1986), present arguments for a revised and reconstituted rule of law associated with institutional reforms directed to more open government, public participation in decision-making and an improved machinery of accountability.

4 Separation of powers

A doctrine of the separation of powers was formulated by English writers and controversialists of the mid-seventeenth century who argued for the separation of the legislative and executive (then including judicial) functions of government, seeing in this a means to restrain the abuse of governmental power. The theory of the separation of powers was subsequently developed by John Locke in his *Second Treatise of Civil Government* (1690) and, more systematically, in France, by Montesquieu in *The Spirit of the Laws* (1748). Montesquieu, in the context of his description of an idealised English constitution, distinguished the legislative, executive and judicial functions of government, which he maintained should be exercised by different persons, and insisted on the independence of the judiciary. (Montesquieu also held that the judiciary should not be identified with any one estate or class of persons in the state.) 'All would be lost', he wrote (*The Spirit of the Laws*, Book XI, ch 6), 'if the same man or the same ruling body, whether of nobles or of the people, were to exercise these three powers, that of law-making, that of executing the public resolutions, and that of judging crimes and civil causes'. He held also that the legislature and the executive should have powers to enable each to check or limit the other.

Montesquieu's work ensured the lasting influence of the theory of the separation of powers. In England, however, this theory was opposed in the eighteenth century by the doctrine of the mixed or balanced constitution, in which monarchical, aristocratic and democratic elements were *joined* and held in equilibrium, rather than strictly separated. Accordingly, the theory of the separation of powers was not to prevail as an explanation of English constitutional arrangements; nor did it provide a focus for constitutional reform. It was in America (and in France) that the theory was to be embraced by political leaders and makers of constitutions, the US constitution of 1789, for example, being based on a conception of the separation of powers qualified by a machinery of checks and balances (for a recent reassessment, see Claus, 'Montesquieu's mistakes and the true meaning of separation' (2005) 25 *OJLS* 419).

The system of parliamentary government that evolved in the United Kingdom in the nineteenth century under the impetus of the Reform Act of 1832 was evidently not based on a theory of the separation of powers. The modern constitution is perhaps even less conformable to that theory as traditionally understood, for nowadays 'rules are made by civil servants and by

judges as well as by legislatures; rules are applied by the courts as well as by "the executive"; and judgements are made by civil servants and ministers as well as by judges' (MJC Vile, *Constitutionalism and the Separation of Powers* (1967), p 317). While we may concede that the British constitution is not *based on* the separation of powers, however, this does not mean to say that the separation of powers is of no relevance to the British constitution. Consider, for example, the reliance placed upon it by the Donoughmore Committee, inquiring into delegated legislation and administrative adjudication in the 1930s.

Report of the Committee on Ministers' Powers (Donoughmore Committee), Cmd 4060/1932, pp 4, 5

In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers; in practice it is inevitable that they should overlap. In such constitutions as those of France and the United States of America, attempts to keep them rigidly apart have been made, but have proved unsuccessful. The distinction is none the less real, and for our purposes important. One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities.

It is customary today for parliament to delegate minor legislative powers to subordinate authorities and bodies. Ministers of the Crown are the chief repositories of such powers; but they are conferred also, in differing degrees, upon Local Authorities, statutory corporations and companies, Universities, and representative bodies of solicitors, doctors and other professions. Some people hold the view that this practice of delegating legislative powers is unwise, and might be dispensed with altogether. A similar view is held with regard to the delegation to Ministers by statutory authority of judicial and quasi-judicial functions. It has even been suggested that the practice of passing such legislation is wholly bad, and should be forthwith abandoned. We do not think that this is the considered view of most of those who have investigated the problem, but many of them would like the practice curtailed as much as possible.

The Donoughmore Committee was appointed in a political atmosphere which was generally hostile to the delegation by Parliament of legislative and judicial functions to ministers and other public authorities. It had been asserted that the practice of delegation, in its denial of the separation of powers, presented a threat to parliamentary sovereignty and the rule of law. The Committee, however, declined to give its imprimatur to a strict separation of powers, seeing the doctrine as no more than a 'rule of political wisdom' which 'must give way where sound reasons of public policy so require' (p 95). Moreover, it rejected the view that the delegation of law-making and judicial powers had led to a 'new despotism' of officials.

While the necessity for the delegation of legislative powers to the executive is not nowadays contested, the nature and extent of such delegations may raise

questions about compliance with the separation of powers. For instance, a House of Lords committee expressed concern about the delegation of powers contained in the Access to Justice Bill and questioned whether 'control by the state of the means of access to justice may erode the separation of powers and put individuals at a disadvantage when seeking to defend themselves against claims brought by the very government which also has the power to prescribe how effectively they may be represented'. (Select Committee on the Constitution, *First Report*, HL 11 of 2001–02: Memorandum by the Select Committee on Delegated Powers and Deregulation, p 8. See Ganz, 'Delegated legislation: a necessary evil or a constitutional outrage?', in P Leyland and T Woods (eds), *Administrative Law Facing the Future* (1997), ch 3, and see further chapter 7.)

Powers of delegated legislation and executive law-making are particularly controversial when they extend to an ability of ministers and civil servants to amend primary legislation. Such powers are known as Henry VIII clauses. It may be thought that only Parliament ought to be able to amend or repeal its (primary) legislation – statutes. Henry VIII clauses extend that power, in certain circumstances, to the executive. Such clauses are included, for example, in the European Communities Act 1972 and in the Human Rights Act 1998. (See Barber and Young, 'The rise of prospective Henry VIII clauses and their implications for sovereignty' [2003] *PL* 112.) The Deregulation and Contracting-out Act 1994 conferred on ministers a broad power to amend or repeal provisions of primary legislation in order to remove or reduce a statutory burden on a trade, business or profession. This was further extended by the Regulatory Reform Act 2001, which empowered ministers to amend or repeal legislation which 'has the effect of imposing burdens affecting persons in the carrying on of any activity' (section 1). The justification for these measures was that scarce parliamentary time should not prevent government departments from bringing forward regulatory reform proposals.

In 2006 the Government introduced its Legislative and Regulatory Reform Bill, which, as the Government drafted it, would have permitted ministers to make orders amending, repealing or replacing almost *any* legislation, primary or secondary, for almost *any* purpose. The only exceptions would have been that such orders could not have: imposed or increased taxation; created or increased criminal penalties; or authorised forcible entry, search or seizure. These powers were so sweeping that the bill was frequently dubbed the 'Abolition of Parliament Bill'. The bill was introduced in order to streamline the procedure available under the 2001 Act, under which, until 2006, only twenty-seven regulatory reform orders had been made. The 2006 Bill met with considerable hostility, with both the Hansard Society and several parliamentary committees calling for significant amendments (the bill was scrutinised – indeed, condemned – in reports of the House of Commons Regulatory Reform Committee (HC 878 of 2005–06), the House of Commons Procedure Committee (HC 894 of 2005–06), the House of Commons Public Administration Committee (HC 1033 of 2005–06) and the House of Lords Constitution Committee (HL 194 of

2005–06)). As a result the Government was forced to make a series of substantial amendments which, on the one hand, reduced the scope of ministerial powers to make and unmake the law and, on the other, increased the degree of parliamentary scrutiny of ministerial orders made under the Act. Even after these amendments, however, the bill was still thought by the House of Lords Constitution Committee to contain 'over-broad and vaguely drawn' ministerial powers to which 'further safeguards' should have been attached (HL 194 of 2005–06, para 5). (See further on ministerial law- and rule-making powers, chapter 7.)

A delegated power to amend the provisions of statute is narrowly and strictly construed by the courts, so far as it admits of any doubt as to its scope: see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 382. (See further, Delegated Powers and Regulatory Reform Committee, *Third Report*, HL 21 of 2002–03, on Henry VIII clauses.)

Most of this part of this chapter is concerned with the separation of the judicial roles in the constitution from those of government and Parliament. While the separation (or, perhaps, the lack of it) between government and Parliament is briefly considered towards the end of the section, this topic is considered in more detail in chapter 9. Here we ask, first, whether the separation of powers in the British constitutional order is more a political ideal than a judicially enforceable rule of law, before considering in detail the judicial role and the matter of judicial independence. The changing role of the Lord Chancellor and the difficult issue of judicial appointments are discussed, before we close our consideration of the judiciary with an outline of the separation of the courts from Parliament.

(a) A political ideal or a legal principle?

A doctrine of the separation of powers can be put into service for different purposes. It may be used in support of a principle that functions should be allocated to the most appropriate body in the state, whether an elected assembly, a court, a tribunal, a body of elected or appointed officials, or something other. This is a matter of allotting functions and powers in such a way that they can be operated with the greatest possible effectiveness. On the other hand, the separation of powers is also invoked in support of arrangements for preventing the abuse of power, whereby public powers are so distributed among different institutions that each has a necessary freedom of action and also some capacity for checking other power-holding bodies – a system of checks and balances. As Vile (*Constitutionalism and the Separation of Powers* (1967), p 10) aptly says:

> We are not prepared to accept that government can become, on the grounds of 'efficiency', or for any other reason, a single undifferentiated monolithic structure, nor can we assume that government can be allowed to become simply an accidental agglomeration of purely pragmatic relationships.

And he goes on to say (p 15): 'The diffusion of authority among different centres of decision-making is the antithesis of totalitarianism or absolutism.'

The doctrine of the separation of powers in each of these uses (which are complementary) has traditionally been supposed to require a threefold classification of functions and corresponding institutions: legislative, executive and judicial. But in the diverse and complex activity of a modern state like the United Kingdom the processes of law-making, administration and adjudication are neither clearly demarcated nor assigned exclusively to separate institutions. Values once associated with a doctrine of the formal separation of legislative, executive and judicial powers may now depend on the pluralist arrangements of the modern state, in which the powerful departments of central government operate in a world of countervailing powers exercised by Parliament, courts, the devolved administrations, local government and other public bodies, political parties, and the empire of pressure groups. We cannot, however, be confident that this pluralist diversity will necessarily give balance to the constitution and prevent undue and dangerous concentrations of power. The questions must be constantly asked, whether powers are appropriately allocated, and what checking mechanisms should be set up, both between and within different branches of the state apparatus.

The question of the proper location of power arises in a great variety of contexts. Is it right, for instance, that a member of the executive should have any role in determining how long a convicted offender should remain in custody? Until recently, if a young offender was convicted of murder and sentenced to be detained during Her Majesty's pleasure, the practice was for the Home Secretary to fix a period of detention (the 'penal element' or 'tariff'), sufficient to meet the requirements of retribution and deterrence, which must be served before the release of the offender could be considered by the Parole Board. In *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407, 526, Lord Steyn said: 'In fixing a tariff the Home Secretary is carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function.' The House of Lords did not conclude that the infringement of the separation of powers made the ministerial fixing of a tariff unlawful (although it was held on other grounds that the Home Secretary had acted unlawfully). But in subsequent proceedings in this case in the European Court of Human Rights it was ruled by that court (*V and T v United Kingdom* (1999) 30 EHRR 121) that the fixing of the tariff amounted to a sentencing exercise, that the Home Secretary as a member of the executive was not an 'independent and impartial tribunal', and accordingly that there had been a breach of Article 6(1) of the European Convention on Human Rights (right to a fair trial). As a result of this decision it was provided by the Criminal Justice and Courts Services Act 2000, section 60, that in respect of young offenders convicted of murder and detained at Her Majesty's pleasure, the tariff should be set by the trial judge in open court.

A different regime, resting upon section 29 of the Crime (Sentences) Act 1997, continued to apply to an adult prisoner serving a mandatory life sentence for murder. In this case the Home Secretary remained responsible for setting the penal tariff and for the eventual decision on release. Here it was contended that the Home Secretary was not fixing the sentence but deciding whether a person sentenced by a court to life imprisonment should be prematurely released. Somewhat surprisingly, this argument found favour with the European Court of Human Rights in *Wynne v United Kingdom* (1994) 19 EHRR 333.

The Home Secretary's power to decide on the release of mandatory life sentence prisoners was again considered by the European Court of Human Rights in *Stafford v United Kingdom* (2002) 35 EHRR 32. The Home Secretary had rejected a recommendation of the Parole Board that Stafford, who was serving a life sentence for murder, should be released on licence, on the ground that he might, if released, commit non-violent imprisonable offences. (He had served a sentence for cheque fraud.) A challenge to this decision in the English courts having failed (see *R v Secretary of State for the Home Department, ex p Stafford* [1999] 2 AC 38) Stafford took his complaint to the European Court of Human Rights. The Court reassessed its decision in the *Wynne* case (above) and concluded that Stafford's continued detention by decision of the executive, on the ground relied upon, was not in accord with the spirit of the European Convention 'with its emphasis on the rule of law and protection from arbitrariness' and was not compatible with Article 5(1) of the European Convention (right to liberty and security of person). Moreover, the fact that Stafford's continued detention was dependent on the discretion of the Home Secretary constituted a violation of Article 5(4) (right of a detained person to have the lawfulness of his detention decided by a court). In the course of its judgment the Court noted that 'the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry, has become increasingly difficult to reconcile with the notion of separation of powers between the executive and the judiciary'.

The Government took a different view regarding the fixing of the tariff and the Home Secretary continued to carry out this function, albeit after taking advice in each instance from the trial judge and the Lord Chief Justice. The procedure was challenged in the following case.

R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46, [2003] 1 AC 837

The appellant, Anderson, had been sentenced by a court to mandatory life imprisonment for murder. The trial judge and the Lord Chief Justice recommended a tariff of fifteen years to be served by him, to satisfy the requirements of retribution and deterrence. The Home Secretary rejected this advice

and fixed the tariff at twenty years. Shortly before the lapse of the judicially recommended minimum term, Anderson brought proceedings to challenge the Home Secretary's decision to set the twenty-year tariff. This decision, it was contended for Anderson, was contrary to Article 6(1) of the European Convention on Human Rights, given effect in the United Kingdom by the Human Rights Act 1998. So far as material in this case, Article 6(1) provides:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It was argued for Anderson that setting the tariff was a sentencing exercise and as such was part of the determination of a criminal charge in terms of Article 6(1): it must accordingly be carried out by an independent and impartial tribunal and not by a member of the executive. For the Home Secretary, on the other hand, the argument was renewed that had been accepted by the European Court of Human Rights in *Wynne* (above) but rejected upon reconsideration in *Stafford* (above), that fixing the tariff was not the imposition of a sentence but the administration of a sentence of life imprisonment already passed by the trial court. On this central point the Lords (sitting as a panel of seven) unhesitatingly accepted the reasoning of *Stafford v United Kingdom*: setting the tariff was a sentencing exercise.

> **Lord Bingham of Cornhill:** . . . What happens in practice is that, having taken advice from the trial judge, the Lord Chief Justice and departmental officials, the Home Secretary assesses the term of imprisonment which the convicted murderer should serve as punishment for his crime or crimes. That decision defines the period to be served before release on licence is considered. This is a classical sentencing function. It is what, in the case of other crimes, judges and magistrates do every day.

The Lords approved the following passage from the judgment in *Stafford*:

> The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the element of punishment.

It followed from the Lords' conclusion on this central point that the existing procedure did not comply with Article 6(1), for it was plain, and was not in dispute, that the imposition of a sentence was part of the criminal trial, and that the Home Secretary was not independent of the executive.

In arriving at this result the Lords emphasised that it was in accordance with the fundamental principle of the separation of powers between the executive and the judiciary, a principle essential to both the rule of law and democracy:

> **Lord Steyn:** . . . In a series of decisions . . . the House of Lords has described the Home Secretary's role in determining the tariff period to be served by a convicted murderer as punishment akin to a sentencing exercise. In our system of law the sentencing of persons convicted of crimes is classically regarded as a judicial rather than executive task. Our constitution has, however, never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government . . . It is reinforced by constitutional principles of judicial independence, access to justice, and the rule of law.

In response to the judgment in this case, provision was made in the Criminal Justice Act 2003 for the tariff or minimum term to be served by mandatory life prisoners to be fixed by the sentencing judge. When the minimum term has been served, the Parole Board decides on the prisoner's suitability for release.

Article 6(1) of the Convention and its interpretation by the courts have given a powerful reinforcement to the domestic principle of the separation of judicial and executive powers. As Lord Steyn expressed it in *Anderson*, 'Article 6(1) requires effective separation between the courts and the executive, and further requires that what can in shorthand be called judicial functions may only be discharged by the courts'. (See also *R (Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, especially the opinion of Lord Hoffmann.)

It may be that one effect of the incorporation by the Human Rights Act 1998 of the European Convention on Human Rights into domestic law is to encourage British courts to enforce the separation of powers as a legal principle more than they were prepared to do in earlier times. As we have seen, before the Human Rights Act the separation of powers was a political ideal that could be variously used to describe or to criticise aspects of the British constitution, but it was not generally regarded as being a judicially enforceable rule. The sentencing context is one area where the courts have begun to talk of the separation of powers in more juridical terms, but it is not the only one.

Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 AC 1163

Matthews concerned an unsuccessful challenge to the legality of a statutory bar that prevented servicemen from suing the Crown in tort for personal injury suffered in the course of military duty (see Crown Proceedings Act 1947, section 10, now repealed by Crown Proceedings (Armed Forces) Act 1987). Matthews argued that the bar constituted a breach of Article 6(1) (the right to a fair trial before an independent and impartial tribunal). The House of Lords disagreed.

In the course of his speech, Lord Hoffmann made the following statements about the separation of powers.

> **Lord Hoffmann:** . . . In the great case of *Golder v United Kingdom* (1975) 1 EHRR 524 the Strasbourg court decided that the right to an independent and impartial tribunal for the determination of one's civil rights did not mean only that if you could get yourself before a court, it had to be independent and impartial. It meant that if you claimed on arguable grounds to have a civil right, you had a right to have that question determined by a court. A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers.
>
> These principles require not only that you should be able to get to the court room door. The rule of law and separation of powers would be equally at risk if the executive government was entitled, as a matter of arbitrary discretion, to instruct the court to dismiss your action. There are different ways in which one could draft a law to give the executive such a power. It might say that the cause of action was not complete without the government's consent. That would look like a rule of substantive law. Or it could provide that the government could issue a certificate saying that the action was not to proceed. That looks like a procedural bar. But provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers, it should not matter how the law is framed. What matters is whether the effect is to give the executive a power to make decisions about people's rights which under the rule of law should be made by the judicial branch of government.

Lord Hoffmann's remarks have since been cited with approval by Lord Nicholls in a case concerning the enforceability of consumer credit agreements (*Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, [2004] 1 AC 816) and by Lord Hope in a case concerning child maintenance and the Child Support Agency (*R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48). Despite the variety of factual contexts in which the separation of powers is mentioned in recent House of Lords case law, however, the work being done by the principle is the same in all these cases. All are concerned with demarcating *judicial* power (none is concerned, for example, with the relationship of legislative to executive power, although, on that issue, see *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, discussed below, p 131). Their Lordships are concerned, on the one hand, that judicial functions (such as sentencing) are undertaken by judicial bodies (and not by the Home Secretary) but, on the other, that the requirements of Article 6(1) are not so strictly interpreted that they mean that all determinations of social security or of economic benefits need necessarily to be taken to the courts. To the extent that Article 6(1) has encouraged the courts to consider the separation of powers as a juridical principle, it has done so only in this context of properly demarcating judicial power. It has not transformed the separation of powers into a general principle of constitutional law beyond this context.

(See further on the proper demarcation of judicial power, *R (Alconbury) v Secretary of State for the Environment* [2003] 2 AC 295 and *Begum v Tower Hamlets LBC* [2003] 2 AC 430, considered in chapter 10.)

(b) The courts in the constitution: judicial review and judicial law-making

As *Anderson* and *Matthews* suggest, the idea of the separation of powers has particular relevance to the role and authority of the courts in the constitution. There are claims and conflicts that are most appropriately resolved by a process of adjudication, in which decisions are reached after hearing argument and by reference to legal rules and principles. Some of these questions are best adjudicated by courts staffed by judges who are expert in the law and independent of Parliament and the executive. In deciding whether a particular matter is suitable for judicial determination, account must be taken of the nature of the process of adjudication and of the expertise and resources available to the courts. Some questions are 'non-justiciable' because they cannot be satisfactorily decided by the process of legal argument and rule application, or because they raise issues of policy or the public interest of which it is impossible for the courts to inform themselves adequately within the limits of existing judicial procedures and rules of evidence. These questions should be referred to other agencies that are better equipped to decide them. (See D Galligan, *Discretionary Powers* (1990), pp 240–51; C Harlow and R Rawlings, *Law and Administration* (2nd edn 1997), pp 598–604.)

The courts will themselves decline to inquire into matters which they identify as non-justiciable: for example, one of the grounds of decision in *Chandler v DPP* [1964] AC 763 (above, pp 11–12) was that the question whether it was in the interests of the state for the armed forces to be provided with nuclear weapons was a political question which was not appropriate for judicial determination. Again, in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (below, pp 697–9), the House of Lords indicated that the exercise by ministers of certain kinds of prerogative power is not controllable by the courts because (said Lord Roskill) 'their nature and subject matter are such as not to be amenable to the judicial process'. The courts, Lord Roskill continued, 'are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another'. It is important, however, that courts should not acquiesce in the abuse of executive power by taking refuge in the notion of non-justiciability. In *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 the Court of Appeal reaffirmed that the courts could not enter the 'forbidden area' of the government's decisions in the conduct of foreign policy. Even so, the court envisaged that judicial review would be possible if the government, in failing to take action to protect British citizens from violations by a foreign government of their fundamental rights, could be shown to have acted irrationally or contrary to legitimate expectations created

by its own assurances or policy statements. (See further *Campaign for Nuclear Disarmament v Prime Minister* [2002] EWHC 2759, noted Perreau-Saussine [2003] *CLJ* 538, and TRS Allan, *Law, Liberty, and Justice* (1993), ch 9.) The law of judicial review is considered more fully in chapter 10.

It is nowadays generally accepted that judges 'do and must make law in the gaps left by Parliament' (per Steyn LJ in *R v Brown* [1994] 1 WLR 1599, 1604) and that the development of the common law is part of the constitutional role of the courts. As Lord Wilberforce said in *British Railways Board v Herrington* [1972] AC 877, 921, 'the common law is a developing entity as the judges develop it, and so long as we follow the well tried method of moving forward in accordance with principle as fresh facts emerge and changes in society occur, we are surely doing what Parliament intends we should do'. Certain kinds of subject matter are considered to be especially suited to judicial creativity, and a claim of this sort was made by Lord Scarman in *Furniss v Dawson* [1984] AC 474, 514, for the judicial development of the principle that 'every man is entitled if he can to order his affairs so as to diminish the burden of tax':

> The limits within which this principle is to operate remain to be probed and determined judicially. Difficult though the task may be for judges, it is one which is beyond the power of the blunt instrument of legislation. Whatever a statute may provide, it has to be interpreted and applied by the courts: and ultimately it will prove to be in this area of judge-made law that our elusive journey's end will be found.

Are there limits beyond which the courts should not go in creating new rules? Lord Reid sounded a note of caution in *Pettitt v Pettitt* [1970] AC 777, 794–5:

> Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the courts in appropriate cases to develop or adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with 'lawyer's law' and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament.

In *Woolwich Equitable Building Society v IRC* [1993] AC 70 a majority of the House of Lords formulated a new rule that the citizen who makes a payment of money to a public authority in response to an unlawful (ultra vires) demand of tax is entitled to restitution of the sum paid. Lord Goff, one of the majority, took note of an objection to the recognition of such a right of recovery:

> This is that for your Lordships' House to recognise such a principle would overstep the boundary which we traditionally set for ourselves, separating the legitimate development of

> the law by the judges from legislation. It was strongly urged by Mr Glick, in his powerful argument for the revenue, that we would indeed be trespassing beyond that boundary if we were to accept the argument of Woolwich. I feel bound however to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships' House would never have been decided the way they were. For example, the minority view would have prevailed in *Donoghue v Stevenson* [1932] AC 562; our modern law of judicial review would have never developed from its old, ineffectual, origins; and *Mareva* injunctions would never have seen the light of day. Much seems to depend upon the circumstances of the particular case.

The majority were convinced by the arguments of justice in favour of judicial recognition of the principle of recovery of tax paid pursuant to an unlawful demand. If limits to the application of the principle were required for reasons of policy or good administration, it would be for Parliament to introduce them. Lord Keith, dissenting, was of the opinion that to accept the argument of the building society would 'amount to a very far-reaching exercise of judicial legislation'. He added:

> It seems to me that formulation of the precise grounds upon which overpayments of tax ought to be recoverable and of any exceptions to the right of recovery, may involve nice considerations of policy which are properly the province of Parliament and are not suitable for consideration by the courts.

In *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, the House of Lords, taking (in Lord Goff's words) 'a more robust view of judicial development of the law', abrogated 'in the public interest' the long-standing rule that money paid under a mistake of law was not recoverable. The courts have not refrained from making innovative decisions in areas of social controversy, as in *Airedale NHS Trust v Bland* [1993] AC 789 (withholding of treatment from a patient in a persistent vegetative state held lawful) and *R v R (Rape: Marital Exemption)* [1992] 1 AC 599.

Can the limits of judicial creativity be expressed in terms of a distinction between *principle* and *policy*? While the legislature makes decisions on grounds of policy, according to its view of what is required for the good of the country, judicial decisions, it has been suggested, should be grounded not in policy but in principle, according with 'a coherent conception of justice and fairness' (R Dworkin, *Law's Empire* (1986), ch 7). In *McLoughlin v O'Brian* [1983] 1 AC 410, Lord Scarman endorsed such a limitation of the judicial function, but Lord Edmund-Davies in the same case emphatically rejected it, and in practice policy considerations are frequently adduced by judges in deciding cases. No doubt the courts must proceed with special caution as the safe waymarks of legal

principle are left behind for the contested ground of social policy, but if judges are to continue to develop and modernise branches of law in which Parliament chooses not to intervene, it does not seem realistic to demand that they should eschew all consideration of policy.

It might be thought that judicial law-making should stop short of the creation of new criminal offences, resulting in the punishment of acts that were not unlawful at the time of their commission. Yet in *Shaw v DPP* [1962] AC 220 the House of Lords made a ruling which amounted to the creation of a wide new offence of conspiracy to corrupt public morals, a decision at odds with many understandings of the separation of powers and also with the 'principle of legality' (*nullum crimen sine lege*) which is an aspect of the rule of law. (See further Smith, 'Judicial law-making in the criminal law' (1984) 100 *LQR* 46 and compare *R v R* [1992] 1 AC 599 in which the House of Lords discarded the 'marital exception' in rape, approving the observation of Lord Lane CJ in the Court of Appeal that 'This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive'.)

The principle of the separation of powers presupposes that the authority conferred on judges to decide disputes and develop legal principles is given on the condition that no political preference will influence their judgments. Sir John Donaldson MR affirmed the principle of judicial neutrality in *British Airways Board v Laker Airways Ltd* [1984] QB 142, 193, in saying:

> It is a matter of considerable constitutional importance that the courts should be wholly independent of the executive, and they are. Thus, whilst the judges, as private citizens, will be aware of the 'policy' of the government of the day, in the sense of its political purpose, aspirations and programme, these are not matters which are in any way relevant to the courts' decisions and are wholly ignored.

Our judiciary can be acquitted of conscious political bias. On the other hand, it has been said that judges, by virtue of their background, training and associations, are generally deeply conservative and have attitudes which lead them to look with favour upon property owners, employers and the established social order. (See J Griffith, *The Politics of the Judiciary* (5th edn 1997), and compare Dworkin, 'Political judges and the rule of law' (1978) 64 *Proceedings of the British Academy* 259.)

(c) Judicial independence and the position of the Lord Chancellor

The British version of the separation of powers was for long able to accommodate the ancient office of Lord Chancellor even though it would have presented an affront to purer forms of the doctrine. The Lord Chancellor was a senior judge and the head of the judiciary in England and Wales while also being a member of the government, with a seat in the Cabinet, and presiding in the upper house of the legislature. It was remarked by a law lord, Lord Steyn, in an

address to the Administrative Law Bar Association in 1996, that the ambivalent role of the Lord Chancellor was 'no longer sustainable on either constitutional or pragmatic grounds'. He noted that the Lord Chancellor was 'a spokesman for the government in furtherance of its party political agenda' and that, even in respect of matters affecting the administration of justice, he was 'subject to collective Cabinet responsibility'. (See also Lord Steyn, 'The case for a Supreme Court' (2002) 118 *LQR* 382.) Lord Irvine of Lairg, as Lord Chancellor, himself underlined the political nature of his office (HL Deb vol 622, col 814, 21 February 2001):

> It is not the case that Lord Chancellors are not party political. They are appointed by the Prime Minister; they take the party Whip; they speak and vote for the Government in Parliament; they sit in Cabinet; and they campaign for their party.

Paradoxically, the multiple role of the Lord Chancellor was defended as supporting the separation of powers, even if incompatible with a 'purist' version of the doctrine. Lord Irvine said that the office 'stands at a critical cusp in the separation of powers', so that 'the judiciary has a representative in the Cabinet and the Cabinet in the judiciary', and further that the protection of the judiciary from executive interference is 'a high order duty' of any Lord Chancellor: 'The office is a buffer between the judiciary and the Executive which protects judicial independence'. (HL Deb vol 597, col 734, 17 February 1999. Compare Lord Steyn's article cited above.)

That the Lord Chancellor might – and from time to time did – sit as a judge on the Appellate Committee of the House of Lords gave rise to particular concern, although it was said that his doing so fostered 'the necessary close relationship with the senior judiciary' (Parliamentary Secretary, Lord Chancellor's Department, HL Deb vol 344, col 1364, 22 February 2000). If there was complacency about the Lord Chancellor's judicial role it was disturbed by the decision of the European Court of Human Rights in *McGonnell v United Kingdom* (2000) 30 EHRR 289.

McGonnell owned land in Guernsey which was not zoned for residential use under the island's development plan. His appeal against a refusal of permission for residential use of the land was dismissed by the Royal Court of Guernsey, composed of the Bailiff of Guernsey and lay members, the Bailiff being the sole judge of the law. The Bailiff also presided (and could exercise a casting vote) in the States of Deliberation (the legislative assembly) which had adopted the development plan. The European Court of Human Rights held that the Bailiff's participation in the adoption of the plan gave objective grounds for doubt to be cast on his judicial impartiality, and accordingly that the hearing by the Royal Court constituted a breach of Article 6(1) of the European Convention on Human Rights (right to a fair trial by an independent and impartial tribunal).

The court accepted the submission of the United Kingdom Government that the Convention does not require states 'to comply with any theoretical concepts

as such' – so that adherence to some particular understanding of the separation of powers is not demanded – and said that the question is always 'whether, in a given case, the requirements of the Convention are met'.

Compatibility with Article 6(1) would be in doubt if the Lord Chancellor were to sit in a case in which governmental interests were at stake or legislation in which the Lord Chancellor had participated came into question. After the *McGonnell* decision Lord Irvine of Lairg said (HL Deb vol 610, col 33 WA, 23 February 2000):

> The Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged.

Indeed it was by then 'unthinkable that he could now sit in any of the major cases which come before the Law Lords every year, such as cases involving constitutional law, public law, devolution, human rights, important points of statutory construction, and so forth' (Lord Steyn, 'The case for a Supreme Court' (2002) 118 *LQR* 382, 387).

Some took the view that all that was necessary to ensure constitutional fitness was for the Lord Chancellor to relinquish his role as a judge. But other features of the office were also problematic. It was doubted whether as a senior minister with extensive executive responsibilities, owing loyalty to his colleagues in government and bound by collective ministerial responsibility, the Lord Chancellor could as head of the judiciary effectively defend the independence of the judges, protecting them from political interference. His responsibility for the appointment of judges, too, had come under increasingly critical scrutiny (see below).

In the result the Government decided on radical reform: the office of Lord Chancellor would be abolished and those of his functions that were to be retained would be redistributed. These changes, it was claimed, would 'put the relationship between the executive, the judiciary and the legislature on a modern footing, and clarify the independence of the judiciary' (*Constitutional Reform: Reforming the Office of the Lord Chancellor*, Department of Constitutional Affairs (2003)). A new Secretary of State for Constitutional Affairs would have responsibility for safeguarding judicial independence. The Lord Chief Justice would become the head of the judiciary of England and Wales. A Constitutional Reform Bill to implement the Government's proposals was introduced in the House of Lords in 2004: see now the Constitutional Reform Act 2005. In the event the office of Lord Chancellor was retained by the Act, albeit that the office is now shorn of its judicial role. (For extensive analysis of the passage of the legislation, including commentary on its impact on the separation of powers, see Windlesham [2005] *PL* 806 and [2006] *PL* 35.)

Senior judges were initially disturbed by the proposal to abolish the office of Lord Chancellor, fearing that the protection of judicial independence would be weakened, but in the second reading debate on the Constitutional Reform Bill

in the House of Lords the Lord Chief Justice, Lord Woolf, said that, following an agreement (known as the 'concordat') reached between himself and the Secretary of State for Constitutional Affairs in January 2004 and reflected in the terms of the bill, the constitutional independence of the judiciary was satisfactorily assured (HL Deb vol 658, col 1004, 8 March 2004. See also Lord Woolf [2004] *CLJ* 317, 324.) It is of fundamental importance that the judicial authorities of the state should be independent, so that their decisions are reached in accordance with law and not in submission to the wishes of government or upon other extraneous considerations. Invited to give a definition of judicial independence, a former Lord Chancellor, Lord Mackay of Clashfern, responded (HL Deb vol 576, col 106 WA, 16 December 1996):

> Judicial independence requires that judges can discharge their judicial duties in accordance with the judicial oath and the laws of the land, without interference, improper influence or pressure from any other individual or organisation.

It is plainly necessary that judges should be secure in their tenure of office, and with us this has been assured, for the senior judiciary, since the Act of Settlement of 1701. The Senior Courts Act 1981 (formerly known as the Supreme Court Act), section 11(3), now provides:

> A person appointed to an office to which this section applies [ie the office of a judge of the Court of Appeal or the High Court of Justice] shall hold that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament.

The Constitutional Reform Act 2005 makes equivalent provision for judges of the Supreme Court (section 33) and for judges of the High Court and Court of Appeal in Northern Ireland (section 133). A judge of the Court of Session in Scotland may be removed from office by the Crown on a recommendation by the First Minister of the Scottish Executive, supported by a resolution of the Scottish Parliament following a report by an independent tribunal that the judge is unfit for office (Scotland Act 1998, section 95).

The Act of Settlement and its modern successors are generally understood as meaning that a judge may be removed by the Crown either for misbehaviour, or for other cause following an address from both Houses, but it is thought unlikely in practice that a judge would be removed for misbehaviour except in pursuance of an address from Parliament. Rodney Brazier comments (*Constitutional Practice* (3rd edn 1999), p 296):

> The reluctance of any government to remove any senior judge other than by the long-winded address procedure; the refusal of successive governments to initiate that procedure, even when a judge has been convicted of an offence as serious as drunken driving; the government's ability to control Commons' business and thereby to prevent discussion of any early-day motion

critical of the judiciary; and the government's power to vote down any Opposition motion debated in Opposition time, taken together all mean that the tenure of office of the senior judiciary is extremely secure.

The only instance since 1701 of removal of a judge under the Act of Settlement procedure was that, in 1830, of Sir Jonah Barrington, a judge of the High Court of Admiralty in Ireland, who had been found guilty of embezzlement. Motions for the removal of a judge have been tabled by backbenchers from time to time – for instance, a motion supported by over 100 MPs called for the removal of the Chief Justice, Lord Lane, in 1991, after the revelation of a miscarriage of justice in the case of the 'Birmingham Six' (see *R v McIlkenny* [1992] 2 All ER 417). But such motions are intended rather as an expression of criticism of judicial conduct than to bring about the judge's dismissal, and they are not debated.

There is little likelihood of the Act of Settlement procedure being invoked because a judge's decisions are unwelcome to the executive. On the other hand vigilance is called for in case of covert pressures being brought to bear on judges, for instance, pressure to resign, or changes in the administrative arrangements for the courts which may have an adverse impact on the conduct of cases and the independent functioning of the whole judicial process. (See D Woodhouse, *In Pursuit of Good Administration* (1997), pp 117–20; Malleson, 'Judicial training and performance appraisal: the problem of judicial independence' (1997) 60 *MLR* 655.) The Constitutional Reform Act 2005 should help to counter threats of these kinds. As we saw above, the office of Lord Chancellor is retained, but he is replaced as head of the judiciary in England and Wales by the Lord Chief Justice, who is also the President of the Courts of England and Wales. The Lord Chief Justice has an enhanced capacity to influence decisions relating to the administration of the court system, including decisions on resources for the administration of justice.

The 2004 concordat declared that judicial independence should be expressly guaranteed. Accordingly, section 3(1) of the Constitutional Reform Act places a general obligation on the Lord Chancellor, other ministers of the Crown and 'all with responsibility for matters relating to the judiciary or otherwise to the administration of justice' to 'uphold the continued independence of the judiciary'. This is supplemented by particular duties imposed 'for the purpose of upholding that independence'. These are set out in section 3(5) and (6) as follows:

(5) The Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary.
(6) The Lord Chancellor must have regard to –

(a) the need to defend that independence;
(b) the need for the judiciary to have the support necessary to enable them to exercise their functions;

> (c) the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.

The duty placed on ministers and others by section 3(1) is of a declaratory rather than specifically enforceable nature, though it may be hoped that it will be taken seriously and contribute to sustaining a culture of judicial independence. The obligation of the Lord Chancellor to have regard to 'the need to defend that independence' (s 3(6)) seems to add little to his duty to 'uphold the continued independence of the judiciary', but it emphasises that he has a special responsibility in this matter, over and above that resting upon other ministers. (Compare the sceptical comments of Woodhouse (2004) 24 *LS* 134, 141–3.)

In terms of the oath that must be taken by the Lord Chancellor, he swears to 'defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible' (s 17). If matters of concern should not be satisfactorily resolved, the Chief Justice of any part of the United Kingdom may invoke the power conferred by section 5(1) to:

> lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom.

(With regard to the independence of the judiciary in Northern Ireland see sections 4, 10 and 11 of the Act.)

The tenure of members of the lower judiciary is not secured by the Act of Settlement procedure. Circuit Judges and Recorders, for instance, may be dismissed by the Lord Chancellor on the ground of misbehaviour or incapacity, but only with the agreement of the Lord Chief Justice and in accordance with procedures prescribed by regulations made under the Constitutional Reform Act 2005 (s 115). The question arose, in respect of part-time or temporary judicial office, whether the office-holder was an 'independent' tribunal in the meaning of Article 6(1) of the European Convention on Human Rights (right to a fair trial by an independent and impartial tribunal). In *Starrs v Ruxton* 2000 SLT 42 the High Court of Justiciary in Scotland held that trial before a temporary sheriff, who held office at pleasure, could be removed from office at any time, and the renewal of whose appointment was within the unfettered discretion of the executive, did not constitute a fair hearing before an independent tribunal as required by Article 6(1). (See O'Neill (2000) 63 *MLR* 429.) In consequence of the ruling in *Starrs* no further use was made of temporary sheriffs and the Bail, Judicial Appointments etc (Scotland) Act 2000 provided for the appointment of part-time sheriffs who would have security of tenure. New arrangements were also made to strengthen the security of tenure of part-time

judicial officers in England and Wales (eg deputy High Court Judges, deputy Circuit Judges and Recorders). (See *Judicial Appointments Annual Report 1999–2000*, Cm 4783/2000, paras 2.14–2.18.)

Security of tenure is essential to judicial independence, but it has been rightly said that this 'cannot justify judicial immunity from proper investigation of allegations of misconduct' (David Pannick, *The Times*, 24 February 1998). Complaints about judicial conduct were formerly made to the Lord Chancellor who as head of the judiciary could, after investigation, 'guide, counsel, advise or rebuke' or, rarely, exercise his powers of dismissal in respect of the lower judiciary. (A Circuit Judge was dismissed in 1983 for the offence of smuggling whisky.) Brazier deplored the Lord Chancellor's power of dismissal as 'a disturbing accretion of power in the hands of a Minister' (*Constitutional Practice* (3rd edn 1999), p 298). The matter is now regulated by the Constitutional Reform Act 2005, sections 108–121. It is there provided (s 115) that the Lord Chief Justice may, with the agreement of the Lord Chancellor, make regulations for the procedure to be followed in investigating allegations of judicial misconduct. The Lord Chief Justice is authorised to give formal advice or a formal warning or reprimand to judicial office-holders – or in certain circumstances to suspend them from office – with the agreement of the Lord Chancellor (s 108(2)–(7)).

It is essential that the appointment of judges should not be affected by political partiality. The Lord Chancellor formerly had a decisive role in the appointment of judges by the Queen, in making recommendations either directly to the Queen or to the Prime Minister as adviser to the Queen on appointments to the most senior judicial offices. The Lord Chancellor, besides being a high judicial officer, was a member of the government. There were no formal safeguards against politically motivated appointments; as with so much in our constitution the avoidance of malpractice depended on those concerned observing the conventions and acting with respect for constitutional principles. Before the Second World War, appointments to the judiciary were sometimes made as a reward for political services, but such impropriety has not, since then, blemished the system.

The selection of those to be recommended for appointment by the Queen was made by the Lord Chancellor after informal and confidential consultations with the senior judiciary and senior members of the profession. Lord Scarman once described the process of appointment as 'all too haphazard' and an 'old-boy network' which had resulted in some 'terrible mistakes' (*The Times*, 8 October 1987, p 7). A President of the Law Society warned of the risk that the system might discriminate 'in favour of those who fit the present mould of the existing judiciary' ((1990) 140 *NLJ* 1594). In response to such misgivings JUSTICE (the British Section of the International Commission of Jurists) proposed the establishment of a Judicial Commission, including lawyers and judges but with a majority of lay members, which would make recommendations on judicial appointments to the Lord Chancellor (*The Judiciary in England and*

Wales, A Report by JUSTICE (1992), ch 6). Successive Lord Chancellors declined to adopt proposals of this kind, but in 1997 Lord Irvine of Lairg decided on more limited reforms of the system of appointment. He announced that appointments to the High Court would no longer be by invitation only and that applications would be solicited from all eligible members of the professions. An annual report would be presented to Parliament on the operation of the judicial appointments system. Following an independent scrutiny of appointment procedures carried out by Sir Leonard Peach at the request of the Lord Chancellor, a Commission for Judicial Appointments was established, not to advise on appointments but to provide an independent oversight of the system.

The Constitutional Reform Act 2005 placed the system of judicial appointments on a modern footing. The role of the Lord Chancellor remains important, in advising the Queen on appointments to high judicial offices and in himself appointing many judicial office-holders, for instance Assistant Recorders, deputy District Judges, justices of the peace, and chairmen and members of a great number of tribunals. His role is, however, complemented by sections 63–107 of the Act, which established a new Judicial Appointments Commission of fifteen members: a lay person as chairman; five judicial members; two members from the legal professions; five lay members; a tribunal chairman, tribunal member or arbitrator; and a justice of the peace. Commissioners are appointed by the Queen on the recommendation of the Lord Chancellor who acts in accordance with procedures, set out in Schedule 12 to the Act, which are designed, through the involvement of the Judges' Council or an independent panel, to exclude partisan considerations from appointments.

The Judicial Appointments Commission has a critical role in the appointment of the Lord Chief Justice, other Heads of Division, Lords Justices of Appeal, High Court Judges and other judicial office-holders. When an appointment is to be made, the Commission (in the case of a High Court Judge or listed office-holder) or a selection panel appointed by it (in the case of the Lord Chief Justice, Head of Division or Lord Justice of Appeal) decides upon the selection process to be applied and proceeds to apply it. Its selection of one person is presented in a report to the Lord Chancellor. (What follows is described here in summary form: for the full details see sections 67–96 of the Constitutional Reform Act.)

On receiving the report (stage 1) the Lord Chancellor has three options: (a) to accept the selection; (b) to reject it; (c) to require the Commission or panel to reconsider the selection. Following a *rejection* or *requirement to reconsider*, the Commission or panel must again make a selection. The Lord Chancellor has then (stage 2) the same three options: to accept, reject or require reconsideration; but he may reject the selection only if it was made following a reconsideration at stage 1, and may require reconsideration of the selection only if it was made following a rejection at stage 1. Following a further selection after rejection or reconsideration at stage 2, the Lord Chancellor must, at stage 3,

accept the selection. If the Lord Chancellor rejects or requires reconsideration of a selection at stages 1 or 2, the Commission or panel in proceeding to a further selection may not select the person rejected, but following a reconsideration may select the person reconsidered. Selection by the Commission or a selection panel 'must be solely on merit'; subject to this the Commission must in performing its functions 'have regard to the need to encourage diversity in the range of persons available for selection for appointments' (sections 63–64 of the Act).

The *Judicial Appointments Annual Reports* published by the Department for Constitutional Affairs are a useful source of information and can be found at www.dca.gov.uk. For judicial appointments in Scotland, see the Judicial Appointments Board for Scotland (www.judicialappointmentsscotland.gov.uk) and the Scottish Executive Consultation Paper, *Strengthening Judicial Independence in a Modern Scotland* (2006); for Northern Ireland, see the Justice (Northern Ireland) Act 2002 and the Northern Ireland Judicial Appointments Commission.

The independence of the judiciary may be put in contention when judges become involved in issues of acute political controversy. It is at such times that the greatest circumspection is called for from all those concerned in the judicial process, as well as particular restraint from politicians and members of the government. There were lapses in these respects during the miners' strike of 1984–85 (see Oliver, 'The independence of the judiciary' (1986) 39 *Current Legal Problems* 237 and 'Politicians and the courts' (1988) 41 *Parliamentary Affairs* 13) and a singular lack of governmental restraint in the 1990s is chronicled by Loveland, 'The war against the judges' (1997) 68 *Political Quarterly* 162. This 'war' was not succeeded by a permanent peace and Lord Irvine, as Lord Chancellor, made it known that he had many times had to argue in government 'in ways that ensure that the independence of the judiciary is upheld' (Committee on the Lord Chancellor's Department, *Evidence*, HC 611-I of 2002–03, Q 29). Lord Irvine added that:

> In all governments some ministers have spoken out against decisions that they do not like and I have to say that I disapprove of that. I think that it undermines the rule of law and . . . that when you get court decisions you favour, you do not clap and when you get a court decision which is against you, you do not boo.

Lord Irvine's disquiet had been provoked by some ill-judged responses by ministers to judicial decisions that displeased them, for instance a decision by Collins J in 2003 that the Home Secretary had acted unfairly in denying support to destitute asylum-seekers. (The Home Secretary's appeal against this decision was dismissed by the Court of Appeal: *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36. On this episode see Bradley [2003] *PL* 397; and see generally Stevens, 'A loss of innocence?: Judicial independence and the separation of powers' (1999) 19 *OJLS* 365.)

One circumstance that has provoked considerable disquiet in recent years about the independence of the judiciary from the executive is the government's use of senior judges to chair politically sensitive public inquiries. Several such inquiries have been chaired by judges, although not all are. Examples include the Scott Inquiry into 'arms to Iraq' in the 1990s, the Phillips Inquiry into BSE ('mad cow disease'), the Hutton Inquiry into the death of Dr David Kelly and the Saville Inquiry into 'Bloody Sunday' (on which see, respectively, A Tomkins, *The Constitution after Scott: Government Unwrapped* (1998), www.bseinquiry.gov.uk, www.the-hutton-inquiry.org.uk and www.bloody-sunday-inquiry.org). The Butler Inquiry into the state and use of secret intelligence on Iraqi weapons of mass destruction (see www.butlerreview.org.uk) is an example of such an inquiry being chaired by someone other than a judge, Lord Butler being a former Cabinet Secretary. The House of Commons Public Administration Select Committee investigated the use of judges to chair such inquiries and recommended as follows (*Government by Inquiry*, HC 51 of 2004–05, paras 57–8):

> We recognise the value of using senior judges to chair some inquiries. Their training and experience give them important transferable skills, and they provide reassurance that an inquiry will be independent and fair. Their use is most appropriate in fact-finding inquiries which are at a distance from government. Inquiries into issues at the centre of government are, however, politically contentious, as well as requiring an understanding of how government works. Criticism of their reports in such cases may undermine the impact of the inquiry and the judiciary as an institution, as well as being detrimental to the reputation of the individual judges. With developments in public law, Human Rights Act considerations about impartiality and the . . . establishment of a Supreme Court, which involves the institutional separation of the judges from the House of Lords, care needs to be exercised in the future use of judges for such work, particularly those from the highest court, and especially in relation to politically sensitive cases. We . . . recommend that decisions about the appointment of judges to undertake inquiries should be taken co-equally by the government and the Lord Chief Justice or senior law lord.

The Government rejected the committee's recommendation, but section 10 of the Inquiries Act 2005 now provides that if a minister proposes to appoint a judge to be a member of an inquiry, he must first *consult* either the senior law lord or the Lord Chief Justice. Whether this provision will be sufficient to allay concerns about judicial independence and the chairing of sensitive public inquiries remains to be seen. (For further consideration, see Beatson, 'Should judges conduct public inquiries?' (2005) 121 *LQR* 221.)

(d) The courts and Parliament

When we turn to the separation of judiciary and legislature – the courts and Parliament – we are at once struck by the presence, until our own time, of judges in the Upper House of Parliament. The Law Lords (Lords of Appeal in

Ordinary), appointed under the Appellate Jurisdiction Act 1876, sat as the final court of appeal for England, Wales, Northern Ireland and (in civil cases) Scotland. Besides sitting as judges in the Appellate Committee of the House of Lords, the Law Lords might also – and frequently did – take part in debates and in the legislative functions of the Upper House.

The decision of the European Court of Human Rights in *McGonnell v United Kingdom* (2000) 30 EHRR 289 (above) also had implications for the dual role of the Law Lords as both judges and legislators. In 2000 the Law Lords adopted a Statement of Principles for their guidance in participating in the business of the House so that they should not be disqualified from adjudicating on issues that might come before them in their judicial capacity. The statement embodied two broad principles (HL Deb vol 614, col 419, 22 June 2000):

> As full members of the House of Lords the Lords of Appeal in Ordinary have a right to participate in the business of the House. However, mindful of their judicial role they consider themselves bound by two general principles when deciding whether to participate in a particular matter, or to vote: first, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.

This act of self-denial was thought by some to provide a sufficient assurance of the independence and impartiality of the Law Lords in adjudicating any case that came before them. But while, on the one hand, it restricted their ability to make a useful contribution to the work of the Upper House, it did not eliminate all possibility of confusion – at least in public perception – of the legislative and judicial roles of the Law Lords. The Government concluded that the continuance of the Law Lords in their existing roles could not be reconciled with Article 6 of the European Convention on Human Rights, which demands of judges that they should be manifestly independent and impartial – should be so in fact and should present an objective appearance of being so. In the Government's view it was in any event desirable in principle that the final court of appeal should be clearly separated from Parliament, saying that it was not 'appropriate in a twenty-first century democracy for the highest appellate court to be part of the legislature' (*Judicial Appointments and a Supreme Court*, Cm 6150/2004, para 11).

The Constitutional Reform Act 2005 accordingly provided for the Lords of Appeal in Ordinary to be removed from the Upper House of Parliament and for the creation of a new Supreme Court as a final court of appeal for the United Kingdom. This reform is currently scheduled to come into force in 2009. The Supreme Court will assume the jurisdiction of the former Appellate Committee of the House of Lords and also the devolution jurisdiction (see chapter 4) of the Judicial Committee of the Privy Council. The existing Lords of Appeal in

Ordinary will become the first Justices of the Supreme Court. Succeeding Supreme Court judges are to be appointed by the Queen on the recommendation of the Prime Minister, after a process of selection in which an independent selection commission, convened by the Lord Chancellor, has a decisive role. The selection procedures are similar to those established by the Constitutional Reform Act for other judicial appointments as described above.

(See further Carnwath, 'Do we need a Supreme Court?' (2004) 75 *Political Quarterly* 249; Hale, 'A Supreme Court for the United Kingdom?' (2004) 24 *LS* 36; Masterman, 'A Supreme Court for the United Kingdom' [2004] *PL* 48; Webber, 'Supreme Courts, independence and democratic agency' (2004) 24 *LS* 55; Woodhouse, 'The constitutional and political implications of a United Kingdom Supreme Court' (2004) 24 *LS* 134; Ryan, 'The House of Lords and the shaping of the Supreme Court' (2005) 56 *NILQ* 135.)

If it could be said without qualification that 'Parliament makes the laws, the courts enforce them', there would be a complete separation of functions between the legislature and the judiciary. In reality the common law has been made by the courts, which continue to have a law-making role in the modern constitution, as we have seen. It is, however, a subordinate role, not to be extended so as to usurp the primary legislative power of Parliament. In *Duport Steels Ltd v Sirs*, the separation of powers was invoked as defining the relation of the courts to Parliament. In this case the House of Lords reversed the decision of the Court of Appeal in which an unwarrantably restrictive interpretation had been placed on section 13(1) of the Trade Union and Labour Relations Act 1974 (as amended in 1976), which conferred immunity from liability in tort for an act done by a person 'in contemplation or furtherance of a trade dispute'.

Duport Steels Ltd v Sirs [1980] 1 WLR 142 (HL)

Lord Diplock: . . . My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.

A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed; if it had, it would have made some provision in the Act in order to prevent them. It is at least possible that Parliament when the Acts of 1974 and 1976 were passed did not anticipate that so widespread and crippling use as has in fact occurred would be made of sympathetic withdrawals of labour and of secondary blacking and picketing in support of sectional interests able to exercise 'industrial muscle'. But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and, if so, what are the precise limits that ought to be imposed upon the immunity from liability for torts committed in the course of taking industrial action. These are matters on which there is a wide legislative choice the exercise of which is likely to be influenced by the political complexion of the government and the state of public opinion at the time amending legislation is under consideration.

It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest.

Lord Scarman: . . . My basic criticism of all three judgments in the Court of Appeal is that in their desire to do justice the court failed to do justice according to law. When one is considering law in the hands of the judges, law means the body of rules and guidelines within which society requires its judges to administer justice. Legal systems differ in the width of the discretionary power granted to judges: but in developed societies limits are invariably set, beyond which the judges may not go. Justice in such societies is not left to the unguided, even if experienced, sage sitting under the spreading oak tree.

In our society the judges have in some aspects of their work a discretionary power to do justice so wide that they may be regarded as law-makers. The common law and equity, both of them in essence systems of private law, are fields where, subject to the increasing intrusion of statute law, society has been content to allow the judges to formulate and develop the law. The judges, even in this, their very own field of creative endeavour, have accepted, in the interests of certainty, the self-denying ordinance of 'stare decisis', the doctrine of binding precedent: and no doubt this judicially imposed limitation on judicial law-making has helped to maintain confidence in the certainty and evenhandedness of the law.

But in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes, and un-makes, the law: the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved

> without violating the legislative purpose of the statute may the judge select the construction which best suits his idea of what justice requires. . . .
>
> Within these limits, which cannot be said in a free society possessing elective legislative institutions to be narrow or constrained, judges, as the remarkable judicial career of Lord Denning himself shows, have a genuine creative role. Great judges are in their different ways judicial activists. But the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today.

(See the comments on this case by TRS Allan, *Law, Liberty, and Justice* (1993), pp 62–4 and by Tomkins, [1999] *PL* 525, 530–1.) It is right that judges should have regard, in resolving the uncertainties and ambiguities of statutory language, to the broad objective of the statute and also to fundamental rights and principles which the courts should seek to uphold. What Lord Diplock was warning against was a substitution by the judge of his own view of the public interest or of justice or fundamental principle for the clear expression of Parliament's will. Reforming legislation has sometimes failed in its purpose when it has encountered discordant ideas or principles embedded in the judicial tradition. (See, for instance, the discussion of section 17(1) and (2) of the Trade Union and Labour Relations Act 1974 by Lord Wedderburn, 'The injunction and the sovereignty of Parliament' (1989) 23 *The Law Teacher* 4.)

It was aptly said by Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638, that 'Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed'. As we saw when considering the sovereignty of Parliament, above, the courts have the function of interpreting parliamentary legislation, and although that judicial task is expressed as one of ascertaining the will or intention of Parliament, the process of interpretation is far from being mechanical and allows for a significant injection of judicial policy into the application of statutes. 'Parliament is accustomed', says Sir Stephen Sedley, 'to accepting from the judges that it meant things which may never have crossed its collective mind' (G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994), p 36). Lord Bridge observed in *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1, 48:

> In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

The courts may not question what takes place in Parliament, as was declared long ago in Article 9 of the Bill of Rights 1689:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Article 9 was said by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 638, to be a provision 'of the highest constitutional importance' in ensuring the freedom of members of Parliament to discuss freely whatever matter they choose without incurring any civil or criminal penalty.

When in 1993 Lord Rees-Mogg brought legal proceedings to challenge the proposed ratification by the United Kingdom Government of the Treaty on European Union (Maastricht Treaty), there being at the time a bill before Parliament to make provisions consequential on the ratification of the Treaty, a complaint was raised in the House of Commons that the proceedings would involve the questioning of debates or proceedings in the House, contrary to Article 9 of the Bill of Rights. The House took no action on this complaint, but the Speaker was sufficiently concerned to deliver a warning (HC Deb vol 229, col 353, 21 July 1993):

> I . . . take with great seriousness any potential questioning of our proceedings in the courts . . .
>
> There has of course been no amendment of [Article 9 of] the Bill of Rights, and that Act places a statutory prohibition on the questioning of our proceedings . . .
>
> I am sure that the House is entitled to expect, when the case [*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg*] begins to be heard on Monday, that the Bill of Rights will be required to be fully respected by all those appearing before the court.

In the result the course taken in the legal proceedings presented no threat of infringement of Article 9. (See [1994] QB 552 at 561. The meaning and scope of Article 9 are not free from difficulty and may still exercise the courts: see D Oliver and G Drewry (eds), *The Law and Parliament* (1998), ch 5 and *Buchanan v Jennings* [2004] UKPC 36.)

When matters are raised in the courts which at the same time are being considered, or are about to be considered, by Parliament, the courts show a particular concern not to act in a way that will interfere with the parliamentary proceedings, but they will not necessarily decline to assume jurisdiction in the matter (see *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657).

While the courts must abstain from improper interference in proceedings in Parliament, it is also a constitutional principle that Parliament should not interfere in or prejudice the judicial process. This is expressed in the *sub judice* rule, which is part of the law and custom of Parliament. The *sub judice* rule, which applies to motions, debates and Questions in each House, disallows consideration of cases in which proceedings are active in United Kingdom

courts. Observance of the rule is ensured by the Speaker in the House of Commons and by the Leader of the House of Lords, each of whom has discretion to waive the rule. The *sub judice* rule is in any event subject to the right of the two Houses to legislate on any matter (or to discuss delegated legislation) and is relaxed where a case concerns a ministerial decision or issues of national importance such as the economy, public order or essential services. (See the Appendix to the House of Commons Standing Orders and HL Deb, cols 1725–6, 11 May 2000 and House of Commons Procedure Committee, *The Sub Judice Rule of the House of Commons*, HC 125 of 2004–05.)

Judges are shielded from criticism in Parliament by a rule that charges against a judge can be made only on a substantive motion upon which a vote will be taken. The Speaker of the House of Commons ruled on 4 December 1973 (HC Deb vol 865, col 1092):

> Reflections on [a] judge's character or motives cannot be made except on a motion. No charge of a personal nature can be raised except on a motion. Any suggestion that a judge should be dismissed can be made only on a motion.

A qualifying ruling was given by the Speaker on 19 July 1977 (HC Deb vol 935, col 1381):

> Yet the rule is not so restrictive as some Hon. Members may think. It is not necessary to have a substantive motion before the House to allow Members to argue that a judge has made a mistake, that he was wrong, and the reasons for those contentions can be given within certain limits, provided that moderate language is used.

See further R Brazier, *Constitutional Practice* (3rd edn 1999), pp 276–81.

(e) Parliament and the executive

As long ago as 1867 Walter Bagehot highlighted 'the close union, the nearly complete fusion, of the executive and legislative powers' (*The English Constitution* (1963 edn), p 65). The executive is headed (under the Queen as formal and ceremonial head of state) by ministers who sit in Parliament and are normally able, through the support of a majority, to exercise significant control of proceedings in the elected House. The Leader of the House in both the Commons and the Lords is a minister and government Whips arrange the business of each House. Parliamentary government depends upon party, and it has been remarked that Parliament 'has little distinct life or identity of its own, separate from government and party' (S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999), p 372). Despite the popularity of this view, however, it stands in need of substantial revision as a result of the recent researches of Philip Cowley, who has chronicled in detail how the Labour backbench MPs of the 1997 and 2001 Parliaments have been more rebellious than

any since the mid-nineteenth century, rebelling against the government line on a broad range of issues, from counter-terrorism and foreign policy (particularly over the Iraq war) to education reform and from university fees to reform of the NHS. (See P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005).)

Yet the domination of the House of Commons by party and government continues to be seen as a formidable obstacle to Parliament's performance of its traditional – and democratically essential – function of scrutinising and checking the operations of the executive. So far as there is a separation of powers between Parliament and government it is not one in which equal powers are counter-balanced. Nonetheless, it would be wrong to see Parliament as a cowed and supine body, the mere instrument of the government's will. A spirit of independence still stirs in the House of Commons and may ignite rebellion or foster subversive alliances among backbenchers. Members of non-conformist outlook, of whom there are not a few, preserve a sense of Parliament's separateness and autonomy, and look for reforms in practice and procedure which would strengthen Parliament's authority in its relations with the executive. (These matters are further considered in chapter 9.)

On occasion it may fall to the courts to ensure that the government is respectful of legal limits in its relations with Parliament. This can be seen in the following case.

Secretary of State for the Home Department, ex p Fire Brigades Union [1995] 2 AC 513 (HL)

Parliament had made provision in the Criminal Justice Act 1988 for a scheme for the compensation of victims of crime. The Act provided further that the statutory scheme should come into force on a day to be appointed by the Secretary of State in a commencement order. The Secretary of State then decided that he would not make a commencement order to implement the scheme and instead used prerogative power to introduce a different, less generous scheme. The House of Lords held by a majority that in so doing the minister had frustrated the will of Parliament and had acted unlawfully. While it was for the minister to decide when it might be appropriate to bring the statutory scheme into force, this was a matter that he was required to keep under continuing review: instead he had 'written off' the statutory scheme, had 'struck out down a different route and thereby disabled himself from properly discharging his statutory duty in the way Parliament intended' (Lord Nicholls). 'It is for Parliament, not the executive', said Lord Browne-Wilkinson, 'to repeal legislation'. We may see the judgment of the majority as upholding the separation of powers in preventing an attempt by the executive to legislate (under prerogative) in defiance of the intention of Parliament.

On the other hand it was a dissenting Law Lord in this case, Lord Mustill, who expressly invoked the separation of powers in warning that *the courts* must not overstep the boundaries that were set between them, the executive and

Parliament: 'it is the task of Parliament and the executive in tandem, not of the courts, to govern the country'. Similarly Lord Keith, also dissenting, considered the majority ruling to be 'an unwarrantable intrusion by the court into the political field and a usurpation of the function of Parliament'. (For comment, see Barendt [1995] *PL* 357 and A Tomkins, *Public Law* (2003), ch 1.)

See generally on the separation of powers T Allan, *Law, Liberty, and Justice* (1993), ch 3; Barendt, 'Separation of powers and constitutional government' [1995] *PL* 599; Bellamy, 'The political form of the constitution: the separation of powers, rights and representative democracy' (1996) 44 *Political Studies* 436; C Munro, *Studies in Constitutional Law* (2nd edn 1999), ch 9; Barber, 'Prelude to the separation of powers' [2001] *CLJ* 59.

5 Accountability

Accountability is a liability or obligation attaching to those invested with public powers or duties. Its primary ingredient is an obligation to explain and justify decisions made or action taken. EL Normanton says of it ('Public accountability and audit: a reconnaissance' in B Smith and D Hague (eds), *The Dilemma of Accountability in Modern Government* (1971), p 312):

> Accountability is a device as old as civilised government itself; it is indispensable to regimes of every kind. It provides the post-mortem of action, the test of obedience and judgement, the moment of truth; it can validate the power of command, or it can create favourable conditions for individual responsibility and initiative.

Accountability is retrospective: it is an obligation to answer *after the event* for acts or decisions. But an awareness that an account will have to be given may have a bracing effect on the quality of decision-making.

We can find in accountability a link with democracy, in that those elected by the people to govern are given power not for their own ends but for the public good; and a link with the rule of law, which demands that those to whom power is granted should not exceed the limits of their authority. Accountability for the use of power is supportive of both democracy and the rule of law and we may claim it as a leading principle of our constitution even if it is only imperfectly realised in practice.

The ultimate accountability of government in a democracy is to the electorate, but more precisely targeted systems of accountability are needed between elections or for application to those (such as civil servants) over whom the electorate has no power of sanction. None who wield the powers or discharge the functions of the state should be exempt from the requirements of accountability. We therefore expect that ministers, their battalions of officials, the chief executives of central government agencies, local government councillors and officers, health authorities, the police, immigration officers and other public bodies and officers will be subject to mechanisms of accountability.

Accountability in a democratic state under the rule of law in principle implies a duty to account to an independent agency outside the organisation whose actions are in question. The outside agency may be the legislature, or a court, or a tribunal, or some other independent body or officer. In actuality we find that for some activities the only form of direct accountability provided is internal (or 'managerial') by which account has to be rendered to superior officers in the organisation, or its head: the personal accountability of civil servants in the United Kingdom is, in general, of this kind. Managerial accountability has a part to play in a structure of accountable government, but we will normally expect that the organisation itself or its head should be accountable in the fuller, 'public' sense, to an outside body.

Accountability may be legal, directed to ensuring that action taken is in accordance with law, or it may relate to any (or several) of other desirable features of executive action such as rationality, economy, efficiency and fairness. (What a particular authority is to be accountable *for* depends on its range of functions, degree of autonomy, etc.)

When acts of the administration may affect individual rights or interests, accountability requires also that appropriate reparation should be made to the victim of illegal action or maladministration. (This may be called 'amendatory' or 'remedial' accountability.) Here accountability overlaps with the redress of grievances. *Legal* accountability for decisions of public authorities depends on the availability of a right of appeal to a court or tribunal or on access to judicial review. Most administrative decisions, however, are not subject to appeal (principal exceptions being social security, immigration and tax matters, where appeals lie to special tribunals); and judicial review, although of great importance in the maintenance of legality in public administration, is limited in a number of ways as a remedy for the aggrieved citizen. (See chapter 10.)

The principal mechanism of *political* accountability in the United Kingdom is found in the doctrine of ministerial responsibility to Parliament. At the end of the nineteenth century the legal and political responsibility of ministers was, as MJC Vile says (*Constitutionalism and the Separation of Powers* (1967), p 231), 'the crux of the English system of government'. The legal responsibility of ministers to the courts was complemented by their political responsibility to Parliament. Ministerial responsibility in the political sense was the result of the development of conventions by which the Sovereign had become bound to act on the advice of ministers, and ministers had become answerable to Parliament for the advice given. The principle of ministerial responsibility, as an element in the theory of the British constitution, was derived from the reality of constitutional practice. 'The accountability of ministers to Parliament, and through Parliament to the nation, is the theoretical basis of our modern English Constitution'; so wrote Sidney Low in 1904 (*The Governance of England*, p 133).

According to this theory the power of government was 'placed under the check of a strict responsibility and control' (Earl Grey, *Parliamentary Government* (new edn 1864), p 5). But it was only for a few decades in the middle of the nineteenth

century, when a Parliament not yet infiltrated by disciplined parties showed its ability to bring down governments, that so strong a statement of the theory might have been justified by the facts. Since then the government has established an ascendancy over Parliament, and the traditional parliamentary techniques of control and accountability, focused on ministers, have struggled to check the use of power in the corridors of the departmental bureaucracies and in the outworks of government occupied by quasi-autonomous organisations.

This modern development has led some to dismiss the theory of ministerial responsibility as mere fiction: it is now 'little more than a formal principle used by ministers to deter parliamentary interference in their affairs' says Vile (p 341). But it can still be maintained that 'The British constitution is built, however precariously, on the political accountability of ministers to Parliament' (M Flinders, *The Politics of Accountability in the Modern State* (2001), p xvi). No other theory of government has taken its place; it still explains much of what happens in government and Parliament, and it is through the mechanisms of ministerial responsibility that Parliament persists in its effort to 'watch and control' the government. The extent to which it is able to do so in practice is considered in chapter 9.

The theory of ministerial responsibility has in one respect had a baleful effect upon the control of public power. The courts have in a number of cases been influenced, in declining to question the exercise of powers by ministers, by the principle that ministers are answerable to Parliament for the use of their powers. In the words of JDB Mitchell: 'The respect for, and belief in, the efficacy of parliamentary controls moved courts to assume an attitude of restraint in the exercise of their admitted powers of control, which otherwise they might not have assumed' ([1965] *PL* 95, 100). For example, in *Liversidge v Anderson* [1942] AC 206 the House of Lords interpreted a wartime regulation which authorised the Home Secretary to order the detention of any person whom he had 'reasonable cause to believe' to be of hostile origin or associations as giving the minister a subjective discretion (it was enough that the minister himself *thought* that he had reasonable grounds for his belief) which could not be controlled by the courts. In justification of this ruling the Lords observed that the Home Secretary was answerable to Parliament for his decisions. (The ruling in *Liversidge v Anderson* has since been repudiated by the House of Lords in *IRC v Rossminster Ltd* [1980] AC 952.) More recently in *R v Secretary of State for Home Affairs, ex p Hosenball* [1977] 1 WLR 766 the Court of Appeal declined to review the Home Secretary's decision to deport a journalist in the interest of national security: 'He is answerable to Parliament as to the way in which he did it and not to the courts here' (Lord Denning MR at 783. See also *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890, 902.) A different view of ministerial responsibility was taken by the High Court of Australia in *Re Toohey, ex p Northern Land Council* (1981) 38 ALR 439, in asserting its jurisdiction to control the exercise of power by the Crown. Gibbs CJ said (457) that 'under modern conditions of responsible government, Parliament

could not always be relied on to check excesses of power by the Crown or its Ministers', and Mason J said (481) that 'the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected'.

There are many actions of public authorities for which ministers have no or only limited responsibility to Parliament, and there is therefore a need for supplementary mechanisms of accountability. Several such mechanisms are in place. For instance, the expenditure of local and health authorities in England and Wales is subject to a system of audit (covering value for money as well as regularity of expenditure) under the general supervision of the Audit Commission for Local Authorities and the National Health Service. (See the Audit Commission Act 1998.) Likewise, central government expenditure is overseen by the National Audit Office, headed by the Comptroller and Auditor-General, and by the House of Commons Public Accounts Committee. As we saw in the previous section of this chapter, public inquiries have become a frequent occurrence in Britain, examining in detail a variety of problems and scandals in governmental and public life. As the House of Commons Select Committee on Public Administration put it (*Government by Inquiry*, HC 51 of 2004–05, para 2), 'the public inquiry has become a pivotal part of public life in Britain, and a major instrument of accountability'. As regards accountability for actions affecting individual citizens there is a great variety of arrangements, in some cases providing an avenue for redress of grievances. Such is the Ombudsman system, for resolving complaints of maladministration against government departments or local authorities. The investigation of complaints against the police is supervised by the Independent Police Complaints Commission established by the Police Reform Act 2002, replacing a previous complaints-handling system which had not enjoyed public confidence. The redress of grievances is considered further in chapters 9–10.

Traditional mechanisms of accountability have been put under strain by the fragmentation that has taken place in central government, through a proliferation of autonomous decision-making bodies (executive agencies and non-departmental public bodies) and the development of collaborative arrangements and networks in the policy-making process. These have included the involvement of private sector bodies (eg through advisory groups, contracting out and public-private partnerships) in the development and implementation of policy. (See further Elcock, 'The changing problem of accountability in modern government' (1998) 13 *Public Policy and Administration* 23; M Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (1998); M Flinders, *The Politics of Accountability in the Modern State* (2001).)

(a) Access to information and reasons

'Information', says PM Jackson, 'is the essential lubricant of any system of accountability and control' (*The Political Economy of Bureaucracy* (1982), p 246). Sir Richard Scott is of the same mind (*Scott Report* (1996), vol I, para

D4.58): 'Without the provision of full information it is not possible for Parliament, or for that matter the public, to hold the executive fully to account'. It is when information is withheld, or Parliament and public are misled, that accountability most signally fails. The question of accountability is, therefore, closely interwoven with that of 'open government', considered below, pp 556–64.

Opacity, and blurred accountability, may result from the complexity of decision-making processes in the modern state. RAW Rhodes ('The hollowing out of the state' (1994) 65 *Political Quarterly* 138, 147) remarks that:

> sheer institutional complexity obscures who is accountable to whom for what. Policy networks, or professional-bureaucratic functional alliances, are a characteristic feature of policy-making in Britain. Such networks restrict who contributes to policy-making and policy implementation. . . . They are also a form of private government; much of their work is invisible to the parliamentary and public eye. With the growth of trans-national networks linking UK networks to the EC, the policy process becomes more complex and the lines of accountability ever more difficult to identify.

A public authority is more effectively held accountable for decisions affecting the individual citizen if it has a duty to give reasons for those decisions. In identifying 'openness' as one of 'Seven Principles of Public Life' the Nolan Committee declared (*Nolan Report* (1995), p 14):

> Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

The JUSTICE–All Souls Review of Administrative Law recommended in 1988 that a general duty to give reasons for administrative decisions should be imposed by legislation. (See *Administrative Justice: Some Necessary Reforms* (1988), ch 3.) No such legislation was then forthcoming, but in the *Code of Practice on Access to Government Information* (2nd edn 1997), para 3, the Government undertook a general obligation 'to give reasons for administrative decisions to those affected', unless excused from doing so by statutory authority or well-established convention. There was an expectation that the Freedom of Information Act 2000 would provide for a general duty to give reasons for administrative decisions, but in the event it did not do so. Section 19 of the Act requires public authorities covered by the Act to adopt publication schemes specifying the classes of information which they will publish voluntarily. An authority must, in adopting such a scheme, 'have regard to the public interest . . . in the publication of reasons for decisions made by the authority'.

While many statutes require reasons to be given (whether invariably or only on request) for particular classes of decisions, the common law has not recognised a general duty to give reasons for administrative decisions. The courts have, however, shown an increasing willingness to require the giving of reasons

on the ground of fairness: see, for example, *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 and *R v Secretary of State for the Home Department, ex p Fayed* [1998] 1 WLR 763. The developing common law as to reasons is reflected in the following passage from the judgment of the court, given by Sedley J, in *R v Higher Education Funding Council, ex p Institute of Dental Surgery* [1994] 1 All ER 651, 665–6:

> The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. It is the relationship of these and other material considerations to the nature of the particular decision which will determine whether or not fairness demands reasons.
>
> In the light of such factors each case will come to rest between two poles, or possibly at one of them: the decision which cries out for reasons, and the decision for which reasons are entirely inapposite. Somewhere between the two poles comes the dividing line separating those cases in which the balance of factors calls for reasons from those where it does not. At present there is no sure indication of where the division comes. . . . No doubt the common law will develop, as the common law does, case by case. It is not entirely satisfactory that this should be so, not least because experience suggests that in the absence of a prior principle irreconcilable or inconsistent decisions will emerge. But from the tenor of the decisions principles will come, and if the common law's pragmatism has a virtue it is that these principles are likely to be robust. At present, however, this court cannot go beyond the proposition that, there being no general obligation to give reasons, there will be decisions for which fairness does not demand reasons. It follows that in appraising each case, the present included, too catholic an approach will amount to generalising what is still a particular obligation; though we are not prepared to accept [counsel for the respondent's] contention that it is any longer an exceptional one.

Sedley J went on to say that there were 'good arguments of public law and of public administration' in favour of a universal duty to give reasons, but that this was not yet part of our law and it remained to be seen what the 'continuing momentum' towards openness of decision-making would bring. Classes of case in which fairness required the giving of reasons included, said the judge, those affecting personal liberty and those in which the decision appeared aberrant (671).

(See further Campbell, 'The duty to give reasons in administrative law' [1994] *PL* 184; Craig, 'The common law, reasons and administrative justice' [1994] *CLJ* 282; Sir Patrick Neill, 'The duty to give reasons: the openness of decision-making' in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998), pp 161–84; Le Sueur, 'Legal duties to give reasons' (1999) 52 *CLP* 150.)

3

Constitutional sources

Contents

In previous chapters we have seen that for a true view of the constitution we must take account of its rules, its institutions, and its 'ideas' or theories. In this chapter we outline the various sources of the British constitution and, in particular, the sources of the *rules* of the constitution. Some of these are legal rules, making up the 'law of the constitution'; others are rules of practice, known as 'constitutional conventions'. During the course of the chapter, we shall ask what are the distinctive features of constitutional laws and conventions, and we shall consider the relationship between these two kinds of rules.

1 Legal rules

Dicey (*Law of the Constitution* (1885), p 203) held it to be one aspect of the rule of law in England that:

> the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

Dicey's statement needs qualification. It fails to take account of the *extraordinary* powers deriving from the royal prerogative, or of the 'law and custom of

Parliament', which has developed separately from the 'ordinary' law. But the statement is more seriously misleading in that a large part of modern constitutional law consists of enactments conferring powers on public authorities, principles developed by the courts in interpreting and giving effect to those enactments, and remedies of exclusive application to public bodies: a corpus of public law, in short, which cannot be explained as a mere extension of private law rules to the administration.

It remains true that the legal rules of the constitution have, in general, evolved by the same processes, and from the same sources, as the law governing the relations between private persons. Thus, we find constitutional rules mingled with the rest of the law, in statutes and subordinate legislation, in the common law and decisions of judges.

(a) Statute

Although our constitution is frequently described as 'unwritten', almost all of it is written down, *somewhere*. What we do not have is a 'codified' constitution, or any sort of overarching, superior constitutional text. A considerable part of the British constitution consists of written Acts of Parliament which regulate the system of government or the exercise of public power. These include statutes which have established fundamental features of the constitution, as by defining or redefining the terms of the Union between England, Scotland and Northern Ireland (Acts of Union with Scotland 1707 and with Ireland 1800 and the devolution statutes of 1998), fixing the duration of Parliaments (Septennial Act 1715, amended by the Parliament Act 1911), defining the relations between the two Houses of Parliament (Parliament Acts 1911 and 1949), effecting changes in the law of the United Kingdom consequent upon accession to the European Communities (European Communities Act 1972), and giving domestic legal effect to the rights protected by the European Convention on Human Rights (Human Rights Act 1998). Elements of the constitution are also to be found in statutes directed against public disorder (Public Order Acts 1936 and 1986, Criminal Justice and Public Order Act 1994), conferring powers on the police and on the security and secret intelligence agencies (Police and Criminal Evidence Act 1984, Police Acts 1996 and 1997, Police Reform Act 2002, Security Service Act 1989, Intelligence Services Act 1994), remedying maladministration in government (Parliamentary Commissioner Act 1967), providing for civil proceedings by and against the Crown (Crown Proceedings Act 1947), regulating the franchise and the conduct of elections (Representation of the People Acts), and others far too numerous to mention.

Among these statutes are certain great constitutional Acts which were enacted in confirmation of the results of political upheaval or revolution, or as emphatic statements of what were conceived as fundamental rights or privileges. The antiquity of these Acts, or the great historical events with which they are associated, or the lasting worth of the principles contained in them – or a

combination of these features – have invested them with a kind of sanctity (in the minds of lawyers and to some extent in public sentiment) which is not unlike that elsewhere attaching to written constitutions. They include Magna Carta 1215, the Habeas Corpus Act 1679, the Bill of Rights 1689, the Act of Settlement 1701, the Act of Union with Scotland 1707 and the Statute of Westminster 1931. The Human Rights Act 1998 may in time take its place among them.

The following extracts are taken from the Bill of Rights 1689:

> [The] Lords Spirituall and Temporall and Commons pursuant to their respective Letters and Elections being now assembled in a full and free Representative of this Nation. . . . Does in the first place (as their Ancestors in like Case have usually done) for the Vindicating and Asserting their ancient Rights and Liberties, Declare
>
> That the pretended Power of Suspending of Laws or the Execution of Laws by Regal Authority without Consent of Parliament is illegal.
>
> That the pretended Power of Dispensing with Laws or the Execution of Laws by Regal Authority as it hath been assumed and exercised of late is illegal.
>
> . . . That levying Money for or to the Use of the Crown by pretence of Prerogative without Grant of Parliament . . . is illegal.
>
> . . . That the raising or keeping a standing Army within the Kingdome in time of Peace unless it be with Consent of Parliament is against Law.
>
> That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.
>
> That Election of Members of Parliament ought to be free.
>
> That the Freedom of Speech and Debates or Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.
>
> That excessive Bail ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted.
>
> . . . And that for Redress of all Grievances and for the amending strengthening and preserving of the Laws Parliaments ought to be held frequently.

The provisions of the Bill of Rights are not inviolate, and some have been altered by subsequent legislation; for example, it hardly needs saying that Protestant subjects no longer enjoy a special privilege in the keeping of arms. Some other provisions have lost their importance. There remains, however, a core of provisions which the courts will still uphold against the Crown or government (but not against specific and clear contrary provision by Parliament).

Attorney General v Wilts United Dairies Ltd (1921) 37 TLR 884 (CA)

It was the statutory duty of the Food Controller to regulate the supply and consumption of food, and he had power under the Defence of the Realm Acts and Regulations to make orders for this purpose. He made orders which fixed

maximum prices for milk and provided for the licensing of wholesale dealers. The maximum price fixed for the more productive counties of Cornwall, Devon, Dorset and Somerset was 2d a gallon less than for other areas, but dealers who took milk from these counties for sale elsewhere were required to pay 2d a gallon to the Food Controller. Licences were granted to the defendants to purchase milk in the four counties on the express condition that they should pay the 2d a gallon, but they afterwards refused to pay, and proceedings were brought to recover the amount claimed to be due.

The Court of Appeal held that the statutory provisions relied upon by the Food Controller did not give him power to levy a financial charge, and accordingly that the imposition of the charge was illegal.

> **Scrutton LJ**: . . . [T]he Bill of Rights . . . forbids 'levying money for the use of the Crown without grant of Parliament', and the requirement of this twopence appears to me clearly to come within these words. It is true that the fear in 1689 was that the King by his prerogative would claim money; but excessive claims by the Executive Government without grant of Parliament are, at the present time, quite as dangerous, and require as careful consideration and restriction from the Courts of Justice.

The judgment of the Court of Appeal was affirmed by the House of Lords: (1922) 38 TLR 781. (The same Article of the Bill of Rights was one of the grounds of the decision of the Court of Appeal in *Congreve v Home Office* [1976] QB 629.)

In *Williams v Home Office (No 2)* [1981] 1 All ER 1211, it was argued that the plaintiff's (claimant's) detention in a special control unit, while serving a sentence in Wakefield Prison, violated the prohibition in the Bill of Rights of the infliction of cruel and unusual punishments. Since the regime in the control unit was authorised only by delegated legislation (the Prison Rules) and not by the Prison Act 1952, it would be illegal if contrary to the Bill of Rights. It was held, however, on the evidence, that the regime was neither cruel nor unusual and therefore that there had been no breach of the Bill of Rights. Challenges in cases of this sort are now more likely to be founded on the Human Rights Act 1998, giving effect to Article 3 of the European Convention on Human Rights in its prohibition of 'inhuman or degrading treatment or punishment'. (See eg, *Davidson v Scottish Ministers* 2006 SLT 110.)

Article 9 of the Bill of Rights (parliamentary proceedings not to be questioned outside Parliament) has frequently arisen for consideration in modern times: see for example, *Rost v Edwards* [1990] 2 QB 460; *Pepper v Hart* [1993] AC 593, 623–4, 638–40; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *Hamilton v Al Fayed* [2001] 1 AC 395. (Article 9 is qualified by the Defamation Act 1996, s 13.)

Certain provisions of Magna Carta, too, continue to be relied upon in judicial proceedings. In *R v Secretary of State for the Home Department, ex p Phansopkar* [1976] QB 606, for example, the Court of Appeal held that a person seeking a

certificate of entitlement to enter the United Kingdom as a patrial (one having the 'right of abode' under provisions of the Immigration Act 1971 then in force) had the right to prompt and fair consideration of her application for the certificate, and could not be required first to return to her country of origin, there to suffer the same delays as affected those requiring leave to enter the United Kingdom. The court cited Magna Carta: 'To none will we sell: to no one will we delay or deny right or justice'. (See too *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603.)

Magna Carta was invoked by the applicant for judicial review in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Office* [2001] QB 1067, where it was argued that the exiling in the 1960s of the Ilois people from the Chagos Islands, a British overseas territory now known as the British Indian Ocean Territory, in order to make way for an American air-force base, was contrary to chapter 29 of Magna Carta, which provides that 'no freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed . . . but by . . . the law of the land'. The argument was unsuccessful, but in the course of his judgment Laws LJ emphasised the 'enduring significance' of Magna Carta, saying that it was 'in truth the first general declaration . . ., in the long run of our constitutional jurisprudence, of the principle of the rule of law'. (See Tomkins, 'Magna Carta, Crown and colonies' [2001] *PL* 571.)

Despite the special deference with which the Bill of Rights, Magna Carta and other great constitutional statutes are cited by the courts, none of them is immune from repeal by Parliament, and many of their provisions have in fact been so repealed. In this respect their legal status may seem to be no greater than that of the National Lottery etc Act 1993.

Chester v Bateson [1920] 1 KB 829 (DC)

A wartime regulation made under statutory authority provided that no person should bring proceedings for the ejectment of a tenant of any dwelling-house situated in certain areas of armament manufacture without the consent of the Minister of Munitions. In proceedings brought by a landlord, without the consent of the Minister, for the ejectment of a tenant, the validity of the regulation was challenged.

Darling J: . . . [Counsel for the landlord] has contended that this regulation violates Magna Carta, where the King declares: 'To no one will we sell, to no one will we refuse or delay right or justice'. I could not hold the regulation to be bad on that ground, were there sufficient authority given by a statute of the realm to those by whom the regulation was made. Magna Carta has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and Persians.

Nevertheless the regulation was held invalid since the 'grave . . . invasion of the rights of all subjects' which it effected had not been expressly authorised by the empowering Act of Parliament.

The proposition that 'constitutional' statutes have no higher status than other Acts of Parliament was countered by Laws LJ in the following case.

Thoburn v Sunderland City Council [2002] EWHC 195, [2003] QB 151

The Weights and Measures Act 1985 authorised the use of both metric and imperial measures for purposes of trade without preference of one over the other. Subsequently regulations were made, under power conferred by section 2(2) of the European Communities Act 1972, which prohibited such use and gave priority to a metric system. It was argued that the regulations were inconsistent with the 1985 Act, and that this later Act must be taken as having impliedly amended section 2(2) of the European Communities Act 1972, restricting the power it conferred in respect of matters regulated by the 1985 Act (the argument of 'implied repeal').

The court reached the conclusion that there was no inconsistency between the Weights and Measures Act 1985 and section 2(2) of the European Communities Act 1972, so that the argument of implied repeal fell away. Laws LJ nevertheless considered the question of principle, whether the European Communities Act 1972 could be *impliedly* repealed or amended by inconsistent provision in a later Act.

Laws LJ: . . . We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are Magna Carta 1297, the Bill of Rights 1689, the Union with Scotland Act 1706, the Reform Acts which distributed and enlarged the franchise (Representation of the People Acts 1832, 1867 and 1884), the Human Rights Act 1998, the Scotland Act 1998 and the Government of Wales Act 1998. The [European Communities Act 1972] clearly belongs in this family. It incorporated the whole corpus of substantive Community rights and obligations, and gave overriding domestic effect to the judicial and administrative machinery of Community law. It may be there has never been a statute having such profound effects on so many dimensions of our daily lives. The 1972 Act is, by force of the common law, a constitutional statute.

Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test

> could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. . . . A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute.

Laws LJ's invention in this case of a class of 'constitutional statutes' was both novel and significant. It may be argued that it was not so innovatory as might appear, for the courts had already recognised the existence of constitutional *rights*, which will not be overridden by an Act of Parliament unless Parliament's intention to do so is expressed in terms that are compellingly clear (see the rule in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, cited above, p 62). Nonetheless, Laws LJ's views were regarded as exceptional, and they have not (as yet) been approved by the House of Lords (although see *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, considered in chapter 2).

In a comment on the *Thoburn* case ((2002) 118 *LQR* 493), Geoffrey Marshall sees difficulty in the thesis of 'two-tier' legislation:

> The proffered definitions are undeniably vague and it is hard to see any clear dividing line between ordinary statutes and statutes that deal with rights of a kind that we would now regard as fundamental. Are rights to education, medical services or pensions basic or fundamental, or are they mere run-of-the-mill entitlements? And where statutes condition the legal relationship between citizen and State, when is the manner in which they do it general or overarching? Are Police Acts or Taxation Acts or trade union legislation general or overarching enough to qualify?
>
> What, in any event, is the rationale for supposing that some Acts of Parliament, whatever their subject matter, embody the intentions of the legislature in a more forceful way or in a more protected form than others, in the absence of any explicit Parliamentary expression of intention to create first and second class statutes? Is it really consistent with the sovereignty of Parliament that such a difference in status should be imposed on different segments of its handiwork? In the absence of a consistent and workable definition it seems likely that whatever statutes are judicially determined to be unamenable, for whatever reason, to implied repeal will turn out to be constitutional. This seems to inject an unwelcome element of uncertainty into our public law.

For ordinary public bills the committee stage in the House of Commons, when their clauses are discussed in detail, is normally taken 'upstairs' in a standing committee, rather than in committee of the whole House. The Select Committee on Procedure recommended in 1945 (*First Report*, HC 9–1 of 1945–46, para 6) that the committee stage of bills of 'first-class constitutional importance' should be taken on the floor of the House so that every member should have the

opportunity of discussing their detailed provisions. This principle was approved by the House of Commons (HC Deb vol 415, col 2402, 15 November 1945) and has since generally been followed (eg in the proceedings on the Human Rights Bill in 1998 and on the House of Lords Bill in 1999), though there is sometimes disagreement as to whether a bill is 'constitutional' or of the first class of importance. The matter is usually settled through 'the usual channels' of consultation between government and opposition, but cannot always be resolved in this way. For instance, a motion to commit the Intelligence Services Bill 1994 to a committee of the whole House, on the ground that it involved 'clear constitutional issues', was resisted and not carried. (Note also the controversy as to the 'constitutional' character of the British Nationality Bill 1980: HC Deb vol 995, cols 649 *et seq*, 4 December 1980; vol 996, col 1138, 12 January 1981.) There was initial disagreement between government and opposition about the legislative programmes for the Scotland Bill and the Government of Wales Bill in the 1997–98 session of Parliament, but after discussion between the usual channels each bill had its committee stage on the floor of the House. The entire committee stage of the Constitutional Reform Bill (2004–05) was taken on the floor of the House rather than, as the Government initially proposed, parts of it being taken in committee (see HC Deb vol 430, cols 589–90, 31 January 2005). (The committee stage of constitutional bills can be split, matters of principle being considered on the floor and more technical provisions in standing committee.) For a thorough analysis, see Hazell, 'Time for a new convention: parliamentary scrutiny of constitutional Bills 1997–2005' [2006] *PL* 247.

(b) Subordinate legislation

Subordinate legislation, in the sense of legislation by the executive, is normally made under the authority of Acts of Parliament (*delegated legislation*), but Orders in Council on a strictly limited range of subjects can be made (by the Queen in Council) under prerogative power – a type of primary, not delegated, legislation. Of this class are the Civil Service Orders in Council, which provide the legal base for the regulation of the civil service.

Delegated legislation is normally concerned with matters of detail but is sometimes of wider significance, and some Orders in Council and regulations made under statutory authority have a place among the sources of constitutional law. Subordinate legislation of this kind may reallocate functions of central government or regulate the exercise of powers by local or other public authorities. For instance, Orders in Council made under the Ministers of the Crown Act 1975 can be used to dissolve government departments, establish new ministerial offices or transfer functions between ministers. (See further T Daintith and A Page, *The Executive in the Constitution* (1999), pp 32–3, 36–7.)

Subordinate legislation made by ministers under the devolution statutes may relate to constitutional matters, for instance in transferring functions to the Scottish ministers (Scotland Act 1998, s 30(2)).

Restrictions on individual liberty sometimes have their source in subordinate legislation. For instance, in 1980 the Home Secretary's Immigration Rules – rules of a hybrid character which include a legislative element – introduced into English law the 'primary purpose' rule, which severely restricted the rights of spouses or fiancé(e)s of persons settled in the United Kingdom to enter the country for settlement. The rule was widely criticised as unjust but in *Rajput v Immigration Appeal Tribunal* [1989] Imm AR 350 it survived a challenge to its validity on the grounds that it was so uncertain, unclear and unfair in its operation that Parliament could never have intended that it should be made. The rule was abolished in 1997.

(For detailed accounts and case studies of the making of delegated legislation, see A Le Sueur and M Sunkin, *Public Law* (1997), chs 10, 11 and E Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001). The making and scrutiny of delegated legislation is considered further in chapters 7 and 9.)

(c) Common law

A substantial part of the law of the constitution is common law. '[W]hile other areas of substantive law have become land-masses of statute', remarks Sir Stephen Sedley, 'our constitutional law remains a common law ocean dotted with islands of statutory provision' ('The Sound of Silence' (1994) 110 *LQR* 270, 273). The doctrine of the rule of law, considered in the previous chapter, owes its authority to the common law. It is in the common law that we find a number of important powers of government, notably the 'prerogative' powers. These are the legal powers of the Crown. Some continue to be exercised by the monarch him-or herself, but most have now transferred to government ministers. Among the former are the power to appoint the Prime Minister, the power to dismiss the government, the power to dissolve Parliament (thereby triggering a general election) and the power to grant (or, exceptionally, to refuse to grant) the royal assent to legislation. All of these are legal powers for which there is no statutory authority: their source lies in the Crown prerogative, recognised by force of the common law. Among the prerogative powers of ministers are the power to make treaties, to conduct diplomacy, to deploy the armed forces (both within the United Kingdom and abroad), to employ and organise the civil service, to issue and revoke passports, and to grant pardons. Ministerial appointment (and removal), appointment to the peerage, and the conferring of honours also fall within the prerogative. (The prerogative powers of the monarch are considered in chapter 6; those exercisable by government ministers are considered in chapter 7.)

In addition, judges have created a broad variety of common law principles in matters which they see as touching the safety of the state, public order, the prevention of crime or the moral welfare of society. Accordingly, and controversially, the police enjoy common law powers of arrest, in addition to their statutory powers (see, for example, *Duncan v Jones* [1936] 1 KB 218), and common law

powers of entry, in addition to their statutory powers (see *Thomas v Sawkins* [1935] 2 KB 249). (For critical commentary, see K Ewing and C Gearty, *The Struggle for Civil Liberties* (2000), pp 261–74 and 289–95.) Indeed, the courts have allowed the police to exercise very considerable 'preventive' powers: further examples include *Piddington v Bates* [1961] 1 WLR 162 and *Moss v McLachlan* [1985] IRLR 76. In other cases, however, common law powers have been confined so as to protect the citizen from the arbitrary use of police power, for instance in *Lindley v Rutter* [1981] QB 128 (disallowing automatic search of persons in custody); *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155 (requiring reasons to be given before search of the person: see now the Police and Criminal Evidence Act 1984, s 54); and *Redmond-Bate v DPP* [2000] HRLR 249 (disapproving police action directed against persons whose conduct is lawful and unprovocative, but which is the occasion for the use of violence by others).

Statutes are interpreted by the courts against a background of common law principles, and some of these are regarded as having so fundamental a character that only very clear statutory language is accepted by the courts as effective to displace them.

Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 (HL)

By statute a person wishing to develop his land had normally to obtain the permission of the local planning authority or of the minister. The relevant legislation also provided that the minister's decision on the question whether permission was needed in a particular case should be final. The appellant company had applied for planning permission, and the minister, having ruled that permission was required, refused permission for part of the land and granted it for another part only upon conditions. The company brought proceedings in which it claimed that the proposed developments did not require planning permission and that as a consequence the minister's decisions were invalid. It was argued against the company that the courts had no jurisdiction to entertain the action because the Act had provided the only procedure for having the question of the need for permission determined.

Viscount Simonds: . . . The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. . . . It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J called it in *Francis v Yiewsley and West Drayton Urban District Council*, a 'fundamental rule' from which I would not for my part sanction any departure. . . . There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away.

Their Lordships held that the jurisdiction of the courts was not excluded, and that the company did not require planning permission for the proposed development. (See too *Raymond v Honey* [1983] 1 AC 1, 12–13, 14–15; *R v Secretary of State for the Home Department, ex p Leech (No 2)* [1994] QB 198; *Boddington v British Transport Police* [1999] 2 AC 143, 161; *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.)

The common law supplies the bulk of the legal principles by which the exercise of public powers may be qualified. While these common law principles have in recent years been supplemented with statutory principles (such as the principle of proportionality, derived from the Human Rights Act 1998), it remains the case that most of the standards against which the courts may judge the exercise of governmental powers originate in the common law of judicial review. This is true both of the substantive tests of legality and rationality (sometimes known as 'ultra vires') and also of the procedural grounds of review, also known as 'natural justice' (see, in more detail, chapter 10). The law of natural justice provides a good example of the contribution that the common law has made to our constitutional order.

Natural justice requires of decision-makers that they should act without bias (*nemo judex in causa sua*: no one should be judge in his own cause), allow those affected by the decision to be heard (*audi alteram partem*: hear the other side of the question), and reach their conclusion honestly and fairly. (These may, indeed, be seen as requirements of the rule of law.)

It offends against natural justice if a decision-maker is biased or has some financial or personal interest in the matter to be decided. Also a decision may be of such a kind (eg a decision of a court or tribunal) that justice must be *seen* to be done, so that a 'real possibility' of bias – from the viewpoint of a 'fair-minded and informed observer' – will invalidate the decision, even if no actual bias is shown. (See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357; *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187. Bias or the appearance of bias may also constitute an infringement of Article 6(1) of the European Convention on Human Rights.)

The obligation to give a hearing was declared long ago in the case of *Dr Bentley* (1723) 1 Stra 557, who had been deprived of his degrees by the University of Cambridge without notice. Fortescue J said in this case (567):

> [T]he objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.

The growth in modern times of governmental powers affecting the individual has extended the reach of natural justice – often expressed in its newer applications as a 'duty to act fairly' – and the courts continually work out its content and application in a great variety of circumstances. Lord Morris of Borth-y-Gest said in *Wiseman v Borneman* [1971] AC 297, 309:

> Natural justice, it has been said, is only 'fair play in action'. Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles J called 'the justice of the common law' (*Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194).

Lord Reid said in the same case (308) that where a procedure for decision-making was laid down by statute, the courts might supplement it with further safeguards if that was necessary to ensure the observance of natural justice, provided that 'to require additional steps would not frustrate the apparent purpose of the legislation'. It is presumed that Parliament, in conferring a power of decision-making, however wide, 'implicitly requires the decision to be made in accordance with the rules of natural justice' (*R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 574, per Lord Browne-Wilkinson). In *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 the House of Lords overruled earlier authority in holding that the courts could intervene to ensure the observance of natural justice by a prison governor exercising disciplinary authority over prisoners. This disciplinary function, said Lord Oliver (578), 'is a public function which affects the liberty and, to a degree, the status of the persons affected by it. As such it must . . . be subject to the general common law principle which imposes a duty of procedural fairness when a public authority makes a decision not of a legislative nature affecting the rights, privileges and interests of individuals.'

Subject to any further development of common law radicalism (discussed in the previous chapter), common law principles, however fundamental they may seem, have always to yield to unequivocal statutory provision. In addition, it may be clear that a statute is intended to implement a policy which runs counter to older ideas enshrined in common law. An example is the opposition between private rights of property, traditionally defended by the common law, and modern public welfare legislation (see eg, *Belfast Corpn v OD Cars Ltd* [1960] AC 490, 523–4, per Lord Radcliffe).

By inventing new common law doctrines the courts may bring about changes in the constitutional system, but they must be slow to do so 'by entering, or re-entering, a field regulated by legislation' (Lord Nicholls in *Re McKerr* [2004] UKHL 12, [2004] 2 All ER 409, [32]). Constitutional reform is primarily the responsibility of Parliament. The reforms witnessed since the election to power of New Labour in 1997 have been introduced, principally, by statute: see, for example, the Human Rights Act 1998, the devolution legislation of 1998, the House of Lords Act 1999, the Freedom of Information Act 2000 and the

Constitutional Reform Act 2005, among others. This is not to say, however, that common law rules of constitutional law cannot be changed by the courts: they clearly may be and, indeed, sometimes are. *M v Home Office* [1994] 1 AC 377, considered in the previous chapter, is a good example, as is the case study to which we now turn.

(i) Developing constitutional common law: a case study

The common law is (subject to Parliament) under the control of the judges, who may by their decisions modify and reinterpret constitutional powers and relationships, and redefine the rights of citizens. In the following case the court extended a common law principle and added to the government's armoury for the protection of Cabinet secrecy.

Attorney General v Jonathan Cape Ltd [1976] QB 752 (Lord Widgery CJ)

Richard Crossman, a minister in the 1964–70 Labour Government, kept a diary of Cabinet proceedings which he meant to publish in full, with the object of challenging the traditional secrecy of British government and giving a detailed public account of the working of the Cabinet. Crossman died before the diaries could be published, but after his death *The Sunday Times* began to publish extracts from them, and Crossman's literary executors proposed to publish the diaries in full as a book. In accordance with the usual practice as to ministerial memoirs, *The Sunday Times* and the executors first submitted the diaries to the Secretary to the Cabinet for his comments. Ordinarily if the Cabinet Secretary asked for the deletion of particular items which he thought infringed the confidentiality of Cabinet proceedings, or would be damaging to national security, the publishers would comply. In this instance, however, *The Sunday Times*, faithful to Crossman's intentions, began to publish the extracts although the Cabinet Secretary had refused to give them clearance.

The Attorney General brought proceedings for injunctions to prevent the further publication of the diaries. In no previous case had an injunction been granted or sought in similar circumstances, but the Attorney General argued that the courts had power to protect the confidentiality of Cabinet proceedings in the public interest. Counsel for the defendants contended, on the other hand, that if publication of Cabinet proceedings was contrary to the public interest, that was a matter to be remedied by legislation.

Lord Widgery CJ: . . . It has always been assumed by lawyers and, I suspect, by politicians, and the Civil Service, that Cabinet proceedings and Cabinet papers are secret, and cannot be publicly disclosed until they have passed into history. It is quite clear that no court will compel the production of Cabinet papers in the course of discovery in an action [but see now *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394, 432], and the Attorney-General

contends that not only will the court refuse to compel the production of such matters, but it will go further and positively forbid the disclosure of such papers and proceedings if publication will be contrary to the public interest.

The basis of this contention is the confidential character of these papers and proceedings, derived from the convention of joint Cabinet responsibility whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel compelled to resign. It is contended that Cabinet decisions and papers are confidential for a period to the extent at least that they must not be referred to outside the Cabinet in such a way as to disclose the attitude of individual Ministers in the argument which preceded the decision. Thus, there may be no objection to a Minister disclosing (or leaking, as it was called) the fact that a Cabinet meeting has taken place, or, indeed, the decision taken, so long as the individual views of Ministers are not identified.

There is no doubt that Mr Crossman's manuscripts contain frequent references to individual opinions of Cabinet Ministers, and this is not surprising because it was his avowed object to obtain a relaxation of the convention regarding memoirs of ex-Ministers. . . . There have, as far as I know, been no previous attempts in any court to define the extent to which Cabinet proceedings should be treated as secret or confidential, and it is not surprising that different views on this subject are contained in the evidence before me. The Attorney-General does not attempt a final definition but his contention is that such proceedings are confidential and their publication is capable of control by the courts at least as far as they include (a) disclosure of Cabinet documents or proceedings in such a way as to reveal the individual views or attitudes of Ministers; (b) disclosure of confidential advice from civil servants, whether contained in Cabinet papers or not; (c) disclosure of confidential discussions affecting the appointment or transfer of such senior civil servants.

The Attorney-General contends that all Cabinet papers and discussions are prima facie confidential, and that the court should restrain any disclosure thereof if the public interest in concealment outweighs the public interest in a right to free publication. . . .

I do not understand . . . the Attorney-General to be contending, that it is only necessary for him to evoke the public interest to obtain an order of the court. On the contrary, it must be for the court in every case to be satisfied that the public interest is involved, and . . . after balancing all the factors which tell for or against publication, to decide whether suppression is necessary.

The defendants' main contention is that whatever the limits of the convention of joint Cabinet responsibility may be, there is no obligation enforceable at law to prevent the publication of Cabinet papers and proceedings, except in extreme cases where national security is involved. In other words, the defendants submit that the confidential character of Cabinet papers and discussions is based on a true convention . . . namely, an obligation founded in conscience only. Accordingly, the defendants contend that publication of these Diaries is not capable of control by any order of this court.

If the Attorney-General were restricted in his argument to the general proposition that Cabinet papers and discussions are all under the seal of secrecy at all times, he would be in difficulty. It is true that he has called evidence from eminent former holders of office to the

effect that the public interest requires a continuing secrecy, and he cites a powerful passage from the late Viscount Hailsham to this effect. . . .

The defendants, however, in the present action, have also called distinguished former Cabinet Ministers who do not support this view of Lord Hailsham, and it seems to me that the degree of protection afforded to Cabinet papers and discussion cannot be determined by a single rule of thumb. Some secrets require a high standard of protection for a short time. Others require protection until a new political generation has taken over. In the present action against the literary executors, the Attorney-General asks for a perpetual injunction to restrain further publication of the Diaries in whole or in part. I am far from convinced that he has made out a case that the public interest requires such a Draconian remedy when due regard is had to other public interests, such as the freedom of speech. . . .

I have already indicated some of the difficulties which faced the Attorney-General when he relied simply on the public interest as a ground for his actions. That such ground is enough in extreme cases is shown by the universal agreement that publication affecting national security can be restrained in this way. It may be that in the short run (for example, over a period of weeks or months) the public interest is equally compelling to maintain joint Cabinet responsibility and the protection of advice given by civil servants, but I would not accept without close investigation that such matters must, as a matter of course, retain protection after a period of years.

However, the Attorney-General has a powerful reinforcement for his argument in the developing equitable doctrine that a man shall not profit from the wrongful publication of information received by him in confidence. This doctrine, said to have its origin in *Prince Albert v Strange* (1849) 1 H & TW 1, has been frequently recognised as a ground for restraining the unfair use of commercial secrets transmitted in confidence. . . . It is not until the decision in *Duchess of Argyll v Duke of Argyll* [1967] Ch 302, that the same principle was applied to domestic secrets such as those passing between husband and wife during the marriage. It was there held by Ungoed-Thomas J, that the plaintiff wife could obtain an order to restrain the defendant husband from communicating such secrets, and the principle is well expressed in the headnote in these terms, at p 304:

> 'A contract or obligation of confidence need not be expressed but could be implied, and a breach of contract or trust or faith could arise independently of any right of property or contract . . . and that the court, in the exercise of its equitable jurisdiction, would restrain a breach of confidence independently of any right at law.'

This extension of the doctrine of confidence beyond commercial secrets has never been directly challenged, and was noted without criticism by Lord Denning MR in *Fraser v Evans* [1969] 1 QB 349, 361. I am sure that I ought to regard myself, sitting here, as bound by the decision of Ungoed-Thomas J.

Even so, these defendants argue that an extension of the principle of the *Argyll* case to the present dispute involves another large and unjustified leap forward, because in the present case the Attorney-General is seeking to apply the principle to public secrets made confidential in the interests of good government. I cannot see why the courts should be powerless to restrain the publication of public secrets, while enjoying the *Argyll* powers in regard to domestic secrets. Indeed, as already pointed out, the court must have power to deal with

publication which threatens national security, and the difference between such a case and the present case is one of degree rather than kind. I conclude, therefore, that when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court, and his obligation is not merely to observe a gentleman's agreement to refrain from publication.

Lord Widgery went on to deal with the argument for *The Sunday Times* that the evidence did not establish the existence or scope of a convention of collective or joint ministerial responsibility:

I find overwhelming evidence that the doctrine of joint responsibility is generally understood and practised and equally strong evidence that it is on occasion ignored. The general effect of the evidence is that the doctrine is an established feature of the English form of government, and it follows that some matters leading up to a Cabinet decision may be regarded as confidential. Furthermore, I am persuaded that the nature of the confidence is that spoken for by the Attorney-General, namely, that since the confidence is imposed to enable the efficient conduct of the Queen's business, the confidence is owed to the Queen and cannot be released by the members of Cabinet themselves. I have been told that a resigning Minister who wishes to make a personal statement in the House, and to disclose matters which are confidential under the doctrine obtains the consent of the Queen for this purpose. Such consent is obtained through the Prime Minister. I have not been told what happened when the Cabinet disclosed divided opinions during the European Economic Community referendum. But even if there was here a breach of confidence (which I doubt) this is no ground for denying the existence of the general rule. I cannot accept the suggestion that a Minister owes no duty of confidence in respect of his own views expressed in Cabinet. It would only need one or two Ministers to describe their own views to enable experienced observers to identify the views of the others. . . .

The Cabinet is at the very centre of national affairs, and must be in possession at all times of information which is secret or confidential. Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.

It is evident that there cannot be a single rule governing the publication of such a variety of matters. In these actions we are concerned with the publication of diaries at a time when 11 years have expired since the first recorded events. The Attorney-General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained, and (c) that there are no other facets of the public interest contradictory of and more compelling than that relied upon. Moreover, the court, when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need.

Applying those principles to the present case, what do we find? In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by Cabinet

Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.

There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse. Since the conclusion of the hearing in this case I have had the opportunity to read the whole of volume one of the Diaries, and my considered view is that I cannot believe that the publication at this interval of anything in volume one would inhibit free discussion in the Cabinet of today, even though the individuals involved are the same, and the national problems have a distressing similarity with those of a decade ago. It is unnecessary to elaborate the evils which might flow if at the close of a Cabinet meeting a Minister proceeded to give the press an analysis of the voting, but we are dealing in this case with a disclosure of information nearly 10 years later.

It may, of course, be intensely difficult in a particular case, to say at what point the material loses its confidential character, on the ground that publication will no longer undermine the doctrine of joint Cabinet responsibility. It is this difficulty which prompts some to argue that Cabinet discussions should retain their confidential character for a longer and arbitrary period such as 30 years, or even for all time, but this seems to me to be excessively restrictive. The courts should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated. In less clear cases – and this, in my view, is certainly one – reliance must be placed on the good sense and good taste of the Minister or ex-Minister concerned.

In the present case there is nothing in Mr Crossman's work to suggest that he did not support the doctrine of joint Cabinet responsibility. The question for the court is whether it is shown that publication now might damage the doctrine notwithstanding that much of the action is up to 10 years old and three general elections have been held meanwhile. So far as the Attorney-General relies in his argument on the disclosure of individual ministerial opinions, he has not satisfied me that publication would in any way inhibit free and open discussion in Cabinet hereafter.

It remains to deal with the Attorney-General's two further arguments, namely, (a) that the Diaries disclose advice given by senior civil servants who cannot be expected to advise frankly if their advice is not treated as confidential; (b) the Diaries disclose observations made by Ministers on the capacity of individual senior civil servants and their suitability for specific appointments. I can see no grounds in law which entitle the court to restrain publication of these matters. A Minister is, no doubt, responsible for his department and accountable for its errors even though the individual fault is to be found in his subordinates. In these circumstances, to disclose the fault of the subordinate may amount to cowardice or bad taste, but I can find no ground for saying that either the Crown or the individual civil servant has an enforceable right to have the advice which he gives treated as confidential for all time.

For these reasons I do not think that the court should interfere with the publication of volume one of the Diaries, and I propose, therefore, to refuse the injunction sought but to grant liberty to apply in regard to material other than volume one if it is alleged that different considerations may there have to be applied. *Injunction refused.*

The report of the case concludes with an afterword by the Chief Justice:

> Lord Widgery CJ said that the statement in his judgment that the courts would not restrict publication of confidential communications between civil servants and Ministers was restricted to the present proceedings and did not amount to a general ruling that the courts had no power to do so in any circumstances.

The Attorney General may be said to have been victorious in this case in gaining judicial acceptance of the *principle* that a legal obligation of confidentiality attaches to Cabinet proceedings, even though the court decided that the Crossman diaries no longer, after the lapse of ten years, retained their confidential character, and so fell outside the protection of the law. The court fashioned from the 'developing equitable doctrine' of confidentiality, which had in previous cases found its application in commercial and domestic relations, a new rule for maintaining the secrecy of Cabinet proceedings.

In the course of the trial an American lawyer commented as follows:

Anthony Lewis, *The Sunday Times*, 3 August 1975

> One of the main differences between the political systems of our two countries, we are always told, is the much more active role of American judges; they feel free, as expounders of a written Constitution, to change the law and to decide social and political questions that would never be deemed appropriate for judicial decision in Britain. Felix Frankfurter, an American Supreme Court justice who deplored his countrymen's habit of looking to the courts for salvation, often pointed to Britain as the happy example of a society that left political issues to a democratic political institution, Parliament.
>
> We have been taught also that the British system relies less than the American on legal restraints, and more on the invisible restraints of honour and custom and responsibility. . . .
>
> Yet in the Crossman Diaries case the Attorney-General asked the court to make new law in a highly political area, that of State secrecy. (Political, that is, not in the partisan sense but in the sense of affecting the nature of the governmental system.) And the result sought in the suit would be to subject to law, and to Civil Service views, a personal discretion and responsibility long exercised by Ministers.

It is important, however, to note Lord Widgery's insistence that publication of confidential Cabinet papers or discussions should be restrained only if the public interest was shown to require such restraint and if there were 'no other facets of the public interest contradictory of and more compelling than that relied upon'.

The new common law rule established in *Attorney General v Jonathan Cape Ltd* was not considered by the Government to give sufficient protection to the confidentiality of government business. More stringent rules of non-disclosure, recommended by a Committee of Privy Counsellors (the Radcliffe Committee, Cmnd 6386/1976), were adopted by the Government in 1976 as

rules of practice to which ministers would be required to agree. The Radcliffe rules do not supplant the common law but impose on ministers obligations, of a non-legal kind, which are more precise and of wider scope than the legal obligation of confidentiality established in the '*Crossman Diaries*' case. The rules stipulate that, in general, ministers are not to disclose confidential discussions for a period of fifteen years.

Ministerial Code (2005), para 6.18

> The principle of collective responsibility and the need to safeguard national security, relations with other countries and the confidential nature of discussions between Ministers and their civil servants impose certain obligations on former Ministers who are contemplating the publication of material based upon their recollection of the conduct of Government business in which they took part. They are required to submit their draft manuscript to the Secretary of the Cabinet for comment and approval and to conform to the principles set out in the Radcliffe Report of 1976.

It has been said that, although depending on voluntary observance, the system 'works reasonably well' (HC Deb vol 194, col 17, 1 July 1991. Cf R Brazier, *Ministers of the Crown* (1997), pp 314–15.) Eric Barendt remarks of the Radcliffe rules that 'they show the characteristic British indifference to legal rules and distrust of the courts in politically sensitive areas' (*Freedom of Speech* (1985), p 135). The protection of government information through the doctrine of confidentiality, as endorsed in *Jonathan Cape*, was at the core of the '*Spycatcher*' litigation in 1986–88 (see chapter 12).

2 Conventions

The working of our system of government is conditioned by a mass of usages or practices which must be taken into account if the system is to be understood. Some of these usages affect the behaviour of the principal organs of the state or their mutual relations, while others operate at lower levels of the conduct of official business and may not be dignified as having a constitutional character. Among these usages are some that have the status of 'conventions of the constitution'. For Dicey, conventions were principally those customary rules that determined the way in which the discretionary (or prerogative) powers of the executive should be used (*Law of the Constitution* (1885), pp 428–9). The modern conception is somewhat broader than this, and Lord Wilson of Dinton has a helpful description of constitutional conventions as 'the main political principles which regulate relations between the different parts of our constitution and the exercise of power but which do not have legal force' ('The robustness of conventions in a time of modernisation and change' [2004] *PL* 407, 408–9). For Jaconelli, conventions are social rules of a constitutional character which govern the relations

between political parties or the institutions of government, regulating the manner in which government is to be conducted ('The nature of constitutional convention' (1999) 19 *LS* 24).

Usages do not have the character and force of constitutional conventions unless they are generally acknowledged – by those involved in the constitutional relationships in which the usages have their setting – as having an obligatory character. (Some conventions, it has been noted, 'do not in fact impose obligations or duties but confer rights or entitlements': G Marshall, *Constitutional Conventions* (1984), p 7; but these too will have been raised above the level of mere usage or practice by a like general acknowledgement, not of their obligatory character, but of their legitimising authority.) Conventions, that is to say, are *rules* and are part of the constitutional order, interwoven with but distinguishable from rules of law. On this view, breach of a constitutional convention is every bit as unconstitutional as breach of a constitutional law. The difference lies in the nature of the enforcement and of the sanction. Laws, of course, are enforced in courts. Conventions are not: they are non-legal but nonetheless binding rules of constitutional behaviour. Their enforcement is political rather than legal and is the responsibility of political bodies such as the House of Commons. The conventions of ministerial responsibility are a good example. It is a convention that ministers are collectively and individually responsible to Parliament. If a minister knowingly misleads Parliament, for instance, he or she will be expected to resign from office. If no resignation is forthcoming the minister will be acting unconstitutionally, but he or she will not be acting illegally. No court of law could compel a resignation in these circumstances: it would be a matter for Parliament. (The operation of ministerial responsibility is considered further in chapter 9.)

That said, the consequences of a breach of convention are various and are not always easily predictable. Sometimes a breach may simply confirm a general view that the convention is inconvenient and should be changed or abandoned. On the other hand the breach may provoke accusations of unconstitutional behaviour and lead to serious political controversy. On occasion the response to a breach has been the passage of legislation to give a legal reinforcement to the convention or replace it with legally binding rules. This was what happened after the House of Lords exceeded conventional limits on its powers in rejecting, in 1909, a finance bill (Lloyd George's 'People's Budget') passed by the Commons. The Parliament Act 1911 removed the Lords' veto over money bills.

Geoffrey Marshall has suggested that it is no less than the 'major purpose' of conventions 'to give effect to the principles of governmental accountability that constitute the structure of responsible government' (*Constitutional Conventions* (1984), p 18). The relations between the Crown and Parliament are fundamental to this structure, and are regulated as much by convention as they are by law. For example, while the Triennial Act 1694 requires only that 'a Parliament shall

be holden once in three years at the least', by convention Parliament is summoned to meet every year. (This convention is fortified by the need to obtain the consent of Parliament to annual Acts providing for the raising of revenue and the expenditure of public money.) Governmental accountability to Parliament depends not only on the conventions of ministerial responsibility referred to above, but also on a host of ancillary conventions which help to safeguard the rights of Parliament, its select committees, opposition parties and individual MPs. For instance, one of these conventions has to do with the Estimates, a principal mechanism for parliamentary control of governmental expenditure. It is an established convention that significant changes in the form of the Estimates presented to Parliament by government departments are not to be made without the prior approval of both the Public Accounts Committee and the Treasury Committee of the House of Commons. (See *Fourth Report, Treasury and Civil Service Committee*, HC 212 of 1994–95, para 4.) The rules of parliamentary procedure are supplemented by conventions which exist (as we read in the 20th edition of Erskine May's *Parliamentary Practice*, p 208) 'for the purpose of securing fair play between the majority and the minority, and due consideration of the rights of individual Members': these conventions are enforced 'by the public opinion of the House'. (We shall meet with some of these conventions in chapter 9.)

Other conventions serve a variety of purposes connected with many different aspects of government. Such is the conventional rule that governs access by ministers to the papers of a previous administration of a different political party. The terms of the convention were set out by the Prime Minister in a written answer to a parliamentary Question on 24 January 1980 (HC Deb vol 977, cols 305–7 W) declaring it to be:

> an established rule that after a General Election a new Administration does not have access to the papers of a previous Administration of a different political complexion. This rule applies especially to Cabinet papers.

In general, documents are withheld from the new administration if they reveal the personal views of the previous ministers on matters of policy or administration, or advice submitted to them on matters which they had under consideration. (For further details, see the *Guidance on Access by Ministers to Documents of a Previous Administration* issued by the Cabinet Office, available at www.cabinetoffice.gov.uk/guidance/two/02.htm.)

Another area regulated by convention is that of government communications. Governments spend substantial sums of money on publicity and advertising. Publicity campaigns have accompanied successive privatisations and such projects as the New Deal jobs programme. In addition, governments mount campaigns on social questions such as road safety and avoidance of AIDS and publish information about recent legislation and new policy initiatives. There is an evident necessity to ensure that public money should not be

spent for party political purposes under the guise of government publicity, and for many years there have been conventions within government as to what is and is not allowable. When the Widdicombe Committee was inquiring into publicity campaigns in local government in 1984–85 it asked to be provided with information about the practice in central government (*Interim Report of the Committee of Inquiry into the Conduct of Local Authority Business* (1985), paras 116–19). As a result the conventions were formally recorded in writing by the Cabinet Office, and they afterwards became known as the 'Widdicombe Conventions'. They provide a fuller statement of the principle, affirmed in both the *Ministerial Code* (2005) and the *Civil Service Code*, that public resources must not be used for party political purposes. Guidelines based on the Widdicombe Conventions were drawn up by a government working group in 1997. These guidelines, as revised from time to time, are followed by civil servants working as communicators. The *Guidance on Government Communications* defines 'how civil servants can properly and effectively present the policies and programmes of the Government of the day' and sets out the basic conventions:

> The following basic criteria have been applied to government communications by successive administrations:
>
> - it should be relevant to government responsibilities;
> - it should be objective and explanatory, not biased or polemical;
> - it should not be – or be easily misrepresented as being – party political; and
> - it should be conducted in an economic and appropriate way, and should be able to justify the costs as expenditure of public funds.
>
> The publicly funded government communications machine cannot be used primarily or solely to meet party-political ends, though it is recognised that the governing party may derive benefit incidentally from activities carried out by the Government.
>
> The Ministerial Code states that Ministers must uphold the impartiality of the civil service, and not ask civil servants to act in any way that would conflict with the Civil Service Code. Ministers must ensure that public resources are not used to support publicity for party-political purposes.

Governments have a tendency to blur the distinction between (legitimate) publicity for government policies and party-political propaganda. The Treasury and Civil Service Committee of the House of Commons suggested in 1988 that there was a case for giving statutory authority to the Widdicombe Conventions, but the Government disagreed, saying that ministers were collectively committed to the conventions and were accountable to Parliament for their observance in particular cases. (See the *Seventh Report* of the Committee, HC 506 of 1987–88, para 17 and its *First Special Report*, HC 180 of 1988–89, para 2.) See further Munro [1990] *PL* 1 and Oborne in K Sutherland (ed), *The Rape of the Constitution*? (2000), pp 318–24.

As is clear from the above examples, conventions may be written or unwritten. Whether they are written or unwritten makes no difference to their force as conventions, although it may make a difference to their clarity. As Jaconelli states, when conventions are written down 'the formula *records*, rather than *creates*, the convention' ('Do constitutional conventions bind?' [2005] *CLJ* 149, 169). Unlike laws, the conventions would be conventions even if they were not written down. Some conventions are even codified. Among these are the conventions of ministerial responsibility, which are included in the *Ministerial Code* (a document formerly known as *Questions of Procedure for Ministers*), which is issued upon appointment to all ministers by the Prime Minister (for the full text, see www.cabinetoffice.gov.uk/propriety_and_ethics/publications/pdf/ministerial_code.pdf).

Ministerial Code (2005), Part I, Section 1

1.1 Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties.

1.2 This Code provides guidance to Ministers on how they should act and arrange their affairs in order to uphold these standards. It lists the principles which may apply in particular situations drawing on past precedent. It applies to all members of the Government (and covers Parliamentary Private Secretaries . . .).

1.3 Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct in Parliament . . .

1.4 Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards, although he will not expect to comment on every allegation that is brought to his attention.

1.5 The Code should be read against the background of the overarching duty on Ministers to comply with the law, including international law and treaty obligations, to uphold the administration of justice and to protect the integrity of public life. They are expected to observe the Seven Principles of Public Life set out in the first report of the Committee on Standards in Public Life [see chapter 6] and the following principles of Ministerial conduct:

a. Ministers must uphold the principle of collective responsibility;
b. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies;
c. it is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;
d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which

should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000;

e. Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code;

f. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;

g. Ministers should avoid accepting any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation;

h. Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;

i. Ministers must not use government resources for Party political purposes. They must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way which would conflict with the Civil Service Code.

1.6 Ministers must also comply at all times with the requirements which Parliament itself has laid down, including in particular the Codes of Conduct for their respective Houses. For Ministers in the Commons, these are set by the Resolution carried on 19 March 1997 (Official Report columns 1046–47), and for Ministers in the Lords the Resolution can be found in the Official Report of 20 March 1997 column 1057.

(a) How do conventions arise?

Whether a convention exists is sometimes a matter of uncertainty. Sir Ivor Jennings, in his *The Law and the Constitution* (5th edn 1959), p 136 suggested the following approach:

> We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them[selves] as bound by it.

This approach, while in many respects commendable, is not authoritative. Furthermore, even if Jennings' approach is applied, it may not always give a clear result (eg there may be a difference of opinion as to whether the precedents are compelling or whether there is a good reason for the rule). There are many conventions which are generally acknowledged to exist, but they are not always precisely formulated and the limits of their application may be unclear. On the one hand, this imprecision makes for a flexibility which allows a congruous development of the constitution in response to experience and

changes in society. Against this, as Peter Madgwick and Diana Woodhouse have noted (*The Law and Politics of the Constitution of the United Kingdom* (1995), p 35):

> The imprecision, flexibility and absence of sanctions work to the advantage of those in positions of power, for it becomes difficult to determine, and thus appeal to, the constitutional position and constitutional limitations.

Conventions, as Geoffrey Marshall says, 'are unlike legal rules because they are not the product of a legislative or of a judicial process' (*Constitutional Conventions* (1984), p 216). Many conventions are the result of a gradual hardening of usage over a period of years or generations. Jaconelli suggests that 'their essence is found to subsist in a stream of concordant actions and expectations deriving from such actions' ('Do constitutional conventions bind?' [2005] *CLJ* 149, 170). Both elements are important: for a constitutional convention to have been established it is not enough that a repeated course of behaviour has occurred. It is necessary, in addition, that such behaviour must be *expected* to continue to recur. This is true, for example, of what is perhaps the cardinal convention of our constitutional monarchy, that the Queen must act upon the advice of her ministers. Queen Victoria might not have assented to this obligation (see G Le May, *The Victorian Constitution* (1979), p 74), but in 1910 the Prime Minister reminded King George V of what had become an incontrovertible convention. The King had proposed to meet the leader of the Unionist Opposition in the House of Lords, Lord Lansdowne, to discover his views on the progress of the Liberal Government's Parliament Bill, in the light of the Liberal victory in the general election of December 1910.

Mr Asquith's Minute to King George V, December 1910

> The part to be played by the Crown, in such a situation as now exists, has happily been settled by the accumulated traditions and the unbroken practice of more than 70 years. It is to act upon the advice of the Ministers who for the time being possess the confidence of the House of Commons, whether that advice does or does not conform to the private and personal judgment of the Sovereign. Ministers will always pay the utmost deference, and give the most serious consideration, to any criticism or objection that the Monarch may offer to their policy; but the ultimate decision rests with them; for they, and not the Crown, are responsible to Parliament. It is only by a scrupulous adherence to this well-established Constitutional doctrine that the Crown can be kept out of the arena of party politics.
>
> It follows that it is not the function of a Constitutional Sovereign to act as arbiter or mediator between rival parties and policies; still less to take advice from the leaders on both sides, with the view to forming a conclusion of his own. George III in the early years of his reign tried to rule after this fashion, with the worst results, and with the accession of Mr Pitt to power he practically abandoned the attempt. The growth and development of our

representative system, and the clear establishment at the core and centre of our Constitution of the doctrine of Ministerial responsibility, have since placed the position of the Sovereign beyond the region of doubt or controversy.

(The Prime Minister withdrew his objection to the interview with Lord Lansdowne upon the King's assurance that his purpose was to obtain information and not advice.)

It may be difficult to say with certainty that a usage or practice has come to be accepted as a binding convention. We can often only infer that a supposed convention is considered to be binding from the consistency of the behaviour over a period of those affected by it: the shorter the period, the more doubtful the inference. Between 1964 and 1983 no new hereditary peerages were created, and it seemed that a new convention in this sense was on the way to becoming established. But in 1983 hereditary peerages were again conferred, on the recommendation of the Prime Minister (Mrs Thatcher), and it was not objected that there had been a breach of convention. Conventions are always emerging, crystallising and dissolving, and it is sometimes questionable whether a convention has been broken or has simply changed.

(b) Doubtful conventions

(i) Going to war

The royal prerogative includes the power, exercisable by the government, to declare war or engage the armed forces of the Crown in military expeditions or armed conflict. As a matter of law a decision to exercise the prerogative in these ways does not require the authority of Parliament (although the expenses of such engagements must be met from the funds voted by Parliament for expenditure by the Ministry of Defence and other departments).

It was not the practice of governments to seek parliamentary approval for decisions on the use of armed force, but in 2003, before embarking on military intervention in Iraq, the Government thought it right, or expedient, to obtain the support of the House of Commons. The House was asked to vote on the Prime Minister's substantive motion requesting approval for the use of all necessary means, including military force, 'to ensure the disarmament of Iraq's weapons of mass destruction' (HC Deb vol 401, col 760, 18 March 2003). The motion was carried.

It has been said that this event established a *convention* that parliamentary approval must be obtained before the use of military force is undertaken by the government (or at all events, in case of action taken in an emergency, at the earliest opportunity thereafter). The Foreign Secretary, Mr Jack Straw, seemed to give support to this view in saying, at the conclusion of the Iraq debate, that it was 'constitutionally proper in a modern democracy' that the Government should seek the 'explicit support' of the House of Commons for military action

(col 900). Lord Wilson of Dinton has suggested that the precedent of 18 March 2003 'will almost certainly have to be followed in similar circumstances in the future' ([2004] *PL* 407, 414), but others have expressed scepticism on this point (see *Minutes of Evidence, Public Administration Committee*, HC 642-I of 2002–03, Q 6: Mr William Hague MP). This uncertainty could be removed, and a requirement of parliamentary approval be given a clearer definition, if the rule were put on an appropriate statutory footing by Act of Parliament (as recommended by the House of Commons Public Administration Committee in its *Fourth Report: Taming the Prerogative – Strengthening Ministerial Accountability to Parliament*, HC 422 of 2003–04, para 60).

The issues are thoroughly rehearsed by the House of Lords Select Committee on the Constitution in its *Fifteenth Report: Waging War – Parliament's Role and Responsibility*, HL 236 of 2005–06, considered in chapter 7.

(ii) Treaties: the Ponsonby Rule

The government exercises a prerogative power of the Crown in concluding treaties which bind the United Kingdom in international law. While a treaty may become binding immediately upon signature (or other form of agreement, such as an exchange of letters), important treaties may be agreed subject to formal ratification by the executive at a later stage. The authority of Parliament is not required for the making or ratification of treaties under the prerogative, although an Act of Parliament will be needed if the treaty requires changes to be made in the domestic law.

A new practice was announced in the House of Commons by Arthur Ponsonby, Under-Secretary of State for Foreign Affairs, on 1 April 1924 (HC Deb vol 171, cols 2001–04). In accordance with this practice, known as the 'Ponsonby Rule', a treaty that is subject to ratification is laid before each House of Parliament for a period of twenty-one days before it is ratified, so allowing for the possibility of scrutiny and debate. Since December 1996 an explanatory memorandum has been provided together with the text of the treaty.

The Ponsonby Rule has generally been followed by successive governments since 1924 but ministers have on various occasions insisted that the rule allows for exceptions and that the government may, 'in appropriate cases', proceed to ratification without laying for twenty-one days – or have even disclaimed the binding character of the 'rule' (see eg, HL Deb vol 566, col 159 WA, 1 November 1995; HL Deb vol 567, col 152 WA, 20 December 1995).

Can this practice be described as a convention? It is normally observed, but on rare occasions governments have, for reasons that seemed good to them (such as urgency), dispensed with the laying requirement.

The House of Commons Public Administration Committee has recommended that the Ponsonby Rule should be replaced by legislation providing for full parliamentary scrutiny of the conclusion and ratification of treaties (*Fourth Report*, HC 422 of 2003–04, para 60).

(iii) Law Officers' advice

It is from time to time declared to be a settled convention that the advice of the Law Officers to the government or to individual ministers is not to be made public. For instance the Attorney General informed the House of Commons on 29 July 1997 (HC Deb vol 299, col 122 W) that:

> It is the established convention that the advice of the Law Officers is not disclosed, nor whether they have advised on a given question.

In the *Ministerial Code* (2005) the rule is expressed as follows (para 6.25):

> The fact that the Law Officers have advised (or have not advised) and the content of their advice must not be disclosed outside Government without their authority.

In *The Attorney General, Politics and the Public Interest* (1984), p 225, John Edwards instanced a number of occasions when advice given by the Law Officers to the government had been disclosed to the House of Commons. The rule against disclosure was, he said, a flexible one, and he continued:

> Talk of an absolute prohibition against such disclosure is totally unsupportable. Expressed in realistic terms, the rule enables considerations of political advantage or embarrassment to the government to govern the decision whether to reveal what advice the Law Officers have given a ministerial colleague or the government as a whole.

Before taking military action against Iraq in 2003 the Government received advice from the Attorney General as to the legality of the proposed action. The terms of the Attorney General's (Lord Goldsmith's) advice were not made public, but in a parliamentary answer on 17 March 2003 he gave a brief summary of the basis for his opinion that military action would be lawful under Security Council resolutions (HL Deb vol 646, cols 2–3 WA). The Government rebuffed attempts to obtain full disclosure of Lord Goldsmith's legal advice, reiterating that there was 'a long-standing convention' against disclosure and 'a strong public interest in maintaining the confidentiality of Law Officers' advice' (HL Deb vol 659, col 105 WA, 25 March 2004. The Attorney General's legal advice was eventually published on 28 April 2005 after it had been extensively 'leaked' to the media without authority.) Upon whom might this 'convention' be said to be binding? It has not been unreservedly endorsed by Parliament and it seems to bind the government, or the Law Officers, only if they choose that it should.

(c) Conventions and laws

To illustrate the close nexus in practice between law and convention, consider the following examples. We know it as a rule of law that the Queen may give or refuse assent to a bill passed by both Houses of Parliament; it is a constitutional

convention that she should always (or in all but very exceptional circumstances: see S de Smith and R Brazier, *Constitutional and Administrative Law* (8th edn 1998), pp 127–8) give her assent. Likewise, as a matter of law the Queen may appoint anyone she wishes to be Prime Minister (indeed, if she wished, she would be legally entitled to appoint no one to the office: there is no legal requirement that there always be a Prime Minister). It is a convention, however, that the Queen should appoint as Prime Minister the leader of the political party with a majority of seats in the House of Commons. (What if there is no such party, however, or what if there is such a party but it has no clear leader? In these situations, which do not frequently arise, there is no convention to regulate Her Majesty's behaviour, and she and her advisers retain a degree of discretion, it seems (see A Tomkins, *Public Law* (2003), pp 62–72).) It is the law that a writ for a parliamentary by-election must be issued by the Clerk of the Crown in Chancery on receipt of a warrant from the Speaker of the House of Commons (Representation of the People Act 1983, Schedule 1, paras 1, 3); it is a convention, resulting from agreement in an all-party Speaker's Conference in 1973, that when a vacancy occurs in the House the Chief Whip of the party to which the former member belonged shall, normally within three months, move that the Speaker issue the warrant for a writ (see *Conference on Electoral Law*, Cmnd 5500/1973; HC Deb vol 41, cols 164–8, 19 April 1983). It is law that the government can spend money only with the authority of Parliament; it is a convention (deriving from a 'concordat' of 1932 between the Treasury and the Public Accounts Committee of the House of Commons) that recurring expenditure should be authorised by a specific Act of Parliament and not merely from year to year by the annual Appropriation Act. (See HM Treasury, *Government Accounting* (2000), ch 2, Annex 2.1.) Convention prescribes that there should be a Prime Minister who is a member of the House of Commons; the law directs that he or she should receive a salary (Ministerial and other Salaries Act 1975).

Dicey formulated the distinction between the law of the constitution and constitutional conventions as follows.

Dicey, *The Law of the Constitution* (1885), pp 23–4

[T]he rules which make up constitutional law, as the term is used in England, include two sets of principles or maxims of a totally distinct character.

The one set of rules are in the strictest sense 'laws', since they are rules which (whether written or unwritten, whether enacted by statute or derived from the mass of custom, tradition, or judge-made maxims known as the common law) are enforced by the courts; these rules constitute 'constitutional law' in the proper sense of that term, and may for the sake of distinction be called collectively 'the law of the constitution'.

The other set of rules consist of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of

> the Ministry or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or constitutional morality.
>
> To put the same thing in a somewhat different shape, 'constitutional law', as the expression is used in England, both by the public and by authoritative writers, consists of two elements. The one element, here called the 'law of the constitution', is a body of undoubted law; the other element, here called the 'conventions of the constitution', consists of maxims or practices which, though they regulate the ordinary conduct of the Crown, of Ministers, and of other persons under the constitution, are not in strictness laws at all.

The distinction made by Dicey in this passage has been rejected by some who have denied that there is any difference in principle between laws and conventions. Sir Ivor Jennings, in particular, argued that enforceability by the courts was not a valid basis for a distinction between laws and conventions and that both rested essentially on the acquiescence of those to whom they applied (*The Law and the Constitution* (5th edn 1959), pp 103–36). But Dicey's analysis can be defended on the ground that laws are given effect or 'enforced' by courts or tribunals in a sense which cannot be applied to the treatment of conventions by these bodies. Moreover, law is not usually defined in terms that can include conventions, and those who are involved in or observe the political process are aware of a difference between laws and conventions and are rarely uncertain as to the category to which a particular rule belongs. A civil servant who, without authority, gives information to a newspaper about the issue of warrants for 'telephone tapping' is in no doubt that he is breaking the law (Official Secrets Act 1989, s 4(3)(a)); a Cabinet Secretary knows that it is convention and not law that prevents him from disclosing to a new administration the papers of the previous government of a different party. On the other hand, TRS Allan has argued that constitutional conventions provide 'a primary source of legal principle': *Law, Liberty, and Justice* (1993), ch 10. A like argument is developed by Mark Elliott in an inquiry into 'Parliamentary sovereignty and the new constitutional order' ((2002) 22 *LS* 340). Conventions properly understood, he says, rest upon or give effect to constitutional principles and these may 'influence the evolution of constitutional law'. In this way conventions may acquire 'legal weight' and 'help to shape the constitution's legal contours'. (For a rebuttal of this view, see Jaconelli, 'Do constitutional conventions bind?' [2005] *CLJ* 149.)

This is not to say that a convention, as such, can be directly enforced by a court.

Madzimbamuto v Lardner-Burke [1969] 1 AC 645 (PC)

After the unlawful declaration of independence by the Government of the Crown colony of Southern Rhodesia in 1965, the United Kingdom Parliament

passed the Southern Rhodesia Act 1965 to deal with the circumstances arising from this unconstitutional action. In the *Madzimbamuto* case the question arose whether Parliament could properly legislate for Southern Rhodesia, the colony having already progressed, before the declaration of independence, to a substantial degree of self-government. The United Kingdom Government had indeed formally acknowledged in 1961 that:

> it has become an established convention for Parliament at Westminster not to legislate for Southern Rhodesia on matters within the competence of the Legislative Assembly of Southern Rhodesia except with the agreement of the Southern Rhodesia Government.

Lord Reid (delivering the majority judgment) referred to the convention set out in the United Kingdom Government's statement of 1961, and continued:

> That was a very important convention but it had no legal effect in limiting the legal power of Parliament.
>
> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.

In the following case there was an unpromising attempt to persuade a court to make a declaration as to the existence of a constitutional convention.

R (Southall) v Secretary of State for Foreign and Commonwealth Affairs [2003] EWCA Civ 1002

The applicant in this case had sought permission to bring proceedings for judicial review. His principal contention was that for the Government to ratify the proposed treaty establishing a constitution for the European Union, and for Parliament to enact its provisions as law, without the approval of the electorate, would be contrary to constitutional convention. He wished the reviewing court to grant a declaration to this effect.

A judge having refused permission for the applicant to proceed to judicial review, he applied to the Court of Appeal for permission to appeal against that refusal.

> **Schiemann LJ** (giving the judgment of the court): . . . [Counsel for the applicant] submitted that there was a convention that no Act of Parliament would be passed which altered our constitution in a fundamental way without it first having received the approval of the electorate either through a general election or a referendum.

The court was presented with evidence about the holding of referendums in the past but was not persuaded that it was arguable that a convention such as was asserted by the applicant in fact existed. In any event, said the court:

> We know of no occasion when in this country declarations similar to those sought have been made by the courts.

Permission to appeal was accordingly refused.

Although conventions are not *enforced* by courts – even in the form of a declaratory judgment – the existence and content of a convention may form part of a judge's reasoning in coming to a decision. For example, in *Attorney General v Jonathan Cape Ltd* (above, p 150) the court held that an injunction can in a proper case be granted to protect the confidentiality of Cabinet proceedings, on the ground that confidentiality is necessary for the maintenance of the convention of joint (or collective) Cabinet responsibility, a convention which the court considered to be in the public interest. Here the court's evaluation of the convention of collective ministerial responsibility as an essential feature of our governmental system was a crucial element in its argument and conclusions. Ian Loveland remarks that it is arguable that in this case the court in effect 'enforced a convention by cloaking it with a common law label' (*Constitutional Law, Administrative Law and Human Rights* (3rd edn 2003), p 271). It is, indeed, contended by TRS Allan (above) that the distinction between recognition and enforcement of conventions dissolves in the process of adjudication and that it is wrong 'to attribute to convention an intrinsic inferiority' to rules of law – even enacted law. Jaconelli, on the other hand, insists on a 'clear conceptual divide' between law and convention, while acknowledging that in some respects 'the two phenomena may intertwine' (see above). (See further on this matter, the *Reference re Amendment of the Constitution of Canada* case, discussed below.)

(d) Patriation of the Canadian constitution: a case study

To close this chapter we offer a detailed case study of convention in action. The case study concerns the patriation of the Canadian constitution in the early 1980s. It shows the importance of convention, it illustrates the close working relationship of convention to constitutional law, and it demonstrates the ways in which courts may make, in this instance quite extensive, use of convention. In this respect this case study may be contrasted with *Attorney General v Jonathan Cape*, the '*Crossman Diaries*' case, considered above.

The basic constitutional structure of Canada was established by the British North America Act 1867, an Act of the United Kingdom Parliament which incorporated the terms upon which the Canadian Provinces were united in the Federation of Canada. Any necessary amending legislation was to be enacted by the United Kingdom Parliament.

Although Canada was a fully independent state, at latest after the Statute of Westminster 1931, the Canadian Parliament remained incompetent to amend the British North America Acts. There was in 1931 no agreement in Canada as to the terms on which the power of constitutional amendment might be transferred to Canadian institutions, and the Statute of Westminster left this power with the United Kingdom Parliament. While section 2 of the Statute allowed full efficacy in general to the legislation of the Canadian Parliament (and the Parliaments of the other independent Dominions), section 7(1) provided:

> Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930.

And section 7(3) provided:

> The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

The British North America (No 2) Act 1949, which transferred a power of constitutional amendment to the Parliament of Canada, excepted amendments affecting the distribution of powers between the provincial and federal governments.

Even before 1931 a convention had become established which governed legislation by the United Kingdom Parliament for the self-governing Dominions. This convention was formally reaffirmed in the preamble to the Statute of Westminster in the following words:

> It is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

(A *legal* reinforcement of this convention was provided by section 4 of the Statute, considered in the previous chapter.)

On a number of occasions, both before and after 1931, the British North America Act 1867 was amended by the United Kingdom Parliament, in each case upon the request of the Canadian Parliament. When the requested legislation would directly affect federal-provincial relations, the request was made and

acted upon only after the Federal Government had obtained the agreement of the governments of the affected Provinces.

In 1980 the Canadian Government decided that the time had come to 'patriate' the Canadian constitution, ie to terminate the power of the United Kingdom Parliament to legislate for Canada and provide for all future constitutional amendments to be effected in Canada in accordance with a prescribed procedure. It was proposed at the same time to incorporate in the patriated constitution a Charter of Rights and Freedoms which would prevail over inconsistent federal or provincial laws. Only the United Kingdom Parliament could pass the necessary legislation to bring about the desired patriation of the constitution. The legislation would clearly affect the distribution of powers in the Canadian Federation, and the Federal Government tried to obtain the agreement of the provincial governments to the proposal. However, only two Provinces (Ontario and New Brunswick) agreed, while the remaining eight Provinces were opposed to patriation on the Federal Government's terms. Nevertheless the Federal Government decided to proceed on the basis of this limited agreement. A proposed resolution was submitted to the Canadian Parliament in the form of an address to the Queen, requesting her to cause a bill to be introduced in the United Kingdom Parliament which would incorporate a Constitution Act for Canada, including a Charter of Rights and Freedoms and a procedure for constitutional amendment in Canada.

In response to these developments the Foreign Affairs Committee of the (British) House of Commons undertook an inquiry into the role of the United Kingdom Parliament in the expected event that a request for patriation should be supported only by the Federal Government and Parliament and two provincial governments. Would the United Kingdom Parliament be bound to accede to such a request? The answer would depend on the applicable conventions rather than on law. The following Memorandum was submitted to the Foreign Affairs Committee.

First Report from the Foreign Affairs Committee (Kershaw Report), vol II, HC 42-II of 1980–81: Memorandum by Professor HWR Wade (p 102)

1. The Government of Canada claims that the United Kingdom Parliament is obliged to enact, without questions asked, any amendment of the British North America Acts which is submitted by the Government of Canada and backed by the usual resolutions of the two Houses of Parliament in Ottawa, even though the amendment affects the rights of the Provinces.

2. The Government of the UK may be tempted to accept this claim since it would enable the Parliament of the UK to play a purely formal and automatic part and to avoid embroiling itself in a Canadian constitutional controversy which ought to be decided in Canada alone and in which no one in the UK wishes to intervene.

3. Are the Government and Parliament of the UK entitled to take this line of least resistance? The answer depends upon constitutional convention rather than upon law. In law there is no doubt that the Canadian courts recognise that in matters affecting the Provinces the British North America Acts can be amended only by the UK Parliament in accordance with the Statute of Westminster 1931, section 7. They may be expected to recognise also (a) that no law sets any limit upon this amending power of the UK Parliament; and (b) that no law sets any limit upon the freedom of the Canadian Government to submit amendments affecting the constitutional powers and position of the Provinces – though if they should decide otherwise this will be an internal Canadian matter. The important question for the UK Government and Parliament is whether it is required by constitutional convention that any amendment legislation should be enacted without question at Westminster, even though it affects and is opposed by some or all of the Provinces.

4. In British constitutional theory and practice there is a clear-cut distinction between law and convention. Law derives from common law and statute and is enforceable by the courts. Convention derives from constitutional principle and practice and is not enforceable by courts. Law remains in force until changed by statute. Convention may change with changing times. Law, at least if statutory, is ascertainable in precise form. Convention is often imprecise and may be nowhere formulated in categorical terms.

5. The correct attitude for the UK Government and Parliament to adopt must be found by looking at (a) constitutional principle and (b) past practice.

A. CONSTITUTIONAL PRINCIPLE

6. The essential elements of a federal constitution are that powers are divided between the central and provincial governments and that neither has legal power to encroach upon the domain of the other, except through the proper process of constitutional amendment. The system of local government in the UK, for example, contains no element of federalism because the powers of local authorities are wholly at the mercy of Parliament . . .

7. If it were correct that the UK Parliament is obliged to enact any amendment of the British North America Acts proposed by the Canadian Government, this would obviously contradict the federal principle. It would then lie wholly within the power of the Canadian Government, de facto, to obtain amendments derogating from the powers of the Provinces and against the will of the Provinces. The Canadian constitution would cease to be federal in the true sense, since the Provinces would be at the mercy of the central government. By agreeing to act merely as an automaton at the direction of the Canadian Government, the UK Parliament would be subverting the whole foundation of the Constitution of Canada. It would put into the hands of the Canadian government powers which are not possessed by the central government of the United States, Australia, India and other federal countries, and which cannot be possessed by the central government without destroying the federal basis of the constitution. It would be idle then to say that the UK was refraining from taking sides in a Canadian controversy. In fact the UK would be taking sides with the Canadian government in undermining the constitutional rights and powers of the Provinces, contrary to the

whole system of the British North America Acts and the fundamentals of Canadian constitutional law. . . .

9. Section 7 of the Statute of Westminster 1931 was inserted at the instance of the Provinces expressly for the purpose of preserving the federal principle. Had that not been done, the Canadian Parliament would have obtained full legal power to amend the British North America Acts under section 2 . . .

10. The provisions of the Statute of Westminster make it quite clear that it cannot have been supposed in 1931 that convention required the UK Parliament to enact without question any British North America Bill put forward by the Canadian Government and Parliament. If there had been any such convention, section 7 would have been useless to the Provinces, and the security which it was intended to give them would have been nugatory, since the Canadian Government could at any time have called upon the UK Parliament to enact an amendment taking away constitutional powers of the Provinces. It is inconceivable that the Provinces would have been satisfied with this situation. Yet they were satisfied with section 7, thus clearly disproving the existence of any convention of the kind now claimed. They must have felt fully assured that they enjoyed not only strictly legal but also genuinely constitutional protection for their rights.

11. Constitutional principle, therefore, is entirely opposed to any alleged convention that the UK Parliament is obliged to enact amendments of the Constitution of Canada which reduce the rights of the Provinces without the consent of the Provinces concerned and without inquiring whether that consent has been given.

B. PAST PRACTICE

12. It would be unprofitable to itemise all the amendments of the British North America Acts effected by the UK Parliament since 1867. The majority of them had no effect on the legislative powers of the Provinces and the fact that provincial consent was not obtained is immaterial.

13. The only amendments affecting the legislative powers of the Provinces were those of 1940, 1951, 1960 and 1964. In each one of these cases all the Provinces were consulted and their agreement was obtained. The amendment of 1940 was delayed for some years until the agreement of Quebec could be obtained. By accepting this delay of the amendment (which gave the Canadian Parliament power to legislate for unemployment insurance) the Canadian Government (in the words of the federal Prime Minister) –

> 'avoided the raising of a very critical constitutional question, namely, whether or not in the amending of the British North America Act it is absolutely necessary to secure the consent of all the Provinces, or whether the consent of a certain number of Provinces would of itself be sufficient.' (Canadian Commons Debates, 1940 (25 June), pp 1117–18.)

It is clear from this remark that the Canadian Government accepted that in the case of such amendments convention made it 'absolutely necessary' that the consent of at least some Provinces was obtained. In principle it would seem right that the consent of all

Provinces suffering any diminution of their legislative powers should be obtained, and this is corroborated by the fact that unanimous consent was obtained for the amendments of 1951, 1960 and 1964.

14. In addition, there is the very significant case of non-amendment represented by the Statute of Westminster 1931. This would have gravely affected Provincial legislative independence, as already pointed out, had not section 7 been inserted at the instance of the Provinces. In this case not only the Canadian Government but also the UK Government and Parliament felt bound to take account of the Provinces' objections.

15. It hardly seems necessary to argue that convention requires the prior agreement of Provinces whose powers will be affected by the amendment, since the Canadian Government expressly admitted as much in the White Paper of 1965 entitled 'The Amendment of the Constitution of Canada'. It said:

> '*The fourth general principle* is that the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The nature and the degree of provincial participation in the amending process, however, have not lent themselves to easy definition.'

This statement, it is important to observe, was agreed by all the Provinces before the White Paper was published. . . . It therefore represents a 'convention' in the literal sense, being an agreed statement of the federal-provincial relationship. It is thus as authoritative a source of constitutional convention as can be imagined.

16. It is therefore acknowledged by all concerned that as the conventions of the Canadian constitution have developed they have hardened in favour of the protection of the rights of the Provinces . . .

17. The 'fourth general principle' quoted above is framed in terms of convention binding the Canadian Parliament rather than the UK Parliament. But it by no means follows that it will not concern the UK Parliament. The whole object of section 7 of the Statute of Westminster was to make the UK Parliament the guardian of the rights of the Provinces and as already shown, constitutional principles make it essential that the UK Parliament should not act as a mere automaton at the Canadian Government's instance. It is inexorably necessary, therefore, that the UK Parliament should be assured that the Canadian conventions for the protection of the Provinces have been duly observed. If the UK Parliament failed to satisfy itself of this, it would be acting as an automaton and failing in its function of constitutional guardian. Where the requested amendment will affect the Provinces, therefore, the UK Parliament must make sure that the Provinces concerned have consented. As the precedents since 1930 make clear, the consent of the Provinces to amendments affecting them has in fact always been sought and obtained by the Canadian Government, so that the UK Parliament has not had to make any inquiry. But it would be entirely wrong to conclude from that that the UK Parliament will never look behind the Canadian Government's request . . .

20. The inescapable conclusion is that section 7 of the Statute of Westminster 1931 has left the UK Parliament with not only legal but also political responsibility for upholding the federal constitution of Canada and acting as guardian of the rights of the Provinces.

> Anachronistic and unwelcome as this responsibility may be, it was deliberately preserved in 1931 and nothing has since happened to alter it. The UK Parliament therefore has the duty, when requested to amend the British North America Acts, to ask itself two questions: first, does the amendment adversely affect Provincial legislative powers; and secondly, if so, have the Provinces affected signified their consent?

In its report to the House of Commons, the Foreign Affairs Committee concluded that the United Kingdom Parliament was not constitutionally bound – in particular, was not bound by convention – to act automatically upon a request from the Canadian Parliament for the repatriation of the Canadian constitution. The Committee advised that it was 'in accord with the established constitutional position for the UK Government and Parliament to take account of the federal character of Canada's constitutional system, when considering how to respond' to such a request (para 14.4). On the other hand the Committee was not persuaded that the United Kingdom Parliament could properly act upon a request for patriation only if it was supported by *all* the Provinces. In the Committee's view the request must have a sufficient degree of provincial support for Parliament to be satisfied that it represented 'the wishes of the Canadian people as a federally structured community' (para 114). The committee proposed a criterion for determining whether the required degree of support existed (para 114).

Meanwhile some of the dissenting Provinces had instituted proceedings in the Canadian courts to obtain a ruling on the constitutionality of the action being taken by the Federal Government to secure patriation. Appeals from the rulings of three provincial Courts of Appeal were heard by the Supreme Court of Canada, which gave its judgment before the resolution of the Canadian Parliament had been submitted to the Queen.

Reference re Amendment of the Constitution of Canada (1981) 125 DLR (3d) 1 (Supreme Court of Canada)

The Supreme Court decided by a majority of seven to two that there was no *legal* impediment to the submission by the Canadian Parliament, without the agreement of the Provinces, of a request for the constitutional amendments necessary to effect patriation, and no legal restraint upon the power of the United Kingdom Parliament to act on such a request. But the court had also been asked to decide the following question:

> Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces?

The Supreme Court decided by a majority of six to three that this question should be answered in the affirmative, and further that 'at least a substantial measure of provincial consent' was required for compliance with the convention. Since the necessary measure of provincial agreement was wanting it would be 'unconstitutional in the conventional sense' for the proposed request for constitutional amendment to be submitted to the Queen. Passages quoted below are from the majority opinion of Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.

In giving general consideration to the nature of conventions the court said:

> The conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the Courts. One reason for this situation is that, unlike common law rules, conventions are not judge-made rules. They are not based on judicial precedents but on precedents established by the institutions of government themselves. Nor are they in the nature of statutory commands which it is the function and duty of the Courts to obey and enforce. Furthermore, to enforce them would mean to administer some formal sanction when they are breached. But the legal system from which they are distinct does not contemplate formal sanctions for their breach.
>
> Perhaps the main reason why conventional rules cannot be enforced by the Courts is that they are generally in conflict with the legal rules which they postulate and the Courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.

The following example was given to illustrate this point:

> As a matter of law, the Queen, or the Governor General or the Lieutenant-Governor could refuse assent to every bill passed by both Houses of Parliament or by a Legislative Assembly [of a Province] as the case may be. But by convention they cannot of their own motion refuse to assent to any such bill on any ground, for instance because they disapprove of the policy of the bill. We have here a conflict between a legal rule which creates a complete discretion and a conventional rule which completely neutralizes it. But conventions, like laws, are sometimes violated. And if this particular convention were violated and assent were improperly withheld, the courts would be bound to enforce the law, not the convention. They would refuse to recognize the validity of a vetoed bill.

It had been argued that a question about the existence of a convention was a political one and did not raise a justiciable issue appropriate for a court to decide. This argument was dismissed on the ground, inter alia, that the statutes empowering the provincial governments to put questions for resolution by the Courts did so in terms wide enough to entitle them to obtain an answer to a question of this kind. Although the question was 'not confined to an issue of pure legality', it had to do with 'a fundamental issue of constitutionality and legitimacy'. The court had not been asked to enforce a convention but rather 'to recognise it if it exists'. This the courts in England and the Commonwealth had done many times:

> In so recognizing conventional rules, the Courts have described them, sometimes commented upon them and given them such precision as is derived from the written form of a judgment. They did not shrink from doing so on account of the political aspects of conventions, nor because of their supposed vagueness, uncertainty or flexibility.
>
> In our view, we should not, in a constitutional reference, decline to accomplish a type of exercise that Courts have been doing of their own motion for years.

Did the convention exist? In addressing this question the court adopted Sir Ivor Jennings' view of the requirements for establishing a convention (above, p 161). The court proceeded to examine in turn the precedents, the beliefs of the 'actors' or participants in government, and the reason for the alleged rule. The court found five precedents where constitutional amendments had changed provincial legislative powers and so had directly affected federal-provincial relationships:

> Every one of these five amendments was agreed upon by each Province whose legislative authority was affected.
>
> In negative terms, no amendment changing provincial legislative powers has been made since Confederation when agreement of a Province whose legislative powers would have been changed was withheld. . . .
>
> The accumulation of these precedents, positive and negative, concurrent and without exception, does not of itself suffice in establishing the existence of the convention; but it unmistakedly points in its direction. Indeed, if the precedents stood alone, it might be argued that unanimity is required.

Turning to the question whether the convention had been acknowledged by the 'actors in the precedents', the court cited the official statement of Federal Government policy, endorsed by all the Provinces and published in the White Paper of 1965. (This statement, affirming the general principle of prior consultation and agreement with the Provinces on amendments affecting federal-provincial relationships, is quoted in Wade's Memorandum, above, para 15.) Government ministers, the court found, had expressed themselves in similar terms on a number of occasions, and successive discussions between the federal and provincial governments on the subject of constitutional amendment had proceeded on the assumption that a substantial degree of provincial consent was required. It was clear to the court that not all the actors concerned had accepted a principle of *unanimous* provincial consent. The court concluded as follows:

> It would not be appropriate for the Court to devise in the abstract a specific formula which would indicate in positive terms what measure of provincial agreement is required for the convention to be complied with. Conventions by their nature develop in the political field and it will be for the political actors, not this Court, to determine the degree of provincial consent required.
>
> It is sufficient for the Court to decide that at least a substantial measure of provincial consent is required and to decide further whether the situation before the Court meets with

this requirement. The situation is one where Ontario and New Brunswick agree with the proposed amendments whereas the eight other Provinces oppose it. By no conceivable standard could this situation be thought to pass muster. It clearly does not disclose a sufficient measure of provincial agreement.

Finally the court considered the reason for the rule, finding this in the federal principle embodied in the constitution of Canada as a federal union.

In the result the conclusion of the Supreme Court was that while the law did not require provincial consent to the proposed resolution of the federal Houses of Parliament, the evolution of convention had made a substantial measure of provincial consent constitutionally necessary. Convention had become settled in this sense without affecting the legal position for, as the court held, it is impossible for a convention to crystallise into law.

The court's judgment did not indicate what would be a 'substantial measure of provincial consent', but its decision that the support of only two Provinces did not meet this condition caused the Federal Government to seek wider agreement on a revised set of proposals for patriation. In the result nine Provinces (all except Quebec) agreed to support the revised scheme. In pursuance of this agreement an Address to the Queen was approved by both Houses of the Canadian Parliament in December 1981, requesting the passage of legislation which would enact a new Constitution for Canada, incorporating a Charter of Rights, and transfer the power of constitutional amendment to Canadian institutions. The Canada Bill 1982, of which the long title was 'A Bill to give effect to a request by the Senate and House of Commons of Canada', was accordingly laid before the United Kingdom Parliament. The Lord Privy Seal, Mr Humphrey Atkins, moved the second reading of the bill in the House of Commons.

House of Commons, 17 February 1982 (HC Deb vol 18, cols 295, 297)

Mr Atkins: It is, of course, a matter for regret that the present proposals do not have the unanimous support of the Canadian provinces. But . . . the Supreme Court of Canada considered that the consent of all the provinces was not required, either by law or by constitutional convention, to the making of a request to us. No one would deny that nine out of 10 provinces constitutes the substantial measure of provincial consent to which the Supreme Court referred.

After referring to the preamble to the Statute of Westminster 1931, Mr Atkins continued:

It would, of course, be inconsistent with this 'request and consent' convention for Parliament to make amendments which have not been requested and consented to by Canada in the first place. . . . In the light of this, I have to state the clear view of the Government that any amendment to the Canada Bill which may be put forward should not be passed by the House.

The Canada Bill was duly passed by both Houses without amendment.

Richard Kay ((1982) 4 *Supreme Court Law Review* 23, 33) remarks that the Canadian Supreme Court's part in the process which resulted in agreement between the Federal Government and nine of the ten provincial governments was crucial, and that perhaps it was only the court's intervention that could have broken the political logjam. He adds: 'But the Court intervened as another political actor, not as a court of law'. Is this a right understanding of the court's involvement?

4

Devolution and the structure of the United Kingdom

Contents

1 The United Kingdom as a union state

The United Kingdom is a union of England, Scotland, Wales and Northern Ireland in a single state. The Channel Islands and the Isle of Man, which are internally self-governing dependencies of the Crown, are not part of the United Kingdom.

It used to be generally thought that the United Kingdom has a *unitary* constitution, like those of France, Italy, Japan, the Netherlands, Sweden, New Zealand and South Africa, and unlike the *federal* constitutions of Germany ('The Federal Republic of Germany'), Switzerland, the United States, Australia, Brazil, Canada, India, Nigeria and the Russian Federation. However, it may be that the better view is that the United Kingdom has a *union* constitution, that is neither straightforwardly unitary nor systematically federal in character (see Walker, 'Beyond the unitary conception of the United Kingdom constitution' [2000] *PL* 384). This, perhaps, is particularly true since the advent of the current devolution arrangements in 1998. That said, however, it should not be thought

that all such differences as exist in the government and public law of England, Scotland, Wales and Northern Ireland were created by devolution. A number of differences between English and Welsh law, on the one hand, and Scots law, on the other, are several centuries old. Others, while more recent in origin, nonetheless have nothing to do with devolution. Examples include differences in the law pertaining to the Crown, in judicial review proceedings and in the law of remedies (see generally A McHarg and T Mullen (eds), *Public Law in Scotland* (2006), esp chs by McHarg, Tierney and Tomkins).

In this chapter we outline first some general issues concerning federalism and devolution. We then examine the various structures of government and public law as now exist in each of England, Scotland, Wales and Northern Ireland, including, where relevant, detailed consideration of devolution arrangements. In the final section of the chapter we outline the United Kingdom's scheme of local government.

(a) Federalism

KC Wheare, *Modern Constitutions* (2nd edn 1966), p 19

> In a federal Constitution the powers of government are divided between a government for the whole country and governments for parts of the country in such a way that each government is legally independent within its own sphere. The government for the whole country has its own area of powers and it exercises them without any control from the governments of the constituent parts of the country, and these latter in their turn exercise their powers without being controlled by the central government. In particular the legislature of the whole country has limited powers, and the legislatures of the states or provinces have limited powers. Neither is subordinate to the other; both are coordinate. In a unitary Constitution, on the other hand, the legislature of the whole country is the supreme law-making body in the country. It may permit other legislatures to exist and to exercise their powers, but it has the right, in law, to overrule them; they are subordinate to it.

From this it appears that the essential features of a federal constitution are that the central and regional governments have limited powers and that, within those limits, each government is independent of the other.

Other definitions of federalism have been proposed. Preston King, *Federalism and Federation* (1982), pp 140–1, sees the distinguishing feature of a federation as the entrenched role of the regional units in national decision-making:

> a federation may conveniently be defined as a constitutional system which instances a division between central and regional governments and where special or entrenched representation is accorded to the regions in the decision-making procedures of the central government.

Sawer identifies the 'basic federal principles' as follows.

Geoffrey Sawer, *Modern Federalism* (new edn 1976), p 1

(1) A country which, taken as a whole, is a nation state, an independent unit from the point of view of international relations and law, is provided with a set of institutions required for the work of government, having authority over the whole of that country. (We shall call this set of institutions the CENTRE.)

(2) This country is also divided into a number of geographical areas, each of which is also equipped with a set of institutions required for the work of government in that area. (We shall call each such set of institutions a REGION.)

(3) The power to govern is distributed between the centre and the regions in such a way that each set of governmental institutions has a direct impact on the individual citizens and other legal persons within its area of competence.

(4) The distribution of competence between centre and regions is effected by a constitution (usually written) having a fair degree of rigidity, so that its basic terms are 'entrenched' – that is, cannot be amended at the sole discretion of the centre or of any region or combination of regions. This implies the inability of a region to secede, unless the terms of the constitution specifically authorise such a step.

(5) The constitution provides rules to determine any conflict of authority between centre and regions, where but for the conflict the activity in question would have been within the competence of each of the conflicting authorities. Theoretically the rule could favour either regions or centre, and could vary with the subject of power; in all known cases the general rule is that the centre law prevails.

(6) The distribution of competence between centre and regions is interpreted and policed by a judicial authority which can make authoritative determinations as to the validity of governmental acts (including legislation) where these are alleged to be beyond the competence of the centre or a region, or where the conflict rules referred to under (5) have to be applied.

This is not to say that all systems commonly regarded as federal will necessarily possess all these features, and there are considerable variations in the ways in which they are worked out in different federal constitutions.

The regions in a federation will sometimes have been independent countries which agreed to join together in a federal union; but an existing unitary state may transform itself into a federation, as Belgium has done, by redistributing sovereign powers between central and regional governments. However created, a federal system seems to embody a *contractual* idea in that the central and the regional governments each hold their powers upon a condition of respect for the independence of the other. The terms of the 'contract' under which power is distributed are expressed in a written constitution, and are unalterable by either the central or the regional legislatures acting unilaterally. To that extent the constitution is supreme.

The formal analysis of federal and unitary constitutions assumes a regularity which is not always to be found in the shifting and diverse patterns of modern governmental systems. Wheare observed that a federal constitution might include elements that diverged from the federal principle as formally defined; indeed if it had 'considerable unitary modifications' it would be better classified as 'quasi-federal'. (KC Wheare, *Federal Government* (4th edn 1963), p 19.) Moreover when we consider the actual practice of governments it appears that a country 'may have a federal constitution, but in practice it may work that constitution in such a way that its government is not federal', or again that 'a country with a non-federal constitution may work it in such a way that it provides an example of federal government' (p 20).

History and our own time show us such a variety of systems for the distribution of power between central and regional governments, and so many exceptions, qualifications, understandings and compromises in the working of constitutions, that there is often disagreement about whether a system of government is federal or unitary. The Constitution of the United States is generally regarded as the paradigm of federal constitutions, yet even there the limits on the powers of the federal and state governments are blurred by innumerable arrangements for shared or cooperative governmental activity, and the central government, with its vast financial resources, has gained an ascendancy that transcends its formal powers. A centralising tendency is, indeed, a feature of most modern federal systems (see eg, R Nagel, *The Implosion of American Federalism* (2001), although in Canada, exceptionally, a contrary tendency has been apparent for some years). No constitution, remarks SE Finer, 'is an entirely realistic description of what actually happens' (*Five Constitutions* (1979), p 16), and in federal constitutions the formal distribution of powers is commonly qualified by networks of consultation, bargaining and joint planning. This means that the classification of a governmental system as federal or unitary (if we can agree upon it) does not tell us much about how the system actually works. Equally it is open to doubt whether either a federal or a unitary system, in the abstract, has the advantage in assuring good, efficient or strong government. S Rufus Davis disposes in the following passage of judgements like that of Dicey, who concluded (in *The Law of the Constitution* (1885), pp 171–2) that 'federal government means weak government' and that a federation 'will always be at a disadvantage in a contest with unitarian states of equal resources'.

S Rufus Davis, *The Federal Principle* (1978), pp 211–12

The truth of the matter is – and experience has been the teacher – that some 'federal' systems fail, some do not; some are able to resist aggression, some are not; some inhibit economic growth, some do not; some frustrate *some* kinds of economic planning, some frustrate *other* kinds; some develop a great diversity of public services, some do not; some promote a great measure of civil liberty, some do not; some are highly adaptive, some are not; some are

> highly efficient in servicing the needs of a modern state, some are not; some gratify values that others do not. Indeed, over a long or short span of time, some are always something (socially, economically, politically, administratively, constitutionally) which other federal systems are not. But whatever their condition at any one time (eg, adaptive/maladaptive, conservative/progressive, efficient/inefficient, etc), it is rarely clear that it *is* so because of their federalness, or the particular character of their federal institutions, or the special way they practise federalism, or in spite of their federalness. And further: when at some moment federal systems resemble or differ from each other in some respect or other (eg, efficiency or inefficiency in the delivery of public services, tepidity or zealotry in the pursuit of civil liberties), the reasons, though sometimes traceable to similarities or differences in their constitutional structure, flow more often than not from the things they share in common as societies or the things that distinguish them as societies.
>
> In a word, we are dealing with things that are only partly the same. And if there is . . . a common 'logic' running through all federal systems, it lacks the force to transcend their different political cultures and impose a common political direction. This is the massive fact we have come to learn. To expect to give a common explanation for, say, the failure of the Weimar Federal Republic and the Central African Federation in any other than trivial generalizations, or to expect that political performance will necessarily differ because states are federal or unitary, is to exaggerate the limited potentialities of contemporary federal theory and mistake the limited value of the distinction between federal and unitary systems.

This agnosticism is not shared by everyone. Sawer (above, p 125) remarks that:

> by contrast with wholly centralised systems a federal one will tend to place checks on speedy and resolute action by either regions or centre, to discourage rapid social change, and to leave to Court action the resolution of policy disputes which elsewhere are settled by political action.

Sawer sees federalism as a 'prudential' system best suited to the more stable or conservative societies.

If there are regionally based ethnic communities in a country, federalism can give them protection against oppression by majoritarian central government. It is also claimed that in the dismantling of a single, all-embracing sovereign power in the state, federal systems foster a more vigorous democratic polity, providing 'an encouragement to diversity, greater responsiveness of government, and an opportunity for broader citizen participation in public affairs'. (C Saunders in J Hesse and V Wright (eds), *Federalizing Europe*? (1996), p 47; see too Stephen Breyer's interesting account of the working of American federalism, 'Does federalism make a difference?' [1999] *PL* 651, esp 661–2.)

The United Kingdom, at all events, is clearly recognisable as a state in which a supreme central authority is firmly established on the principle of parliamentary sovereignty. When a Government and Parliament of Northern Ireland were constituted by the Government of Ireland Act 1920, these institutions were subordinate to the Parliament of the United Kingdom. In practice the United

Kingdom Parliament refrained from exercising its power to legislate on matters 'transferred' to the Parliament of Northern Ireland, and it may therefore have been correct to describe the *system of government* in Northern Ireland – at all events until the period of crisis which began in 1968 – as 'quasi-federal' (V Bogdanor, *Devolution* (1979), pp 50–1). The overriding sovereignty of the Parliament at Westminster was, however, demonstrated when the government of Northern Ireland was suspended and its Parliament prorogued by the Northern Ireland (Temporary Provisions) Act 1972. Institutions of *local* government in the United Kingdom owe their existence and powers to Parliament and can at any time be reorganised, abridged in their powers, or extinguished by Parliament.

There has never been serious official consideration of a restructuring of the United Kingdom on a federal plan. The Kilbrandon Commission, in a rather sketchy (and, perhaps, now somewhat dated) survey of federalism (Cmnd 5460/1973, paras 501–23), concluded that 'in the modern world federal countries are hampered by an inflexible system of government'. The Commission rejected federalism as inappropriate for the United Kingdom on a number of grounds. Among these were: the role which in the Commission's view would be assumed, in a federal system, by the courts; and the dominant position of England, which could not be satisfactorily accommodated in a fully federal United Kingdom.

Report of the Royal Commission on the Constitution, vol 1, Cmnd 5460/1973

527. We have noted that a federal system of government would require a written constitution, a special procedure for changing it and a constitutional court to interpret it. None of these features has been present in our constitutional arrangements before, and we doubt very much whether they would now find general acceptance . . .

529. In a federal system . . . there is more than one legislature and the powers of each are strictly defined. There may be provision for federal law to override provincial law where the two conflict, but this rule is designed for those fields in which the federal and provincial governments have joint responsibility. It cannot be used by the federal government to encroach upon legislative territory specifically assigned under the constitution to the provinces. Disputes about governmental powers which cannot otherwise be resolved go to a constitutional court. The effect is therefore to place elected bodies in a position subordinate to the judiciary. Inevitably there are some constitutional questions which have to be decided more as a matter of individual judgement than in accordance with the rules laid down in the constitution. . . . The work of the judges therefore tends to become political, and their known political views are taken into account when they are appointed. This situation, probably unavoidable in a federal system, is foreign to our own tradition of unitary government based upon the complete sovereignty of Parliament and upon the complete dissociation of the judiciary from matters of political policy. . . .

The dominant position of England

531. As far as we are aware no advocate of federalism in the United Kingdom has succeeded in producing a federal scheme satisfactorily tailored to fit the circumstances of England. A federation consisting of four units – England, Scotland, Wales and Northern Ireland – would be so unbalanced as to be unworkable. It would be dominated by the overwhelming political importance and wealth of England. The English Parliament would rival the United Kingdom federal Parliament; and in the federal Parliament itself the representation of England could hardly be scaled down in such a way as to enable it to be out-voted by Scotland, Wales and Northern Ireland, together representing less than one-fifth of the population. A United Kingdom federation of the four countries, with a federal Parliament and provincial Parliaments in the four national capitals, is therefore not a realistic proposition.

532. The imbalance would be corrected if England were to be divided into a number of units, each having the status of a federal province. It is clear, however, that this artificial division into provinces with independent sovereign powers would be unacceptable to the people of England. Advocates of federalism have attempted to get round the difficulty by an arrangement in which the regions of England would not have the full status of federal provinces; they would have elected assemblies with fewer powers than the legislatures of Scotland, Wales and Northern Ireland, and a separate body would be established to deal with all-England affairs. But no matter how this body were to be constituted and its powers shared with the regional assemblies, the fact would remain that England by its weight of numbers and wealth would continue to dominate the federation.

The nub of the case for federalism is that it allows for autonomy and diversity in a system of shared power, while keeping sufficient authority at the centre to uphold common standards (eg of respect for human rights) and to maintain the unity, security and prosperity of the state. Are the arguments of the Kilbrandon Commission conclusive against the case for a United Kingdom federation? (See further Olowofoyeku, 'Decentralising the UK: the federal argument' (1999) 3 *Edinburgh L Rev* 57.)

The federal principle has not been without influence in British history. If dismissed by Dicey as incompatible with fundamentals of the British constitution, it has been embraced by other writers of his time and ours and on occasion by politicians, and it provided the framework for a number of constitutions established for former British colonies. (See B Burrows and G Denton, *Devolution or Federalism?* (1980); J Kendle, *Federal Britain: A History* (1997); Crozier, 'Federalism and anti-federalism in the United Kingdom' and Bosco, 'The British federalist tradition' in F Knipping (ed), *Federal Conceptions in EU Member States* (1994).) The political impetus for the introduction of a federal system of government does not, however, at present exist in the United Kingdom. The devolutionary projects of 1998 for Scotland, Wales and Northern Ireland were not designed to refashion the United Kingdom as a federal state.

(See generally M Burgess and A Gagnon (eds), *Comparative Federalism*

and Federation (1993); S Rufus Davis, *Theory and Reality: Federal Ideas in Australia, England and Europe* (1995); G Smith (ed), *Federalism: The Multiethnic Challenge* (1995); J Hesse and V Wright (eds), *Federalizing Europe*? (1996); M Fazal, *A Federal Constitution for the United Kingdom* (1997); J Barnes, *Federal Britain* (1998); R Watts, *Comparing Federal Systems* (2nd edn 1999); Marquand, 'Federalism and the British: anatomy of a neurosis' (2006) 77 *Political Quarterly* 175.)

(b) Devolution

A system of devolved government applied in Northern Ireland from 1921 to 1972, replaced in the latter year by direct rule from Whitehall. (See below, pp 228–33.)

The 1974–79 Labour Government launched a scheme for the devolution of powers to Scotland and Wales. Responding to an upsurge of Scottish and Welsh nationalism in the 1960s (rather than acting upon a cool appraisal of constitutional deficiencies and the need for reform), the Wilson Government initiated the appointment in 1969 of a Royal Commission on the Constitution:

> To examine the present functions of the central legislature and government in relation to the several countries, nations and regions of the United Kingdom;
>
> to consider, having regard to developments in local government organisation and in the administrative and other relationships between the various parts of the United Kingdom, and to the interests of the prosperity and good government of Our people under the Crown, whether any changes are desirable in those functions or otherwise in present constitutional and economic relationships.

The Commissioners saw it as their main concern to investigate the case for 'devolution' of governmental functions to new institutions in the countries and regions of the United Kingdom (Kilbrandon Report, paras 12–19).

The Kilbrandon Report (so named from Lord Kilbrandon, who had become chairman of the Commission in 1972) was published in 1973 (Cmnd 5460). The Report adopted a broad meaning of the term 'devolution', so as to include both the 'deconcentration' of functions within the governmental hierarchy, which it termed 'administrative devolution', and the more advanced devolution which involves a *transfer* of central government powers to regional bodies, although 'without the relinquishment of sovereignty'. Devolution of the more advanced kind might extend to the transfer of powers to determine policies and enact legislation to put them into effect – *legislative devolution*; alternatively, major policies and primary legislation might be kept at the centre, while powers of subordinate policy-making and administration were transferred to the regions – *executive devolution*. The question for the Commission was whether the case had been made for going beyond the existing system of administrative devolution in favour of either legislative

or executive devolution to any of the countries or regions of the United Kingdom.

All the Commissioners were persuaded that central government had become overloaded and remote, and that there had been a weakening of public confidence in the democratic process. As a remedy for these infirmities of the body politic, twelve Commissioners – all but one – prescribed the introduction of schemes of legislative or executive devolution, but there was disagreement about the application of the schemes. Eight Commissioners proposed a scheme of legislative devolution for Scotland, six wished to see it extended to Wales, two favoured executive devolution for Scotland, Wales and eight English regions, three wanted an elected assembly for Wales with advisory functions only, nine recommended non-elected regional advisory councils for England. In a Memorandum of Dissent (Cmnd 5460-I) two Commissioners proposed a more thoroughgoing scheme of executive devolution for Scotland, Wales and five English regions.

The Labour Government responded to these discordant voices by deciding in 1974 to establish elected assemblies in Scotland and Wales, the former with legislative and the latter with executive powers (*Democracy and Devolution: Proposals for Scotland and Wales*, Cmnd 5732). The difference of treatment was justified by the Government as resting on the need for distinctive legislation in Scotland, with its separate legal system, and the lack of public demand in Wales for a legislative assembly. The Government ruled out the creation of an English assembly or regional assemblies in England with legislative powers, but canvassed the possibility of executive devolution to new regional authorities (*Devolution: The English Dimension* (1976)). A year later the Government announced that it had found no 'broad consensus of popular support' for devolution in England, and the matter was dropped.

A Scotland and Wales Bill introduced in the House of Commons in 1976 provided for directly elected assemblies in Scotland and Wales: the Scottish Assembly would have legislative powers, while the Welsh Assembly would have executive powers only, to be exercised within a framework of Westminster legislation. The bill was strongly contested, made little progress and was withdrawn. A fresh start was made after the Government had concluded a bargain with the Liberal Party (the 'Lib-Lab' pact of 1977–78) and separate devolution bills for Scotland and Wales were passed by Parliament in 1978. It was a condition of each bill that its provisions should not take effect unless approved by 40 per cent of the electorate in, respectively, Scotland and Wales. After Royal Assent both Acts were submitted to referendums as so required and, since the 40 per cent threshold was achieved in neither country, the Acts were repealed, as provided, by Orders in Council.

Devolution remained on the political agenda despite the loss of the Scotland and Wales Acts. In Scotland, in particular, where 52 per cent of those voting in the referendum (albeit only 33 per cent of the electorate) had been in favour of putting the Scotland Act 1978 into effect, there was continuing and

substantial support for the revival of the devolution project. Such support grew through the 1980s and early 1990s, as Scotland saw itself as governed by a government it did not vote for, and which showed little regard for the economic priorities of the Scots. The Government's apparent non-reaction to the collapse of ship-building on the Clyde and to the economic hardships that resulted for Glasgow, and its imposition of the hated poll tax (or community charge) one year earlier in Scotland than in England and Wales were merely the headlines in a prolonged story of Scotland's disaffection from British government. In the 1950s, half Scotland's MPs were Conservatives. After the 1987 and 1992 general elections fewer than a dozen of Scotland's (then) seventy-two MPs were Conservatives and in the 1997 election the Conservatives were wiped out altogether, as not a single Tory MP was returned from a Scottish constituency. In the 1980s and 1990s Scotland was governed by the Conservatives because the majority of English MPs were Conservative and despite the fact that, within Scotland, there were clear and overwhelming majorities in favour of what, in British terms, were then the opposition parties. (See further A Marr, *The Battle for Scotland* (1992), chs 5, 6.)

Scotland did not simply take all of this lying down. A remarkable and broadly constituted Scottish Constitutional Convention convened in 1989, composed of Scottish Labour and Liberal Democrat MPs together with representatives of local authorities, churches, trade unions and other bodies. (The Conservative Party and the Scottish National Party declined to take part, the latter on the ground that the Convention resolved to focus on devolutionary solutions that envisaged Scotland remaining in the United Kingdom; the SNP desires to see an independent Scottish state, outside of the United Kingdom but remaining in the European Union.) The first act of the Convention was to adopt a Claim of Right for Scotland which declared as follows:

> We, gathered as the Scottish Constitutional Convention, do hereby acknowledge the sovereign right of the Scottish people to determine the form of Government best suited to their needs, and do hereby declare and pledge that in all our actions and deliberations their interests shall be paramount.
>
> We further declare and pledge that our actions and deliberations shall be directed to the following ends: to agree a scheme for an Assembly or Parliament for Scotland; to mobilise Scottish opinion and ensure the approval of the Scottish people for that scheme; and to assert the right of the Scottish people to secure the implementation of that scheme.

As Neil MacCormick has suggested ('Sovereignty or subsidiarity? Some comments on Scottish devolution' in A Tomkins (ed), *Devolution and the British Constitution* (1998), p 5), this is a 'bold, categorical, and even revolutionary' statement of intent. But it was meant as no mere piece of grandstanding rhetoric, as the work of the Convention went on to demonstrate. After a lengthy period of discussion and consultation the Convention agreed in 1995 on a scheme of

devolution, published in its report (and, again, note the boldness of the claim), *Scotland's Parliament: Scotland's Right*. The opening words of the report were:

> This report is about practical intent. It says, 'Here is what we are going to do', not 'here is what we would like'. Those who seek inspirational home rule rhetoric are respectfully directed elsewhere . . . We have moved on. We regard the argument in principle as compelling. The longing of the people of Scotland for their own Parliament rings clear and true every time opinion is sounded. We believe that the momentum for change is now too great to deny . . .

What Scotland would have done about this had the Conservatives enjoyed a fifth successive general election victory in 1997 we will never know. In the event, of course, Tony Blair's Labour Party won with a landslide majority and a manifesto commitment to create a Scottish Parliament 'firmly based on the agreement reached in the Scottish Constitutional Convention' (*Because Britain Deserves Better* (1997), p 33). True to its word, the Labour Government's proposals for Scottish devolution, contained in the White Paper, *Scotland's Parliament* (Cm 3658/1997), were indeed broadly based on the scheme outlined in *Scotland's Parliament: Scotland's Right*.

Significantly, there was no equivalent preparation of a devolutionary scheme for Wales. Nor was there political pressure of a like intensity for a restructuring of the system of government of Wales. But the Labour Party had committed itself before the 1997 general election to devolution of powers to Wales as well as to Scotland, and the new Government's project for Welsh devolution was set out in its White Paper, *A Voice for Wales* (Cm 3718/1997).

The proposals in the White Papers were submitted to referendums in the two countries in September 1997 in accordance with the Referendums (Scotland and Wales) Act 1997 (which did not stipulate a threshold such as that which had shackled the earlier devolution project). In Scotland, in a turnout of 60.4 per cent, 74.3 per cent of those voting agreed that there should be a Scottish Parliament, and 63.5 per cent also agreed that the Parliament should have tax-varying powers. The Welsh electorate voted only on the question whether there should or should not be a Welsh Assembly. In a turnout of 50 per cent, 50.3 per cent of those voting agreed that there should be a Welsh Assembly, while 49.7 per cent disagreed – a narrow margin of affirmative votes but a significant shift from the 1979 Welsh referendum result, when a mere 20 per cent of those voting (in a turnout of 59 per cent) had been in favour of devolution.

The Scotland Bill and the Government of Wales Bill which were introduced in the House of Commons at the end of 1997 were based on the White Papers. Each bill received the royal assent in the following year. In that year, too, the Northern Ireland Act 1998 was enacted, devolving powers to an elected Assembly in Northern Ireland. One commentator has suggested that these Acts brought about 'the most radical constitutional reform this country has seen since the Great Reform Act of 1832' (V Bogdanor in University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom* (1998), p 9).

As we shall see in more detail below, the progress of devolution has been markedly different in the three countries since 1998. Devolution in Northern Ireland has been suspended, reinstated and suspended again on several occasions, as the various parties have cooperated and fallen out with each other over aspects of security policy and other matters. Devolution in Wales was subjected to a major review in 2002–04 (see www.richardcommission.gov.uk), leading to fresh legislation in 2006 that significantly reformed the 1998 settlement: see the Government of Wales Act 2006, replacing the Government of Wales Act 1998. In comparison with Northern Ireland and Wales, Scottish devolution has been relatively untroubled – so far.

The essential features of the devolution settlement are now to be found in the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998. These are complemented by a variety of more or less formal arrangements, principally a series of agreements between the United Kingdom Government and the devolved administrations which set out the principles on which they conduct their mutual relations. The agreements 'are not legally binding but there is nevertheless a clear expectation that the spirit and letter will be observed by all parties' (*Scotland Office Departmental Report*, Cm 5120/2001, para 3.2).

The main agreement is the *Memorandum of Understanding*, Cm 5420 (as revised in 2001), which provides for the establishment of a Joint Ministerial Committee as a consultative forum for ministers of the United Kingdom Government, Scottish Ministers, Welsh Secretaries and Northern Ireland ministers. The Joint Ministerial Committee considers matters of common interest or overlapping responsibilities and seeks to resolve inter-governmental disputes. In addition there are four multilateral 'overarching' agreements or Concordats, which deal respectively with arrangements for cooperation on European Union business, international relations, financial assistance to industry and United Kingdom-wide statistical work. The Department for Constitutional Affairs has agreed on Concordats with the administrations for Scotland and Wales, 'to provide the framework to guide future working relationships' between the department and the devolved administrations. Other United Kingdom government departments have also concluded bilateral Concordats with those administrations. Although Concordats are not intended to be legally binding, they may turn out to be justiciable in proceedings for judicial review: for instance, a Concordat might give rise to a legitimate expectation that its terms would be properly adhered to. (On legitimate expectations see below, pp 688–91.) (See further Rawlings, 'Concordats of the constitution' (2000) 116 *LQR* 257; Poirier, 'The functions of intergovernmental agreements' [2001] *PL* 134; House of Lords Select Committee on the Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28 of 2002–03; A Trench, 'The more things change the more they stay the same', in A Trench (ed), *Has Devolution Made a Difference*? (2004), ch 7 and A Trench, 'Intergovermental relations within the UK: the pressures yet to come', in A Trench (ed), *The Dynamics of Devolution* (2005), ch 7.)

The terms of the devolution settlements for Scotland, Wales and Northern Ireland are considered in the next section.

2 The countries of the United Kingdom

The United Kingdom is a multi-national state in which the inhabitants of Scotland, Wales and Northern Ireland identify themselves not only as 'British' but also – indeed often exclusively – as Scots, Welsh, Ulstermen or Irish. (See R Rose, *Understanding the United Kingdom* (1982), p 14, Table 1.1. Cf *British Social Attitudes*, 13th Report (SCPR 1996), chs 1 and 7; 17th Report (SCPR 2000), ch 8; the MORI poll reported in *The Economist*, 3 October 1998, p 32; and Heath and Kellas, 'Nationalisms and constitutional questions', *Scottish Affairs* (Special Issue 1998), p 110.) In law there is, however, a single British citizenship for all those sufficiently connected by birth or descent with the United Kingdom (British Nationality Act 1981).

Richard Rose, 'The United Kingdom as a Multi-National State', in Richard Rose (ed), *Studies in British Politics* (3rd edn 1976), pp 115–16

Legally, there is no such thing as an English regime. In international law as in the title of the Queen, the regime is the United Kingdom of Great Britain and Northern Ireland, a composite of jurisdictions joined in one state. The prolonged and continuing refusal of some Irish people to give allegiance to this regime has meant that at no time has it been fully legitimate everywhere in the realm. Scotland and Wales have not shown the same measure of political disaffection and violence, but the resurgence of distinctive parties such as the Scottish Nationalists and Plaid Cymru in the 1960s is a reminder that generalisations about political allegiance in the United Kingdom cannot automatically be extended beyond England's boundaries.

Unfortunately, many who write about British politics confuse England, the largest part, with the whole of the United Kingdom, or ignore any possibility of differences within it. For instance, Bagehot's study of *The English Constitution*, published in 1867, gives no hint of the constitutional problems that followed the Fenian Rising in Ireland in the same year. Latter-day writers have also ignored differences between English and United Kingdom politics. LS Amery, an active politician during the Irish troubles, gave careful attention in his *Thoughts on the Constitution* (1953), to the integration of colonies into the British Empire and Commonwealth, but none to the problems of the integration and disintegration of parts of the United Kingdom.

The structure of the United Kingdom as we now know it dates from 1922, when southern Ireland withdrew from the Union as the Irish Free State.

Legislation of the United Kingdom Parliament has usually extended to all parts of the Kingdom, but some public Acts have not extended to Northern

Ireland, or have applied only to Scotland, Wales or Northern Ireland (rarely only to England). The former Parliament of Northern Ireland (1921–72) enacted many laws for the province which are still in force. The devolution arrangements of 1998, while not restricting the legal competence of Parliament to legislate for the whole of the United Kingdom, do affect the exercise of its power in respect of devolved matters: the Government undertook that it would 'proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature' (*Memorandum of Understanding*, Cm 5240/2001, para 13). Devolution has increased the diversity of the law in force in different parts of the Kingdom.

There is freedom of movement throughout the United Kingdom for those settled there. This was qualified by the Prevention of Terrorism (Temporary Provisions) Act 1989, by which a person suspected of terrorism might be excluded either from Great Britain or from Northern Ireland (or from the whole of the United Kingdom). This draconian power was allowed to lapse when the Act was partially renewed in 1998 and it did not reappear in the Terrorism Act 2000.

(a) England

England is the largest of the four countries of the United Kingdom, and its population of 50.1 million is about 84 per cent of the total United Kingdom population of 60.2 million. While there are no significant nationalist or separatist political movements in England, there are cultural differences associated with particular regions, and differences both cultural and linguistic among the ethnic minority populations of English cities.

England has 529 of the 646 seats in the House of Commons, and is underrepresented in comparison with the rest of the United Kingdom: if average constituency electorates were equal throughout the United Kingdom, England would have 541 seats.

In the central government of the United Kingdom there is no separate department for England like the 'territorial' departments for Scotland, Wales and Northern Ireland, but the work of several departments – in particular, Environment, Food and Rural Affairs, Health, Transport, Education and Skills – is predominantly concerned with the affairs of England because the corresponding functions in the other countries of the United Kingdom are largely devolved.

With the First World War there began a process of 'deconcentration' of administrative functions to outstations of Whitehall departments in regions of England (and in Scotland and Wales). (This is sometimes described as 'administrative devolution'. It is not the same thing as a 'decentralisation' of powers to autonomous bodies outside central government.) Regional offices deliver the services of departments and agencies, in some cases through a network of local

offices, in administering social security benefits, employment services, agricultural subsidies and grants, assessment and collection of taxes, road construction and maintenance, and so on. A great many decisions affecting individuals are taken by these regional or local units of government. As Richard Rose remarks, 'British government is not a set of ministers gathered around a table in 10 Downing Street; it is the totality of employees working in thousands of government offices throughout the United Kingdom' (*Ministers and Ministries* (1987), p 269).

The boundaries of regional administration were established ad hoc and they have varied to suit the services of different governmental bodies: there was no single organisational map of English regions. A substantial measure of consistency was achieved in 1994 when the Government established ten new integrated regional offices in England, each headed by a regional director and staffed by civil servants. The nine Government Offices for the Regions are responsible for implementing the regional programmes of ten participating departments, in such fields as employment, the environment, public health, trade and industry and transport. They take a cross-departmental approach and provide 'a regional perspective to inform the development and evaluation of policy'.

Government policy for the regions was taken further by the Regional Development Agencies Act 1998 which established Regional Development Agencies, intended to be 'economic powerhouses' for the regions of England. The eight Agencies are non-departmental public bodies responsible to ministers and are required 'to promote sustainable development and social and physical regeneration and to coordinate the work of regional and local partners [local authorities and interest groups] in areas such as training, investment, regeneration and business support' (*Building Partnerships for Prosperity*, Cm 3814/1997. The purposes of a Regional Development Agency are set out in s 4 of the Act.) London has its own development agency, accountable to the mayor, with powers and functions similar of those of the Regional Development Agencies.

The work of the Regional Development Agencies is scrutinised by regional chambers known as Regional Assemblies (representing local authorities, businesses, trade unions and other interests) that have been established in all eight regions. Development Agencies are required by the Secretary of State to consult the Assemblies in the exercise of their functions and to take account of the views expressed (Regional Development Agencies Act 1998, s 8). As regional planning bodies the Assemblies have responsibilities for the development of strategic planning and transport policies in their regions. They are said to 'represent the voices of regions to Whitehall and European institutions'.

The Government proposed in 2002 that the Regional Assemblies should be directly elected where support for this was expressed by the people of the regions in referendums. (See *Your Region, Your Choice: Revitalising the English Regions*, Cm 5511/2002.) The emergence of a democratic regional level of

government in England would have gone some way to redress the imbalance in the asymmetrical devolutionary arrangements for the United Kingdom. But in the first such referendum, held in the North East region in 2004, the proposal to establish an elected Regional Assembly was convincingly defeated, whereupon plans for further regional referendums were suspended. England, as Robert Hazell has remarked, 'remains the gaping hole in the devolution settlement' (*An Unstable Union: Devolution and the English Question* (2000), p 7).

A House of Commons Standing Committee on Regional Affairs was set up in 1975 to consider matters relating to the regions of England. The *raison d'être* of the committee was to provide more time for debates on regional questions than was available on the floor of the House, but there was an unenthusiastic response to its establishment and after 1978 it did not meet for over twenty years. The committee was reconstituted under a revised standing order of the House (SO 117) in April 2000 to consider 'any matter relating to regional affairs in England which may be referred to it'. It consists of thirteen members representing English constituencies nominated by the House's Committee of Selection; any other member representing an English constituency may take part in its proceedings but may not vote. Ministers may appear before the committee to make statements and to be questioned on them. A motion calling for a meeting of the Committee must be moved by a Minister of the Crown and it does not meet often.

See further Hazell, 'The English question: can Westminster be a proxy for an English parliament?' [2001] *PL* 268; R Hazell (ed), *The English Question* (2006); M Russell and G Lodge, *Westminster and the English Question* (2005); M Sandford and P Hetherington in A Trench (ed), *The Dynamics of Devolution* (2005), ch 5; Hadfield, 'Devolution, Westminster and the English question' [2005] *PL* 286.

(b) Scotland

(i) Scotland in the Union

Scotland covers about one-third of the area of the United Kingdom and has a population of 5.1 million or about 8.5 per cent of the total United Kingdom population.

Scotland and England, under the same Crown from 1603 but with separate institutions of government, were joined in the United Kingdom of Great Britain in 1707 by the Treaty and Acts of Union. Articles of Union, agreed in 1706 by Commissioners acting on behalf of the Parliament of each country, were adopted by Acts of Union passed by the English Parliament in 1706 and the Scottish Parliament in 1707. In terms of these instruments the two Parliaments were superseded by a Parliament of Great Britain – 'a new Parliament for a new State' (Scottish Law Commission, Memorandum No 32 (1975), p 16).

In entering the Union the Scots were concerned to ensure, as far as they could, that certain of their cherished rights and institutions should not be at risk from

a Parliament in which English members would be in a majority. The Union legislation accordingly declared, as a 'fundamental and essential condition' of the union, that the Presbyterian religion and Church of Scotland should 'remain and continue unalterable' in Scotland, and affirmed that the Scottish superior courts (Court of Session and Court of Justiciary) should remain 'in all time coming' with their authority and privileges. While the Parliament of Great Britain was authorised to alter the laws of Scotland, it was stipulated that no alteration should be made in private law 'except for evident utility of the subjects within Scotland'. From a modern point of view the Acts of Union are defective in that they include no safeguards against violation of their 'fundamental' provisions, nor any special machinery for amending these as changed conditions might require. At least one of the fundamental provisions, obliging professors of Scottish universities to make a formal submission to Presbyterianism, was repealed by the Universities (Scotland) Acts 1853 and 1932; the issue was not a contentious one and the Scots may be said to have acquiesced in the repeal.

It would seem to follow from the doctrine of parliamentary sovereignty that an Act of Parliament is valid even if it violates fundamental provisions of the Union legislation. Against this it is argued that the Acts of Union are constituent Acts which, in creating the Parliament of the United Kingdom, imposed limitations upon its powers which remain effective. English constitutional lawyers have not in general accepted this argument. It has been heard in the Scottish courts and although it has not prevailed there, neither has it been summarily dismissed.

MacCormick v Lord Advocate 1953 SC 396 (Court of Session)

The chairman and secretary of the Scottish Covenant Association petitioned the Court of Session for a declaratory order that a proclamation describing the Queen as 'Elizabeth the Second of the United Kingdom of Great Britain' was illegal. They argued that the adoption of the numeral 'II', since it implied that Elizabeth I had been Queen of Great Britain, was contrary to Article I of the Treaty and Acts of Union which brought about the union of the two Kingdoms in 1707. For the Crown the Lord Advocate denied that the proclamation conflicted with Article I, and maintained further that the use of the numeral 'II' was authorised by the Royal Titles Act 1953. The petitioners contended that the Act could not validly permit the violation of a fundamental provision of the Treaty.

The Lord Ordinary (Lord Guthrie) dismissed the petition on the grounds (1) that the Royal Titles Act had authorised the adoption of the numeral, and an Act of Parliament could not be challenged as being in breach of the Treaty or on any other ground; (2) that in any event the Treaty did not expressly or impliedly prohibit the use of the numeral; and (3) that the petitioners had no sufficient interest to bring the proceedings.

The petitioners' appeal to the First Division of the Inner House was dismissed, the court agreeing with Lord Guthrie that there was nothing in

Article I of the Treaty against the use of the numeral, and that the petitioners had no title to sue. The court was of the opinion that the Royal Titles Act had no relevance in the case: it was enacted only after the proclamation of the Queen as Elizabeth II, and was not concerned in any way with the numeral adopted. The Lord President nevertheless expressed his opinion on the questions of the validity of an Act of Parliament that conflicted with the Treaty, and the jurisdiction of the courts if such an issue were to arise.

Lord President (Cooper): . . . The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter having stated the doctrine in its classic form in his *Law of the Constitution*. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.

The Lord Advocate conceded this point by admitting that the Parliament of Great Britain 'could not' repeal or alter such 'fundamental and essential' conditions. He was doubtless influenced in making this concession by the modified views expressed by Dicey in his later work entitled *Thoughts on the Scottish Union*, from which I take this passage (pp 252–253): – 'The statesmen of 1707, though giving full sovereign power to the Parliament of Great Britain, clearly believed in the possibility of creating an absolutely sovereign Legislature which should yet be bound by unalterable laws'. After instancing the provisions as to Presbyterian Church government in Scotland with their emphatic prohibition against alteration, the author proceeds: – 'It represents the conviction of the Parliament which passed the Act of Union that the Act for the security of the Church of Scotland ought to be morally or constitutionally unchangeable, even by the British Parliament. . . . A sovereign Parliament, in short, though it cannot be logically bound to abstain from changing any given law, may, by the fact that an Act when it was passed had been declared to be unchangeable, receive a warning that it cannot be changed without grave danger to the Constitution of the country.' I have not found in the Union legislation any provision that the Parliament of Great Britain should be 'absolutely sovereign' in the sense that that Parliament should be free to alter the Treaty at will . . .

> But the petitioners have still a grave difficulty to overcome on this branch of their argument. Accepting it that there are provisions in the Treaty of Union and associated legislation which are 'fundamental law', and assuming for the moment that something is alleged to have been done – it matters not whether with legislative authority or not – in breach of that fundamental law, the question remains whether such a question is determinable as a justiciable issue in the Courts of either Scotland or England, in the same fashion as an issue of constitutional *vires* would be cognisable by the Supreme Courts of the United States, or of South Africa or Australia. I reserve my opinion with regard to the provisions relating expressly to this Court and to the laws 'which concern private right' which are administered here. This is not such a question, but a matter of 'public right' (articles 18 and 19). To put the matter in another way, it is of little avail to ask whether the Parliament of Great Britain 'can' do this thing or that, without going on to inquire who can stop them if they do. . . . This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic Courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union. From the standpoint both of constitutional law and of international law the position appears to me to be unique, and I am constrained to hold that the action as laid is incompetent in respect that it has not been shown that the Court of Session has authority to entertain the issue sought to be raised.

Lord Carmont expressed agreement with the views of the Lord President, and Lord Russell in a concurring judgment was in general agreement with those views.

It has been said of Lord Cooper's conclusion that the courts have no jurisdiction to rule on the validity of an Act of Parliament contradicting the Treaty of Union, that 'what he gave with the right hand he took away with the left' (CMG Himsworth and CM O'Neill, *Scotland's Constitution: Law and Practice* (2003), p 154). See further MacCormick, 'Does the United Kingdom have a constitution? Reflections on *MacCormick v Lord Advocate*' (1978) 29 *NILQ* 1; Tomkins, 'The constitutional law in *MacCormick v Lord Advocate*' [2004] *Juridical Rev* 213.

Gibson v Lord Advocate 1975 SLT 134 (Court of Session)

Section 2(1) of the European Communities Act 1972 provides that European Community Regulations (creating directly effective obligations) are to have the effect of law in the United Kingdom. Article 2 of Council Regulation 2141/70/EEC required Member States to allow equal access to fishing grounds in their maritime waters for all fishing vessels of other Member States.

The pursuer (claimant) in this case was the skipper and part-owner of an inshore fishing vessel with which he fished waters off the west coast of Scotland. He sued the Lord Advocate, as representing the Crown, for

a declarator (declaration) that section 2(1) of the European Communities Act 1972, in purporting to give legal effect to Article 2 of the EC Regulation, was contrary to Article XVIII of the Act of Union 1707 and was null and of no effect. Article XVIII enacted:

> that the laws concerning regulation of trade customs and such excises to which Scotland is by virtue of this treaty to be liable be the same in Scotland from and after the Union as in England and that all other laws in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before . . . but alterable by the Parliament of Great Britain with this difference betwixt the laws concerning public right policy and civil government and those which concern private right that *the laws which concern public right policy and civil government may be made the same throughout the whole United Kingdom but that no alteration be made in laws which concern private right except for evident utility of the subjects within Scotland* [emphasis added].

The pursuer maintained that before 1707 Scottish subjects had exclusive fishing rights in Scottish waters, and that the laws which assured those rights were laws concerning private right within the meaning of Article XVIII: the alteration of the fishing rights by the EC Regulation (in making them non-exclusive) was not for the evident utility of Scottish subjects, and therefore section 2(1) of the European Communities Act 1972, so far as it gave effect to Article 2 of the Regulation, was null and void. These arguments were unsuccessful. After extensive analysis the Lord Ordinary (Lord Keith) ruled that 'the law which the pursuer founds upon as the basis of his case is a law concerned with public right' and that 'section 2(1) of the 1972 Act and Article 2 of the EC Regulation do not effect any alterations in the private laws of Scotland'. Lord Keith concluded that 'For these reasons I am of opinion that the pursuer's case is irrelevant and should be dismissed'.

Like *MacCormick v Lord Advocate*, however, what is of most importance is not the holding of the court as to the substance of the case, but remarks uttered as to the scope, in Scots law, of the sovereignty of Parliament:

> **Lord Keith:** . . . In addition to the argument on relevancy there were addressed to me interesting arguments upon the question of jurisdiction and the competency of the action. These arguments raised constitutional issues of great potential importance, in particular whether the Court of Session has power to declare an Act of the United Kingdom Parliament to be void, whether an alleged discrepancy between an Act of that Parliament and the Treaty or Act of Union is a justiciable issue in this court, and whether, with particular reference to article XVIII of the Act of Union, this court has power to decide whether an alteration of private law bearing to be effected by an Act of the United Kingdom Parliament is 'for the evident utility' of the subjects in Scotland. Having regard to my decision on relevancy, these are not live issues in the present case. The position was similar in *MacCormick v Lord Advocate* [above], a case concerned with the validity of the proclamation as Queen of Her present Majesty under

> a title which incorporated the numeral 'second'. The First Division held that no question properly arose concerning the validity of the Royal Titles Act 1953, but delivered certain obiter dicta upon the constitutional position as regards the Treaty and Act of Union. . . . Like Lord President Cooper, I prefer to reserve my opinion on what the question would be if the United Kingdom Parliament passed an Act purporting to abolish the Court of Session or the Church of Scotland or to substitute English law for the whole body of Scots private law. I am, however, of opinion that the question whether a particular Act of the United Kingdom Parliament altering a particular aspect of Scots private law is or is not 'for the evident utility' of the subjects within Scotland is not a justiciable issue in this court. The making of decisions upon what must essentially be a political matter is no part of the function of the court, and it is highly undesirable that it should be. The function of the court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain instances, to the state. A general inquiry into the utility of certain legislative measures as regards the population generally is quite outside its competence.

(See the note by Thomson (1976) 92 *LQR* 36, who draws attention to an earlier case, *Laughland v Wansborough Paper Co Ltd* 1921 1 SLT 341, in which Lord Ashmore thought it right to consider the utility of a statutory rule which had been challenged as contrary to Article XVIII, finding it to be of general benefit to Scotland. Compare too the opinions expressed in *Stewart v Henry* 1989 SLT (Sh Ct) 34 and *Fraser v MacCorquodale* 1992 SLT 229, the decision of the Court of Session in *Pringle, Petitioner* 1991 SLT 330, discussed by Edwards (1992) 12 *Legal Studies* 34 and *Murray v Rogers* 1992 SLT 221.)

MacCormick's case and *Gibson*'s case contain interesting dicta but give no definite ruling on the question whether Parliament's powers are limited by the Treaty and Acts of Union. It is evident, however, that anyone seeking to challenge an Act on this ground will have the difficult task of persuading a court to assume jurisdiction to decide the question. If a court should agree to entertain the matter, arguments for the fundamental status of the Treaty of Union, while likely to carry substantial weight in a Scottish court, might be countered by arguments that the new Parliament created in 1707 succeeded to the sovereignty of its English predecessor and was unlimited in *law* by the terms of the Treaty of Union; or alternatively that any initial limitations upon the power of the United Kingdom Parliament have been overcome by the full maturing of the doctrine of parliamentary sovereignty since 1707.

It is nevertheless the fact that the essential conditions of the Treaty of Union have in substance been respected. Scottish lawyers, politicians and others still hold them to be significant. Custom, Scottish national sentiment and political calculation are factors which have qualified the exercise of Parliament's powers with regard to the Treaty of Union.

In the course of consideration by the House of Lords of the government bill to remove the right of hereditary peers to sit and vote in the House (House of

Lords Bill 1999), the objection was raised that the bill, if enacted, would breach Article XXII of the Treaty and Acts of Union. This Article provided for the representation of Scottish peers in the Parliament of Great Britain and was argued to be a fundamental law of the Union. The question was submitted to the House of Lords Committee for Privileges for its opinion. The unanimous opinion of the Committee, expressed in reasons given by the three Law Lords among its members, was that Article XXII did not have the character of fundamental or unalterable law; that it had already been progressively repealed (by the Peerage Act 1963, the Statute Law Revision (Scotland) Act 1964 and the Statute Law (Repeals) Act 1993); and that it would in any event not be breached by the terms of the House of Lords Bill if enacted. Lord Slynn expressed doubt 'whether a provision, even if regarded as fundamental and as part of the constitution, cannot be altered by Parliament', whereas Lord Hope remarked that 'the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful' (see *Second Report from the Committee for Privileges*, HL 108-I of 1998–99).

(See further Smith, 'The Union of 1707 as fundamental law' [1957] *PL* 99; Upton, 'Marriage vows of the elephant: the constitution of 1707' (1989) 105 *LQR* 79; Walker and Himsworth, 'The poll tax and fundamental law' [1991] *Juridical Rev* 45; Addo and Smith, 'The relevance of historical fact to certain arguments relating to the legal significance of the Acts of Union' [1998] *Juridical Rev* 37; N MacCormick, *Questioning Sovereignty* (1999), ch 4; C Munro, *Studies in Constitutional Law* (2nd edn 1999), ch 5; Wicks, 'A new constitution for a new state? The 1707 union of England and Scotland' (2001) 117 *LQR* 109.)

(ii) Government of Scotland before devolution

After the Union of 1707 the Scottish administration was absorbed into an administration of Great Britain centred in London. The Lord Advocate held an office of ancient origin in Scotland and, as well as being a Law Officer of the Crown, had far-reaching executive responsibilities. Public boards with governmental functions were established in Scotland in the nineteenth century. A new system of administration was instituted in 1885 when a Secretary for Scotland was appointed as ministerial head of a Scottish Office in Whitehall. The Scottish Secretaryship was replaced in 1926 by the more senior office of Secretary of State, and in 1939 the Scottish Office was moved to Edinburgh (with a branch of the Office in London).

Except in the war years, the Secretary of State for Scotland always had a seat in the Cabinet – necessary if he was to be able to press the case for Scotland on equal terms. In 1998 the responsibilities of the Secretary of State, heading a team of five subordinate ministers, covered a wide range of Scottish affairs, corresponding to functions which were spread over no fewer than seven Whitehall departments. The Scottish Office and its agencies employed some 10,000 civil servants.

There were special arrangements for the conduct of Scottish business in Parliament. In the House of Commons a Scottish Grand Committee, comprising all MPs representing Scottish constituencies, resembled a sub-Parliament for Scotland within the House, debating bills relating exclusively to Scotland and questioning Scottish Office ministers. There were also Scottish standing committees to examine the detail of Scottish bills and a Select Committee on Scottish Affairs to review the work of the Scottish Office.

These arrangements provided much work for Scottish MPs and involved them closely and constantly in Scottish business at Westminster. This business was, however, firmly set in a United Kingdom context where collective ministerial responsibility and centralised policy-making were the rule.

(iii) Devolution under the Scotland Act 1998

The devolution settlement for Scotland rests upon the provisions of the Scotland Act 1998 (for the campaign for and background to Scottish devolution, see pp 189–90 above). The Act put the union of Scotland with the rest of the United Kingdom on a new basis, devolving primary legislative powers and administrative responsibilities to newly created institutions in Scotland. Section 37 provides: 'The Union with Scotland Act 1706 and the Union with England Act 1707 have effect subject to this Act'. The Act's provisions do not, however, seem to violate any of the fundamentals of the Treaty and Acts of Union.

The Scotland Act established a unicameral, law-making Scottish Parliament and a Scottish Administration (consisting of ministers, certain non-ministerial office-holders and their civil service staff).

The main characteristics and powers of the Scottish Parliament may be summarised as follows.

(1) The Parliament has at present 129 members (MSPs). Scottish Parliament constituency boundaries were initially linked with those for the House of Commons, with the consequence that an expected revision of electoral boundaries of Scottish Westminster constituencies would have resulted in an unwelcome reduction of the number of MSPs to about 106. This was averted by the Scottish Parliament (Constituencies) Act 2004, which removed the link and provided for Scottish Parliament constituency boundaries to be reviewed in future by the Electoral Commission.

(2) The Parliament is elected by the Additional Member (or 'Mixed Member') system, designed to achieve a degree of proportionality between votes cast and seats won through a combination of the plurality or 'first past the post' (FPTP) system with a regional list system. At present, seventy-three MSPs are elected in single-member constituencies by FPTP and seven additional members are elected in each of eight regions of Scotland by the list system, the parties presenting closed lists of their chosen candidates for each region. An elector can vote for a constituency candidate and has a second, regional vote to be cast for a party (or for an independent candidate standing in the region).

A commission established by the Secretary of State for Scotland to examine voting systems and the pattern of electoral boundaries in Scotland has recommended that closed lists should be replaced by open ones, allowing voters to have 'a more direct and active role in the selection of regional members': *Report of the Commission on Boundary Differences and Voting Systems* (2006). (On the working of list systems see further below, pp 521–4.) The Additional Member System has a tendency to bring about coalition government and indeed after each of the first two elections (in 1999 and 2003) a coalition of Labour and the Liberal Democrats took office in Scotland.

(3) The Parliament is elected for fixed terms of four years, but exceptionally may be dissolved before the term has run. This will happen if the Parliament resolves, by a two-thirds majority of its members, that it should be dissolved, or if the Parliament is deadlocked in the choice of a First Minister.

(4) The Parliament is a legislature of limited powers (for relevant case law, see below). It is competent to legislate for Scotland on devolved matters, its laws being known as Acts of the Scottish Parliament (ASPs). Unlike Westminster, the Scottish Parliament has no competence to legislate in a way that is incompatible with Convention rights or with European Community law (Scotland Act 1998, s 29).

(5) The scheme adopted in the Scotland Act is to specify the powers *retained* at Westminster, not those devolved. Accordingly the Act specifies in detail (in Sch 5) the 'reserved matters' which are outside the competence of the Scottish Parliament, those matters that are not reserved being generally devolved.

Matters are reserved to the Westminster Parliament so as to 'safeguard the integrity of the United Kingdom' (C Himsworth and C O'Neill, *Scotland's Constitution: Law and Practice* (2003), p 166). The reserved matters include: the constitutional framework (the Crown, the Union of Scotland and England, the United Kingdom Parliament, the continued existence of the High Court of Justiciary and the Court of Session); international relations and the European Communities; the regulation of international trade; the civil service; defence and the armed forces; fiscal, economic and monetary policy; electoral arrangements (except local government elections); immigration and nationality; national security and official secrets; companies and other business associations; competition policy; consumer protection; ownership and exploitation of coal, oil and gas; nuclear energy; social security; employment and industrial relations; broadcasting; and equal opportunities.

Within the reserved categories many exceptions are made. For instance, the reservation of fiscal, economic and monetary policy is subject to the exception of local taxation to fund local authority expenditure, which is devolved.

The list of reserved matters in Schedule 5 is lengthy but leaves a wide range of matters to fall within the competence of the Scottish Parliament. The devolved matters include Scots private law (including judicial review) and criminal law; the prosecution service, police and prisons; the judiciary and the court system; agriculture, forestry and fisheries; economic development, tourism,

roads and transport; planning and environmental protection; education and training; health; local government, social work and housing, sport and the arts. Some matters within these fields are reserved in Schedule 5: for instance, abortion, surrogacy, medicines and regulation of the health professions are reserved although in general health is a devolved matter; treason, terrorism, firearms legislation and misuse of drugs are reserved although criminal law is broadly devolved.

Acts of the Scottish Parliament have implemented distinctive policies for Scotland, for instance, in abolishing feudal land tenure, discontinuing tuition fees for students in higher education, reforming the law of marriage, divorce and cohabitation, legitimising breast-feeding in public, providing for free long-term care for the elderly and banning smoking in public places.

(6) Since the judiciary and the court system are devolved matters, the Scottish Parliament has power to alter the structure and jurisdiction of the courts in Scotland. On the other hand the continued existence of the High Court of Justiciary as a criminal court of first instance and of appeal, and of the Court of Session as a civil court of first instance and of appeal, as well as the determination of judicial salaries, are reserved matters. The Scotland Act includes provisions for the appointment and removal of judges which are designed to safeguard the independence of the judiciary (s 95).

(7) Changes to the list of reserved matters – as by transfer of additional powers to the Scottish Parliament – may be made by Order in Council under section 30 of the Act. This can be done only if the Westminster and Scottish Parliaments agree on the change, for the Order in Council has to be approved in draft by both Houses at Westminster and by the Scottish Parliament. If the change is effected by primary legislation, an agreed convention requires that the prior approval of the Scottish Parliament should be obtained.

(8) Section 29 of the Act places certain restrictions on the competence of the Scottish Parliament to enact valid legislation. In particular, an Act of the Parliament may not relate to reserved matters and cannot modify the Scotland Act itself (with some few exceptions: see Sch 4, para 4), or the Human Rights Act 1998, or include provisions that are incompatible with any of the Convention rights under that Act or with Community (EU) law. In general the Parliament can, however, repeal or amend Acts of the Westminster Parliament in relation to devolved matters.

(9) Finance for Scotland is provided in a block grant voted by the Westminster Parliament and paid by the Secretary of State for Scotland into the Scottish Consolidated Fund. (The amount is adjusted each year in line with changes in population and in financial allocations to comparable Whitehall spending departments, in accordance with the so-called 'Barnett formula'.) The Scottish Parliament and Executive determine expenditure within this block budget. The Parliament has power to vary the basic rate of UK income tax in Scotland by up to 3p and can by the use of this power increase the amount of money at its disposal, although by 2006 this option had not been exercised.

(10) The Parliament decides on its own procedures and working practices, which are incorporated in standing orders and may be amended as necessary. The standing orders provide for the establishment of committees of the Parliament, some of which are mandatory (eg on Procedures of the Parliament, European and External Relations, Finance and Equal Opportunities), while 'subject' committees scrutinise departments of the Scottish Executive and legislative proposals and may themselves initiate legislation ('committee bills').

(11) A bill becomes an Act of the Scottish Parliament 'when it has been passed by the Parliament and has received Royal Assent' (Scotland Act 1998, s 28(2)). The Act provides (in s 36) for a framework of legislative procedure, including three stages corresponding to the second reading, committee stage and third reading of bills in the House of Commons.

The Act also includes provisions intended to reduce the likelihood of an ultra vires bill being passed by the Parliament. A member of the Scottish Executive in charge of a bill is required to state, on or before the introduction of the bill, that in his view its provisions would be within the legislative competence of the Parliament (s 31(1)). In addition the Presiding Officer of the Parliament – a politically impartial officer like the Speaker of the House of Commons – has to decide and state whether or not in his view the bill's provisions would be within the Parliament's competence (s 31(2)). It is for the Parliament to decide on the appropriate course of action – such as a corrective amendment – if the Presiding Officer should conclude that provisions of the bill would be ultra vires.

The legality of Acts of the Scottish Parliament may be judicially reviewed (for the relevant procedures, see below). One question for the courts in such cases is how they should treat Acts of the Scottish Parliament: should they be regarded as being akin to decisions of local authorities, or should they be regarded with more deference than that, owing to the fact that the Acts concerned are, after all, the product of a fully democratic *Parliament*? The following two cases reveal that a variety of approaches may be taken to this issue.

Whaley v Watson 2000 SC 340 (Court of Session)

Whaley sought to prevent an MSP, Lord Watson, from introducing into the Scottish Parliament a bill that, if passed, would have banned in Scotland certain forms of hunting with hounds. The MSP was closely connected to, and relied upon the assistance and support of, the Scottish Campaign Against Hunting with Dogs. As such, Whaley argued that in presenting the bill the MSP was in violation of article 6 of the Scotland Act 1998 (Transitional Provisions) (Members' Interests) Order 1999, S1 1999/1350 which prohibited a Member of the Scottish Parliament from doing anything in his capacity as an MSP which relates directly to the affairs or interests of, or which seeks to confer benefit upon, any person from whom the member received or expected

to receive remuneration. At first instance, the Lord Ordinary refused the motion and dismissed the action. In the course of his judgment he ruled as follows:

> In my opinion, the actionable wrong, assuming it to have been committed, is against the rules of the Parliament . . . In my opinion it is for the Parliament to decide whether or not in those circumstances the member in question is entitled or not to present the bill . . . The Scottish Parliament is entitled to make its own determination, in my opinion, upon its own rules and this court should not even look at it on grounds of irrationality.

While Whaley's reclaiming motion (appeal) to the Inner House of the Court of Session was unsuccessful, in the course of his judgment the Lord President of the Court of Session, Lord Rodger (now Lord Rodger of Earlsferry, in the House of Lords), stated as follows:

> **Lord President (Rodger):** . . . These remarks . . . contain some general observations about the relationship between the courts and the Scottish Parliament . . . which I am unable to endorse.
>
> The Lord Ordinary gives insufficient weight to the fundamental character of the Parliament as a body which – however important its role – has been created by statute and derives its powers from statute. As such, it is a body which, *like any other statutory body*, must work within the scope of those powers . . . In principle, therefore, [subject to the Scotland Act 1998, s 40] the Parliament like any other body set up by law is subject to the law and to the courts which exist to uphold that law . . .
>
> Some of the arguments of counsel . . . appeared to suggest that it was somehow inconsistent with the very idea of a parliament that it should be subject in this way to the law of the land and to the jurisdiction of the courts which uphold the law. I do not share that view. On the contrary, if anything, it is the Westminster Parliament which is unusual in being respected as sovereign by the courts . . . By contrast, in many democracies throughout the Commonwealth, . . . even where the parliaments have been modelled in some respects on Westminster, they owe their existence and powers to statute and are in various ways subject to the law and to the courts which act to uphold the law. The Scottish Parliament has simply joined that wider family of parliaments.

Adams v Scottish Ministers 2004 SC 665 (Court of Session)

Adams challenged the legality of the Protection of Wild Mammals (Scotland) Act 2002, legislation passed by the Scottish Parliament which bans in Scotland the hunting of wild mammals with dogs. The basis of Adams' argument was that the Act was ultra vires the Scottish Parliament on the basis that it was violative of a number of Convention rights (the Scottish Parliament having no power to legislate incompatibly with Convention rights). The argument was unsuccessful. The court's judgment was delivered by the Lord Justice

Clerk, the second most senior judge in the Court of Session, and the approach taken was significantly different from that preferred by Lord Rodger in *Whaley*'s case.

Lord Justice Clerk (Gill): . . . If the Parliament was of the view that foxhunting was cruel, and was aware of the likely impacts of the legislation, the next question is whether the Parliament was entitled to make the judgment that foxhunting should be proscribed by law.

The starting point on this issue, in our opinion, is that the prevention of cruelty to animals has for over a century fallen within the constitutional responsibility of the legislature. The enactment of every statute on the subject has necessarily involved the making of a moral judgment. In our view, the 2002 Act should be seen as a further step in a long legislative sequence in which animal welfare has on numerous occasions been promoted by legislation related to contemporary needs and problems.

Looking at the Act in that context, we consider that it represents a considered decision by the Parliament on a long-standing and highly charged public controversy. In our view, any judgment on that controversy is pre-eminently one for MSPs . . . MSPs are elected on their policies on matters such as this. Once elected, they have the means at hand to inform themselves on the factual and moral issues, and are open to representations from all interest groups. They are subject to the constraints of the legislative process, which requires *inter alia* that the principle of a Bill should be expressly considered and voted on before any question of the details of the proposal can arise. That consideration involves the formal reception of evidence and the analysis of the issues in the course of debates.

We consider that it was entirely within the discretion of the Parliament to make the judgment that the pursuit and killing of a fox by a mounted hunt and a pack of hounds for the purposes of recreation and sport and for the pleasure of both participants and spectators was ethically wrong; that the likely impacts of the legislation did not justify its continuing to be legal; that it was a fit and proper exercise of legislative power to proscribe such an activity; and that the criminal offences, and related sanctions, that the 2002 Act imposes were the appropriate means of doing so. Moreover, in deciding on the utility and appropriateness of the legislative response to the problem of animal cruelty, the Parliament was entitled to consider *inter alia* whether, apart from its sporting and recreational aspects, foxhunting was an efficient method of pest control.

The judgment of the Parliament in this case had the consequence that certain individuals and groups would suffer economic loss without right to compensation. That was a material consideration, but not a decisive one. Most legislation that is enacted for some public benefit results in economic detriment to some persons or bodies. The lack of compensation is merely one of many material factors that go into the exercise by which the intended public benefit is balanced against adverse social, economic and other impacts and against private disadvantage. This is certainly not an area in which the courts have any special expertise. The considered judgment of the Parliament upon it lies squarely within the scope of that discretionary area into which, in our view, the court should not intrude.

> For these reasons, we consider that the Lord Ordinary was right in his general approach to this matter and in his conclusion that the prohibition of foxhunting was capable of being regarded as necessary in a democratic society for the protection of morals (Article 8(2) ECHR) and necessary in accordance with the general interest (Article 1 of the First Protocol, para 2).
>
> That was pre-eminently a judgment for the legislature. In our opinion, there is no reason why we should conclude that the legislature exceeded or misapplied its discretionary area of judgment, still less substitute our own views on the matter.

(These cases touch on issues of how much 'deference' the courts should show to Parliaments and governments when judicially reviewing their decisions and policies. We return to this theme and consider it in more detail in chapter 10. For further commentary on the judges' approach to Acts of the Scottish Parliament, see Winetrobe [2002] *PL* 31 and [2005] *PL* 3.)

The Scotland Act 1998 provides for a Scottish Administration consisting of ministers, other office-holders and their staff. All these are servants of the Crown. Non-ministerial office-holders and members of the staff belong to the unified home civil service of the United Kingdom.

The Crown is one and indivisible but may have distinct capacities, and the Scotland Act distinguishes between 'the Crown in right of Her Majesty's Government in the United Kingdom' and 'the Crown in right of the Scottish Administration'. By section 99, the Crown in either of these capacities may enter into legal relations with, and take legal proceedings against, the Crown in its other capacity. Accordingly contracts and other legal arrangements may be made between the Scottish Administration and the United Kingdom Government, and may be enforced in legal proceedings.

Within the Scottish Administration executive power is exercised in devolved matters, in a 'Cabinet-style' government, by the Scottish Executive. What follows is a summary of the main attributes and powers of the Executive (see, in more detail, Himsworth, 'The domesticated Executive of Scotland', in P Craig and A Tomkins (eds), *The Executive and Public Law* (2006), ch 6).

(1) The Scottish Executive is composed of a First Minister, ministers appointed by the First Minister and the Scottish Law Officers (the Lord Advocate and the Solicitor General for Scotland). The members of the Executive are known collectively as the Scottish Ministers. They may be assisted by junior ministers. These latter, together with all members of the Executive except the Law Officers, must be members of the Parliament. Consistently with the Westminster model of Cabinet government, Scottish Ministers are individually responsible for their portfolios (the matters allocated to them by the First Minister), take part in decision-making in the Executive and are collectively responsible for the decisions taken.

The First Minister is nominated by the Parliament and appointed by the Queen; ministers and junior ministers are appointed by the First Minister with

the agreement of the Parliament and the approval of the Queen. The Law Officers are appointed by the Queen on the recommendation of the First Minister, acting with the agreement of the Parliament. In 2006 there were eleven ministers (including the First Minister), together with eight junior ministers. In 2006 five ministerial posts (including that of Deputy First Minister) were held by members of the junior partner in the coalition (the Liberal Democrats).

(2) The Executive is accountable to the Scottish Parliament. Its members may be required by the Parliament or its committees to appear before them and give evidence. If the Parliament resolves that the Executive no longer enjoys its confidence, the First Minister and all other members of the Executive as well as junior ministers are obliged to resign (Scotland Act 1998, ss 45(2), 47(3)(c), 48(2) and 49(4)(c)).

(3) Functions (powers and duties, including powers of subordinate legislation) which formerly belonged to the Secretary of State for Scotland, or to other United Kingdom ministers in regard to Scotland, have been transferred generally – so far as they fall within the devolved field – to Scottish ministers (s 53).

Additional functions may be transferred by Order in Council ('executive devolution orders') from Ministers of the Crown to Scottish Ministers under section 63. The first executive devolution order (SI 1999/1750) transferred over 400 functions to the Scottish Ministers and further transfers have been made by subsequent orders.

Legislation of the Scottish Parliament itself may entrust new functions to Scottish Ministers in devolved matters, and may empower them to make subordinate legislation.

(4) The Scottish Executive is bound to implement European Community obligations in the devolved field, and may not act incompatibly with Community law (s 57(2)). A quantitative Community obligation of the United Kingdom (eg, a requirement to achieve a specified reduction of 'greenhouse gas' emissions) may be split so that an appropriate share of the obligation is placed on Scottish Ministers (see s 106).

Relations with the European Communities are a reserved matter under Schedule 5 but Scottish Ministers may 'assist' Ministers of the Crown in the conduct of such relations (Sch 5, Part I, para 7(2)(b)). The United Kingdom Government undertook to 'involve the devolved administrations as fully as possible in discussions about the formulation of the UK's policy position on all EU and international issues which touch on devolved matters' (*Memorandum of Understanding*, Cm 5240/2001, para 19: see above) and the Joint Ministerial Committee operates 'as one of the principal mechanisms for consultation on UK positions on EU issues which affect devolved matters' (*Agreement on the Joint Ministerial Committee* (Part II A of the *Memorandum of Understanding* above), para A1.9). Arrangements for handling European Union business that affects Scottish interests are made in the Concordat on Co-ordination of European Union Policy Issues: Scotland agreed between Scottish Ministers and the United Kingdom Government (see above, p 191). The Concordat declares

as a 'key objective' that there should be 'full and continuing involvement of Ministers and officials of the Scottish Executive in the processes of policy formulation, negotiation and implementation, for issues which touch on devolved matters'. Scottish Ministers may be part of the United Kingdom delegation at meetings of the Council of the European Union and on occasion it may be agreed that a Scottish Minister should speak for the United Kingdom in the Council, although always in furtherance of 'a single UK policy line'. The Scottish Administration has established an office in Brussels. (See further Sloat, 'Scotland and Europe' (2000) 31 *Scottish Affairs* 92; Simon Bulmer *et al* (eds), *British Devolution and European Policy-Making* (2002); C Jeffery in A Trench (ed), *The Dynamics of Devolution* (2005), ch 9; N Burrows in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006).)

(5) Subordinate legislation and other acts of the Scottish Executive must be compatible with the Convention rights under the Human Rights Act 1998 (Scotland Act 1998, s 57(2)).

Since the Scottish Parliament is a legislature of limited competence, provision is made in the Scotland Act for resolving questions of vires that may arise in the passage of a bill or after its enactment. We have seen that the Act sets up procedures designed to ensure that bills introduced in the Parliament are intra vires. If it should nevertheless happen that the Parliament passes a bill which it is thought may be (wholly or in part) ultra vires, the Advocate General for Scotland, the Lord Advocate or the Attorney General may within a period of four weeks refer the question of vires to the Judicial Committee of the Privy Council (or, once it comes into operation, the Supreme Court) (Scotland Act 1998, s 33). If the Privy Council (or Supreme Court) decides that the bill or any of its provisions would not be within the Parliament's legislative competence, the Parliament has an opportunity of reconsidering the bill with a view to its amendment or rejection (s 36(4)). The Presiding Officer cannot submit a bill in its unamended form for the Royal Assent if the Privy Council (or Supreme Court) has ruled that it or any of its provisions is ultra vires (s 32(3)(a)). To date no such case has been brought.

Section 29(1) of the Act provides:

> An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.

Questions of competence, which include the requirement of compatibility with Convention rights and Community law, are termed 'devolution issues'. After a bill has received the Royal Assent and become an Act of the Scottish Parliament, a devolution issue – as to whether the Act's provisions are within the competence of the Parliament – may arise in the course of legal proceedings, whether in the Scottish courts or elsewhere in the United Kingdom. Moreover, proceedings for the determination of a devolution issue may be instituted in

Scotland, England and Wales or Northern Ireland by the appropriate Law Officer. Questions of judicial machinery and jurisdiction relating to devolution issues are dealt with in Schedule 6 to the Scotland Act, as amended. The final court of appeal in devolution issues is the Judicial Committee of the Privy Council, although its jurisdiction will be transferred to the new Supreme Court once that Court commences its work (see the Constitutional Reform Act 2005).

There may be difficulty in deciding whether a provision of an Act of the Scottish Parliament exceeds the limits of the Parliament's power because it relates to a reserved matter. Whether it does so relate must be determined by reference to the *purpose* and the *effect* of the provision (Scotland Act 1998, s 29(3)). (See further C Himsworth and C O'Neill, *Scotland's Constitution: Law and Practice* (2003), pp 184–8.) Devolution issues may also arise with regard to actions of the Scottish Executive, as to whether they are within devolved competence or are compatible with Convention rights or with Community law. These issues too are determined by the courts in accordance with the jurisdictional rules in Schedule 6.

When any devolution issue arises in respect of either an Act of the Scottish Parliament or subordinate legislation by a member of the Scottish Executive, a disputed provision 'is to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly' (s 101). Interpretation in accordance with this section may save the legislation from being struck down as ultra vires.

Most of the devolution issues that have arisen in Scottish courts have concerned the compatibility of Acts of the Scottish Parliament, or (more often) actions of the Scottish Executive, with the European Convention on Human Rights. For instance, in *Adams v Scottish Ministers* 2004 SC 655 and *Friend v Lord Advocate* [2005] CSIH 69, the Protection of Wild Mammals (Scotland) Act 2002 survived a challenge on the ground of incompatibility with Convention rights, while in *Starrs v Ruxton* 2000 SLT 42 it was held by the High Court of Justiciary that the Lord Advocate (a member of the Scottish Executive) had acted incompatibly with Article 6(1) of the Convention (right to a fair trial by an independent and impartial tribunal) in permitting a criminal trial to proceed before a temporary sheriff who lacked security of tenure and did not possess the required independence. (See too *Kearney v HM Advocate* [2006] UKPC D1 and see further G Gee, 'Devolution and the courts' in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (2005), ch 8.)

There continues to be a Secretary of State for Scotland with a seat in the Cabinet, although the transfer of almost all the functions of the Scotland Office to Scottish Ministers greatly reduced the range of his or her responsibilities and the present Scottish Secretary also holds the office of Secretary of State for Transport. The Scotland Office, now a component part of the Department for Constitutional Affairs, occupies premises in both Edinburgh and London. The

role of the Secretary of State following devolution is described as follows on the Scotland Office website:

> The primary role of the Secretary of State for Scotland is to promote the devolution settlement and to act as guardian of it. He promotes partnership between the Government and the Scottish Executive and between the two Parliaments. At the same time, the Secretary of State continues to represent Scottish interests in reserved matters within the UK Government, advising colleagues about any distinctive Scottish aspects that arise for reasons other than the impact on devolved matters and supporting them in presenting Government policies in Scotland.

Under the Scotland Act the Secretary of State (it can be *any* Secretary of State) has certain powers of intervention to safeguard United Kingdom interests. Under section 35 the Secretary of State may make an order prohibiting the Presiding Officer of the Parliament from submitting a bill for Royal Assent, if he has reasonable grounds to believe that its provisions would be incompatible with international obligations or the interests of defence or national security, or would adversely affect the operation of the law in reserved matters. Section 58 gives the Secretary of State power to revoke subordinate legislation of the Scottish Executive on similar grounds, and to give directions to the Executive to ensure compliance with international obligations. (Note also the further powers conferred on United Kingdom ministers by section 107.) A new Law Officer, the Advocate General for Scotland, was created by section 87 of the Scotland Act. The Advocate General for Scotland is responsible for advising the United Kingdom government on matters of Scots law. (The far older offices of Lord Advocate and Solicitor General became the Law Officers of the Scottish Executive.)

(iv) Parliament and the devolution settlement

In the White Paper, *Scotland's Parliament* (Cm 3658/1997) para 4.2, it was insisted that the United Kingdom Parliament 'is and will remain sovereign in all matters', and that it 'will be choosing to exercise that sovereignty by devolving legislative responsibilities to a Scottish Parliament without in any way diminishing its own powers'. Section 28(7) of the Scotland Act, in empowering the Scottish Parliament to make laws, provides:

> This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

In the course of proceedings on the Scotland Bill in the House of Commons, Mr Tam Dalyell MP remarked of this subsection that it 'may conceivably be true in an arcane legal sense, but in the political reality of 1998 it is palpably misleading and about as true as it would be to say that the Queen can veto any legislation' (HC Deb vol 305, col 366, 28 January 1998). A similar view was taken

by Vernon Bogdanor, in concluding that after devolution the supremacy of Parliament 'will become merely a nebulous right to supervise the Scottish Parliament, together with the right under pathological circumstances, to abolish it' ('Devolution: the constitutional aspects', in University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom* (1998), p 12). In its enactment of the Scotland Act we may see Parliament as having divested itself, in respect of devolved matters, of the real substance of its sovereignty. Doubtless Parliament may once again put on that substance, but the likelihood of its doing so will seem increasingly remote as the devolutionary scheme becomes embedded in constitutional thought and practice. May a time come when the courts will be persuaded to hold that devolution is irreversible, in accordance with a judicially revised account of parliamentary sovereignty? (See M Loughlin, *Sword and Scales* (2000), p 154 and Little, 'Scotland and parliamentary sovereignty' (2004) 24 *LS* 540.)

It was contemplated from the first that it might sometimes be convenient, from the viewpoints of both the Scottish Administration and the British Government, for the United Kingdom Parliament to legislate on a devolved matter. This might be so, for instance, if it were thought desirable to have uniform legislation in place throughout the United Kingdom, or if an Act to be passed by the United Kingdom Parliament in the reserved field would need corresponding provision to be made for Scotland to ensure its effectiveness. (For examples see J McFadden and M Lazarowicz, *The Scottish Parliament* (3rd edn 2003), pp 86–7.) Moreover, if the provisions of an Act to be passed at Westminster were in any event to be replicated for Scotland, it would save time and trouble for the Scottish Parliament if the Act were to be made applicable to Scotland, even though it dealt with devolved matters.

It was envisaged that in cases such as these the Westminster Parliament should legislate on devolved matters only with the agreement of the Scottish Parliament. This understanding was confirmed by a minister, Lord Sewel, when the Scotland Bill was before the House of Lords, in saying (HL Deb vol 592, col 791, 21 July 1998):

> we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

The 'Sewel Convention' was put on record in the *Memorandum of Understanding* concluded in 1999 between the United Kingdom Government and the devolved administrations (see above). The convention has since been scrupulously observed. After discussion and agreement between the United Kingdom Government and the Scottish Executive, a 'Sewel Motion' is introduced in the Scottish Parliament for approval of the legislation to be enacted at Westminster. Perhaps one of the most surprising things about Scottish devolution since 1998 is how frequently Sewel Motions have been employed: the first six years of

devolution saw no fewer than fifty-two bills being discussed in Westminster which concerned devolved matters in Scotland. As Barry Winetrobe has argued ('A partnership of the parliaments?', in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (2005), pp 41–2):

> What began life as a 'negative' safeguard and assurance against any unilateral exercise of Westminster legislative supremacy over devolved matters, has become in practice a positive mechanism authorising the exercise, albeit with consent, by Westminster of just such legislative authority. Far from being the exception, as was originally suggested, it has become a regular, virtually institutionalised feature of the Scottish devolved law making scene . . .
>
> The central criticism of the Sewel Convention as a law making device, is that legislation subject to the Sewel process is not only *not* scrutinised by the Scottish Parliament in its usual ways, but also that it *is* scrutinised in the very place and by the very procedures whose perceived failings were a justification for both devolution and for the devising of Holyrood's own legislative process.

(See also Page and Batey, 'Scotland's other Parliament: Westminster legislation about devolved matters in Scotland since devolution' [2002] *PL* 501; Cairney and Keating, 'Sewel motions in the Scottish Parliament' (2004) 47 *Scottish Affairs* 115.)

Members representing Scottish constituencies continue to sit in the House of Commons. Scotland was formerly overrepresented in the House with seventy-two MPs, but this number was reduced in 2005 to fifty-nine, following a review by the Boundary Commission for Scotland under new rules. (See the Scotland Act 1998, s 86.)

In debates on the Scotland Bill the familiar and intractable 'West Lothian question' re-emerged. In the 1976–78 devolution debates the Labour MP for West Lothian, Mr Tam Dalyell, had repeatedly protested that, since the representation of Scotland in the United Kingdom Parliament was to be maintained, Scottish MPs might have a decisive voice in legislation on a matter concerned only with England and Wales, whereas English and Welsh MPs would have forfeited their right to take part in legislation devolved to Scotland. (A similar objection had troubled the attempts to enact home rule for Ireland in 1886–1914.) An amendment designed to deal with the West Lothian question was made to the 1978 Scotland Bill although it had been resisted by the Government as a 'constitutional imbecility'. It provided that if the second reading of an 'English' bill was approved only with the support of MPs for Scottish constituencies, there would have to be a second vote after an interval of fourteen days. (It was contemplated that the Scottish MPs would be induced to abstain in the second vote.)

The Scotland Act 1998 includes no provision for dealing with the West Lothian question. Scottish MPs in the House of Commons can vote on all matters arising there and could be in a position to exert decisive political power

if there should be a hung Parliament. Concern is expressed that 'West Lothian' introduces an imbalance into the constitutional system; Mr Tam Dalyell (as MP for Linlithgow) concluded that 'some legislative entity is going to have to emerge in England to fill the vacuum left by Scottish home rule' (HC Deb vol 311, col 741, 6 May 1998). The most radical solution would be the creation of an English Parliament with powers limited to matters of exclusive relevance to England but, as we have seen, this approach to a federal constitution has found little support. Some (including latterly the Conservative Party) have proposed instead that the procedures and conventions of the House of Commons should be changed so as to restrict consideration and voting on matters relating solely to England to MPs for English constituencies. A formal proposal on these lines was presented to the House by Mr Frank Field MP in June 2000 in his House of Commons (Reserved Matters) Bill which would have disabled MPs from Scotland (and Northern Ireland) from voting in the House on matters devolved to their Parliaments: he acted to stimulate debate rather than in hope of seeing the bill passed. It was objected to the proposal that it 'would create an English Parliament – a haphazard, accidental creation – within the body of the UK Parliament' (Mr David Curry MP). The project was renewed in January 2006 when a Parliament (Participation of Members of the House of Commons) Bill was introduced in the House of Lords by Lord Baker of Dorking: it would have required the Speaker of the House of Commons to designate which category of MPs should be eligible to speak and vote on a bill, having regard to the bill's territorial extent. In particular, only English MPs would be able to vote on English laws.

Expedients of this kind would not only result in two classes of MPs, but would give rise to intractable technical and political difficulties. (See R Hazell (ed), *The English Question* (2006), pp 225–6.) A solution to the West Lothian question might be found in the development of democratic regional government in England, but plans for bringing this about have stalled, at least for the time being (see pp 194–5 above). In any event it may be that the constitution is sufficiently tough and sufficiently flexible to accommodate the West Lothian anomaly and an asymmetrical devolutionary settlement, as it has succeeded in reconciling many other discordant elements of which it is composed. (See further Tomkins in A Tomkins (ed), *Devolution and the British Constitution* (1998), pp 100–3; R Hazell (ed), *The English Question* (2006), chs 4 and 11.)

There has been only a limited accommodation of the procedures and working practices of the House of Commons to the challenge of devolution. Questions directed to the Secretary of State for Scotland may relate, in general, only to matters for which he or she continues to have responsibility and not to devolved matters (see HC Deb vol 336, cols 761–74, 25 October 1999). The time allotted for Scottish Questions has been reduced. The Scottish Grand Committee, comprising all MPs for Scotland, remains as a forum for debating reserved matters that have a direct impact on Scotland, but it rarely has occasion

to meet. The Select Committee on Scottish Affairs scrutinises the work of the Scotland Office, including its relations with the Scottish Parliament.

(See further AW Bradley, 'Constitutional reform, the sovereignty of Parliament and devolution', in University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom* (1998); J McFadden and M Lazarowicz, *The Scottish Parliament* (3rd edn 2003); B Winetrobe in J Jowell and D Oliver, *The Changing Constitution* (5th edn 2004), ch 7; A Page in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (2005), ch 1; J Mitchell in A Trench (ed), *The Dynamics of Devolution* (2005), ch 2.)

(v) Conclusion: how settled is the current Scottish settlement?

Scottish devolution since 1998 seems, thus far at least, to be a constitutional success story. There has been a very high degree of cooperation between the Labour Government in London and the Labour/Liberal Democrat coalition in Edinburgh, such that not a single dispute between the two administrations has yet reached the courts (this does not necessarily mean that there have been no disputes between London and Edinburgh, but that, when they have arisen, they have been resolved in private within the confidential frameworks of the Concordats and *Memorandum of Understanding*). The apparent success of Scottish devolution is, no doubt, due to the twin facts, first, that both the British Government and the Scottish Executive have been eager to make devolution work and, secondly, that the Labour Party has been in power both north and south of the border. Even though in Scotland it is in coalition with the Liberal Democrats, the Labour Party is the lead partner.

Beneath the surface, however, there is little in place beyond political goodwill to ensure that the smooth operation of Scottish devolution continues into the future. Whether the current arrangements would survive a change in the party of government either in London or Edinburgh must be open to some doubt, especially considering the remarkable informality that is such a feature of the inter-governmental relations that have emerged in Britain since 1998. We saw above (p 191) how inter-governmental relations in the United Kingdom are governed by the *Memorandum of Understanding* (Cm 5420) and by a series of Concordats drawn up by ministers in the various administrations. The *Memorandum of Understanding* established the Joint Ministerial Committee (JMC) as a forum for consultation, mediation, discussion and dispute resolution. While it continues to meet, albeit apparently only occasionally, it has become something of a ceremonial rather than an executive, decision-making body. Indeed, it has been reported that even the most detailed of the Concordats are rarely used by civil servants and officials (see House of Lords Select Committee on the Constitution, *Devolution: Inter-Institutional Relations in the United Kingdom*, HL 28 of 2002–03). Yet the structure of devolution in the United Kingdom means that a 'high level of interaction between levels of government is inevitable . . . [T]he interplay between functions that have been devolved and those retained at United Kingdom level means that many policies

or initiatives of one level of government will affect the other in some way' (*ibid*, para 17). The House of Lords Constitution Committee made the following findings with regard to inter-governmental relations in practice: that a large amount of contact takes place between the various administrations, frequently and at a variety of levels; that these contacts are often highly informal, often taking place by phone or email rather than in formal, minuted meetings; that the justification for such a level of informality is the mutual goodwill between the administrations; and that the bulk of informal contacts tend to be bilateral – between the United Kingdom Government and one devolved administration – and that this appears to be where the bulk of disputes are resolved, rather than being referred to the full JMC (*ibid*, para 23).

There are other respects, also, in which Scottish devolution may be seen as a constitutional success story. The renewal and genuine modernisation of Scottish parliamentary democracy that devolution has facilitated is not to be overlooked. That MSPs sit in a hemicycle rather than in opposing ranks, that they address each other directly by name, that they vote with electric buttons rather than by walking through lobbies, that they work normal office hours, that they cooperate across party lines, that most of their work is done in powerful subject committees rather than in plenary session, and that 37 per cent of MSPs in the first Parliament were women – the highest proportion of any European Parliament apart from Sweden and Denmark – all mark Scottish parliamentary democracy out as different from, and more modern than, that found in Westminster (see N Ascherson, *Stone Voices: the Search for Scotland* (rev edn 2003), p 293).

Yet we should not get too carried away. It has not been all plain sailing. Scotland went through three First Ministers within as many years of devolution. Donald Dewar died suddenly in October 2000 and was replaced as First Minister by Henry McLeish. But he lasted only until the following summer, when a scandal involving the expenses of his Westminster constituency brought him down. He was replaced by the hard-working but not hugely inspiring figure of Jack McConnell, a man who, as Ascherson puts it, 'made a career as an astute and efficient Labour Party apparatchik' (*Stone Voices*, p 293). Further, the newly invigorated democratic politics that Ascherson and others applaud was given a large dose of *realpolitik* over the scandal concerning the extravagant cost of the new Scottish Parliament building. A public inquiry chaired by Lord Fraser reported in 2004 that the final cost of the project was £431 million, *ten times* the original estimate. Moreover, according to the Fraser Report, £170 million of the eventual cost was wasted, unnecessary expenditure (see www.holyroodinquiry.org). Yet, as Scott Veitch has written in a penetrating critique ('Irresponsible government', *Scottish Left Review*, November/December 2004, p 18) the Fraser Report's key achievement was 'to expose through a sustained forensic dissection of structures, systems and decision-making processes how the normal expectations of government may operate – and operate well – to dissipate responsibility for major harms suffered'. For the Fraser Report showed how, despite the enormity of the

sums involved, 'it is plausible to end up with culpability simply vanishing and how, instead, those with least input into the whole process – the people of Scotland – are left to pick up the bill'. As Veitch concludes (p 19):

> The real problems emerge through Fraser's analysis of the culture of 'closedness', and the way in which this allowed incompetence to proliferate in the proceedings. Evidence of this opens with the failure of senior civil servants to keep their political masters properly informed of what was going on, particularly with regard to true cost figures and the nature of the risk regime agreed by them in the construction arrangements. The justifications for these failures, as Fraser again points out, come across as implausible at best and incompetent at worst. Errors of judgement were made . . . with apparently scant regard for [the] public interest.

Not here, then, the spirit of openness and democracy in which devolution was said to have been conceived.

For the time being, however, and perhaps for as long as the Labour and Liberal Democrat Parties continue to be in power in both Edinburgh and London, the structure of Scottish devolution appears to have solved the problems it was designed to address, even if, as the Fraser Report found, some of the features of old, British, closed, 'irresponsible' government continue in the new devolved Scotland. This conclusion – of devolution's success in Scotland – tentative and provisional as it must necessarily be, is starkly at odds with a number of predictions that were made when the Scottish Parliament was established. The iconoclastic political sociologist, Tom Nairn, wrote, for example, that the 'devolution project has added greatly to the momentum of change in Scotland. Since the [1997] referendum there has arisen the general sense of an incoming tide, carrying us forward into a new period of history' (*After Britain: New Labour and the Return of Scotland* (2000), p 155), a period of history that, Nairn thought, would see the break-up of Britain and the (re-)establishment of an independent Scotland. Nairn might be proved right, in time, but for at least the first two terms of the new Scottish Parliament, Scottish independence has seemed a more distant prospect than at any point in the last twenty-five years. In politics, however, one should never say never, and it may be some time before the true consequences of what happened in 1998 are realised. Consider, for example, the following, more meditative interpretation, offered by the Scottish journalist, Neal Ascherson.

Neal Ascherson, *Stone Voices: the Search for Scotland* (rev edn 2003), pp 303–5

> Will devolution lead inexorably to independence? For the moment, this question has lost its urgency. Scots are more interested in whether devolution can lead to democracy . . . This means reaching towards qualities of social justice, equality and sheer modernity which the

United Kingdom as a whole has not achieved. In discussions about 'opening up the Parliament to the people', and 'interactive government', I met nobody who suggested that these good aims could only be fulfilled in an independent Scotland. And yet I think that independence will probably come about.

There are pragmatic political reasons to think so, but also considerations from history. At the practical level, it is unlikely that the British political structure can absorb the tensions between – say – a right-wing Tory government in London and a Labour-Liberal coalition in Edinburgh. Confrontation would probably centre on finance for Scottish social programmes: the block grant. In those circumstances, it is not hard to imagine a 'velvet divorce' on the Czech/Slovak model. Slovakia's independence was not achieved by Slovak patriotic fervour. Instead it was dumped on the table by the Czechs, who grew tired of negotiating endless Slovak demands and walked away. As births of nations go, it was undignified.

But there are . . . deeper reasons to suspect that Scotland may not long remain in the United Kingdom. All are to do with the revival of traditions or – more precisely – with the selective rediscovery of elements in Scotland's past which are now being adapted to serve Scotland's future. One of these elements is Scotland's sense of European identity, as a small North Sea nation which needs to encounter the world directly rather than through the priorities of 'Great Britain' . . .

[Additionally], there is the particular, apparently indelible colouring of Scottish society. All generalisations are subjective. So I am speaking personally when I suggest that the Scots are communitarian rather than individualist, democratic in their obsession with equality, patriarchal rather than spontaneous in their respect for authority, spartan in their insistence that solidarity matters more than free self-expression. Not all of these are admirable or 'modern' qualities. But they are all being invoked as the Scots move beyond riddles of national identity towards establishing institutions which they recognise as their own. This, too, points towards a completion of self-government which lies outside the limits of the Union.

(c) Wales

Wales is about one-twelfth the size of the United Kingdom and has a population of 3 million, or about 5 per cent of the total United Kingdom population. Wales came under the rule of the English Crown in the thirteenth century. There was no treaty of union, then or later, between the two countries, and the Act of Union of 1536 was a unilateral Act of the English Parliament, extending the English administrative system to Wales and providing for Welsh representation in Parliament.

In the early years of the twentieth century a number of departments with Welsh responsibilities were created (eg, the Welsh Board of Health and the Welsh Department of the Board of Education) and from 1951 a senior departmental minister (at first the Home Secretary) was given a general responsibility for Wales with the title of Minister for Welsh Affairs. A Secretaryship of State for Wales was created by the Wilson Government in 1964, and since then there

has been a Secretary of State for Wales, with a seat in the Cabinet, in charge of the Welsh Office (now named the Wales Office).

The responsibilities of the Secretary of State for Wales were substantially increased in the years after 1964. They did not become quite so wide-ranging as those of the Secretary of State for Scotland, for, as we have seen, the Scottish Office had a longer history of 'separateness' and administered Scotland's own judicial and legal systems. To a great extent government policies were executed in Wales by local authorities and by some twenty-four (in 1998) executive non-departmental public bodies overseen by the Welsh Office (eg, the Welsh Development Agency and the Welsh Language Board).

It was remarked by the House of Commons Welsh Affairs Committee that the framework of policy was generally 'set by English government departments and copied by the Welsh Office with greater or lesser variations to suit Welsh circumstances' (*First Report*, HC 259 of 1992–93, para 3). The Secretary of State and the Welsh Office were also, no doubt, sometimes able to bring Welsh interests into account when government policies were being formulated. On the other hand, the Welsh Secretary was bound by collective responsibility and by the policies of the governing party, whether or not these were to the advantage of Wales or coincided with the wishes of a majority of Welsh voters (see V Bogdanor, *Devolution in the United Kingdom* (1999), pp 160–1).

Wales is guaranteed a minimum of thirty-five seats in the House of Commons (by the Parliamentary Constituencies Act 1986, Sch 2) and has at present forty. Wales is overrepresented in the House on the basis of the size of its electorate, which would strictly entitle it to no more than thirty-three seats. No change was made in Welsh representation in consequence of devolution.

Parliamentary legislation relating exclusively to Wales was uncommon before devolution: examples are the Welsh Language Act 1993 and the Local Government (Wales) Act 1994. Arrangements were put in place in the House of Commons for debating Welsh affairs and for scrutinising the administration of Wales. A Welsh Grand Committee, consisting of all MPs for Wales and up to five other members, considered bills and other matters relating exclusively to Wales and could question Welsh Office ministers. In addition a Select Committee on Welsh Affairs examined 'the expenditure, administration and policy of the Welsh Office and associated public bodies'. Both committees have continued to function since devolution.

(i) Devolution under the Government of Wales Act 1998

In the 1980s and 1990s Wales, like Scotland, was governed by a Conservative administration that only a minority of voters in Wales supported. Unlike Scotland, however, Wales experienced no equivalent of the Scottish Constitutional Convention. There was no Welsh equivalent to the Scottish Claim of Right (see above, p 189) and, by the time of Labour's election victory in 1997 there was no fresh blueprint for Welsh devolution to supersede the discredited model of the 1970s. Nonetheless, the new Labour Government, conscious of

what it described as Wales' distinctive 'language and cultural traditions', was committed to 'meet the demand for decentralisation of power to . . . Wales, once established in [a] referendum' (Labour Party manifesto, *Because Britain Deserves Better* (1997), p 33). As we saw above (p 190), the referendum produced a positive result (albeit by only the tightest of margins) and the result was the Government of Wales Act 1998. Commenting on the differences between Scotland and Wales, Sir David Williams observed as follows (in University of Cambridge Centre of Public Law, *Constitutional Reform in the United Kingdom* (1998), p 44):

> There has never been an independent Welsh Parliament on an established basis and hence no overall executive government. Welsh law – at least in this millennium . . . has been English law; and, despite the Courts of Great Sessions (finally abolished in 1830) there has been no separate system of courts for Wales. The 'trappings' of legislative devolution are not, as they are to some extent in Scotland, in place, and the process of administrative decentralisation has been more recent and less extensive. For many Scots legislative devolution might appear, especially in the light of three decades of deliberations, to be a small step in constitutional terms; for many Welsh it might appear to be a giant leap.

The arrangement for Wales, unlike that for Scotland, was to be a scheme of *executive* devolution: no powers of primary law-making or of taxation were devolved. The essential purpose of the Government of Wales Act 1998 was to place the existing Welsh administration and its non-departmental public bodies (quangos) under the control of an elected Welsh Assembly, which would have the power to make delegated or secondary legislation, but not primary legislation.

To this end the Act established an Assembly for Wales, known as the National Assembly for Wales or *Cynulliad Cenedlaethol Cymru*. The Assembly was a body corporate which exercised its functions 'on behalf of the Crown' (s 1). Like the Scottish Parliament, it is a unicameral assembly. It comprises sixty members (known as AMs), forty elected in single member constituencies under the first-past-the-post system and twenty by the party list system. The functions of the Welsh Office that were devolved to Wales were transferred to the Assembly by the Government of Wales Act 1998 itself, by subsequent Acts of Parliament and by Orders in Council made under section 22 of the 1998 Act. These functions fell within the eighteen fields listed in Schedule 2 to the Act, as follows:

1. Agriculture, forestry, fisheries and food.
2. Ancient monuments and historic buildings.
3. Culture (including museums, galleries and libraries).
4. Economic development.
5. Education and training.
6. The environment.
7. Health and health services.
8. Highways.

9. Housing.
10. Industry.
11. Local government.
12. Social services.
13. Sport and recreation.
14. Tourism.
15. Town and country planning.
16. Transport.
17. Water and flood defence.
18. The Welsh language.

A considerable devolution of functions and powers (deriving from some 300 statutes) took place, but there remained many functions exercisable in relation to Wales by Ministers of the Crown which were not transferred. (These include such matters as are reserved under the Scotland Act, as well as others.)

Unlike the provision made for Scotland, the Government of Wales Act did not establish a separate executive body for the government of Wales: functions to be devolved, with corresponding powers and duties, were conferred upon the Assembly itself as a corporate body. In practice, however, a form of Cabinet government emerged, most of the Assembly's executive powers being delegated to the Assembly First Secretary and Assembly Secretaries, who, from 2002 onwards, came to be known as Welsh Ministers and collectively, together with civil servants, as the Welsh Assembly Government.

The Welsh Office (since 1999 the Wales Office) continues to exist as a department of central government, headed by the Secretary of State for Wales. The Secretary of State for Wales is the key government figure liaising with the devolved administration in Wales and represents Wales' interests in the Cabinet and in Parliament.

(ii) Dissatisfaction with the 1998 scheme for Wales

From the beginning there was a marked contrast in the success of devolution in Scotland compared with Wales. Unlike in Scotland, it was never clear that the Government of Wales Act 1998 solved the problem it was designed to address. Perhaps this is because (again, unlike in Scotland) it was not clear what the problem was in the first place. It was as if Wales was being dragged along in Scotland's wake, offered something of devolution but never as much as was offered to (or demanded by) the Scots. This was nothing new: as Sir David Williams put it ('Devolution: the Welsh perspective', in A Tomkins (ed), *Devolution and the British Constitution* (1998), pp 21–2), 'In the 1970s the dominance of Scotland in the devolution debates largely obscured the Welsh dimension, and the process has been repeated in the later 1990s'. Further, he continued, 'there is little or no constitutional framework or context in which the proposals for executive devolution can properly be assessed'. What led Welsh devolution in the late 1990s, it seems, was not an echo of the consistent and coherent demand for home rule that had been heard so resoundingly in

Scotland, but an inchoate and far from unanimous sense within the Labour Party that, in the light of developments in Scotland, *something* ought also to be offered to Wales. Exactly what that something should amount to, it seems, was determined as much by reference to internal squabbles within the Labour Party as to any constitutional road map. As Rawlings has written, 'the original scheme suffered from a lack of constitutional vision, [being the] product of a closed and elite form of constitution-making grounded in internal party compromise' ('Hastening slowly: the next phase of Welsh devolution' [2006] *PL* 824, 826; see further R Rawlings, *Delineating Wales* (2003), pp 1–52).

In his masterly survey of the early years of Welsh devolution, *Delineating Wales* (2003), Rick Rawlings showed how the 'Wales of bits and pieces', as he described it (p 63), was alternately seen in three different lights, which Rawlings terms the three 'faces' of Welsh devolution. The first face was 'Welsh Office plus', an image of devolution that saw it as little more than a reinvention of the territorial administration experienced between the 1960s and the late 1990s. This was Alun Michael's rather limited and ultimately self-destructive sense of the project. (Alun Michael was the first First Secretary, who resigned from the position in early 2000 under threat from a no confidence motion in the Assembly. Since that time the First Secretary/First Minister has been Rhodri Morgan.) The second face was the 'new kind of politics' ushered in with the new kind of Assembly, the corporate body with no separation of powers between executive and legislature, that promised collaboration rather than party division and consensus rather than majoritarianism. The third face was the attempt to recreate in Wales something of what exists in Scotland and at Westminster: namely, adversarial parliamentary government with a clear distinction between government and opposition and a sometimes clear distinction between executive and legislature. (See R Rawlings, *Delineating Wales* (2003), chs 3, 4). What frustrated the smooth operation of Welsh devolution, Rawlings suggests, was the constant turning from one face to another that characterised it throughout its early years.

In an effort to add constitutional clarity and direction to the uncertain start of Welsh devolution, the Welsh Assembly Government commissioned in 2002 a report on 'the powers and the electoral arrangements of the National Assembly for Wales'. A commission of ten members, chaired by the Labour peer Lord Richard, reported in March 2004 (see www.richardcommission.gov.uk).

Report of the Richard Commission (2004), ch 14

[T]here is now in place an evolving legislative relationship based increasingly on the expectation that, in principle, the needs and wishes of the Assembly should be met. For example:

- it is recognised that the Assembly Government is the initiator of policy on devolved matters and a major stakeholder on non-devolved issues as well;
- it is the Welsh Assembly Government that formulates distinctive legislative proposals for Wales on devolved matters; and proposes them to the UK Government and Parliament for enactment;

- the Assembly Government is consulted on the content of legislation affecting devolved fields and has opted out of such legislation if it wishes;
- Assembly Committees, and individual Members, have the opportunity, so far as is practicable, to comment on Bills being considered at Westminster, particularly through pre-legislative scrutiny . . .

The Assembly has already become the initiator of much legislation for Wales on devolved matters and this is accepted both in Cardiff and at Westminster as the right relationship . . .

It seems to us, therefore, inaccurate to describe the present situation as one of merely executive devolution. It already has some features and practical infrastructure of legislative devolution . . .

New legislation has already conferred upon the Assembly considerable permissive powers in the key policy areas of health, education and the environment, including powers to amend by order UK primary legislation . . .

The Assembly has used its powers of secondary legislation to reflect its own policy choices and priorities. Some of the most popular decisions of the past four years, nationwide free bus passes for the elderly and disabled, and free prescriptions, have been introduced by statutory instrument and not primary legislation.

It is this growing and maturing experience which, in our view, should determine the development and the pace of the Assembly's legislative activity and future powers. The case for change does not rest on the limitations of the existing settlement – but also on the legislative and regulatory experience gained in these first four years.

One of the most encouraging developments over this period has been the growing consensus in favour of devolution not only within Wales but also at Westminster. We hope that our proposals can build on that consensus, and thus provide the best foundation for a stable and sustainable settlement . . .

We do not think the status quo is a sustainable basis for future development. Although there has been significant evolution in the Assembly's powers since 1999, it has been an ad hoc, piecemeal development, on a case by case basis, not founded upon any agreed general policy, or informed by any set of devolution principles.

The report of the Richard Commission offered two ways forward, one which could be accommodated within the framework of the Government of Wales Act 1998 and the other of which would require new Westminster legislation. The former possibility was outlined in chapter 13 of the report:

[A] possibility would be for the powers of the Assembly to develop within the existing Government of Wales Act framework, but with much broader legislative powers. The objective would be to enable the Government in the Assembly to deliver its programme, but through specific powers delegated to it by Parliament.

There are no formal legal or constitutional rules that define what should be the subject of primary rather than secondary legislation . . . [T]he current settlement depends on what Parliament decides, on a measure by measure basis, shall be provided through primary

> legislation and what through secondary legislation. Accordingly, the Assembly's powers could be strengthened within the current settlement by including in future primary legislation new framework provisions designed to allow the Assembly to, for example, make through secondary legislation any changes it wishes within the field covered by the Act . . .
>
> There are precedents for a more permissive approach to the Assembly's powers: the Education Act 2002; and the NHS Reform and Healthcare Professions Act 2002 and the Health (Wales) Act 2003, which confer on the Assembly powers to amend certain primary legislation. Although the powers granted under these Acts do not give the Assembly the freedom to do anything it chooses within the scope of the Act, the two Health Acts in particular do confer some broad powers on the Assembly to shape NHS delivery in Wales.

The second solution recommended by the Richard Commission was to confer by fresh legislation new powers on the Assembly to make primary legislation. In the event the United Kingdom Government opted for a combination of the two schemes, albeit that the ability of the Assembly to make primary legislation would come in a series of steps, and not immediately: see its White Paper, *Better Governance for Wales* (Cm 6582/2005) and the legislation it spawned: the Government of Wales Act 2006, to which we can now turn.

(iii) Devolution under the Government of Wales Act 2006

The Government of Wales Act 2006 has three main aims: to effect a formal separation of powers between the executive and the legislative branches of the Assembly, to reform electoral arrangements and to enhance the legislative powers of the Assembly.

To take each of these in turn, under the Act the Welsh Assembly Government is established for the first time as an entity separate from, but accountable to, the National Assembly (ss 45–8). Welsh Ministers act on behalf of the Crown rather than as delegates of the Assembly, but will have to resign from office if they lose the confidence of the Assembly. A new office of Counsel General is created, the post-holder being responsible for providing legal advice to the Assembly Government on matters relating to their devolved functions (s 49). Most of the statutory functions which under the 1998 Act were exercised in the name of the Assembly have under the 2006 Act formally become the responsibility of the Welsh Ministers (ss 56–8).

The main change in the electoral arrangements is the new rule that individuals are no longer able to be candidates in constituency elections and at the same time be eligible for election as regional members from party lists (s 7). In the 2003 Assembly elections, seventeen of the twenty AMs elected from the regional party lists were candidates who had stood in, but had lost, constituency elections. These included the candidates who had come second, third and even fourth in the Clwyd West constituency. In the Government's view, this was both confusing for electors and unfair, making winners out of losers, but in the view of other parties the change was nothing more than a crude attempt on the part

of the Government to rig future elections in favour of the Labour Party, as it would be the Liberal Democrats and Plaid Cymru who would be most adversely affected by the new rule. Consequently, the proposed change was a matter of considerable controversy as the Government of Wales Bill made its progress through Parliament. Indeed, there was some doubt whether the Bill would be passed at all, such was the hostility to this provision in the House of Lords. In the event, however, the Government got its way.

The enhancement of the Assembly's legislative powers is complex, and is divided into three stages. The first (as recommended by the Richard Commission, see above) sees the conferral of wider powers on the Assembly to make subordinate legislation. This change, as explained above, did not require fresh legislation and has already commenced under the framework of the Government of Wales Act 1998: see eg, the Commissioner for Older People (Wales) Act 2006 and the NHS Redress Act 2006 s 17. The second and third stages are provided for in the Government of Wales Act 2006. The second stage consists of an Order in Council mechanism whereby Parliament may confer enhanced legislative powers on the Assembly in relation to specified subject matters which fall within devolved fields. Such Orders in Council will enable the Assembly to pass its own legislation within the scope of the powers delegated by Parliament. Such legislation will be known as 'Assembly Measures' (ss 93–102).

It is important to note that, under these provisions, the 2006 Act does not itself confer additional powers on the Assembly. Rather, it provides a mechanism whereby such powers can be conferred on a case by case basis as appropriate, with parliamentary consent. The 'devolved fields' with regard to which such Orders in Council may be made are listed in Schedule 5 to the Act. They are: agriculture, fisheries, forestry and rural development; ancient monuments and historic buildings; culture; economic development; education and training; the environment; fire and rescue services and fire safety; food; health and health services; highways and transport; housing; local government; public administration; social welfare; sport and recreation; tourism; town and country planning; water and flood defence; and the Welsh language. The effect of an individual Order in Council will be to insert, under the relevant 'field' heading in Schedule 5, a description of the 'matter' in relation to which the Assembly is to be given enhanced legislative competence, together with any specific restrictions necessary accurately to define its scope (ss 93–5).

The Act provides for the Assembly and both Houses of Parliament to approve draft Orders in Council before they come into force. It is supposed that Orders in Council will normally be proposed by the Welsh Ministers. Where this is so, the following procedure will be adopted: the Order in Council will be drafted following discussion between the Welsh Ministers, the relevant UK government department(s) and the Wales Office. This may be followed by prelegislative scrutiny either by the Assembly or in Parliament (or both) – these are matters for the Assembly and the Houses of Parliament respectively, and are not prescribed

by the 2006 Act. There will then follow the formal, statutory processes for the Assembly and both Houses of Parliament to give their approval (or otherwise) to the Order in Council. No amendment will be possible at this stage, as both the Assembly and Parliament will have to approve an identical text (ss 96–8).

Assembly Measures and (as under the 1998 Act) acts and decisions of the Welsh Ministers will be unlawful if they are incompatible with Community law or with Convention rights (ss 80, 81, 94). Provision is made for the Supreme Court (once it comes into being), at the instigation of either the Counsel General or the Attorney General, to review the legality of proposed Assembly Measures (s 99). Additionally, a potentially divisive power is conferred by section 101 on the Secretary of State to make an order preventing an Assembly Measure from coming into force if he has reasonable grounds to believe that it 'would have an adverse effect on any matter which is not specified in . . . Schedule 5' (ie, on any matter that is not devolved to the Assembly), that it 'might have a serious adverse impact on water resources in England' or that it 'would have an adverse effect on the operation of the law as it applies in England'. Is this last criterion so broadly drawn that it amounts to an effective veto on the part of the Secretary of State?

The changes to Welsh devolution so far considered (in relation to the separation of powers, to electoral arrangements and to legislative powers) apply with effect from the day after the 2007 Assembly elections (s 161).

The third stage in the enhancement of the Assembly's legislative powers is to confer primary legislative powers on the Assembly to pass 'Assembly Acts' within devolved fields (ss 103–16). Under the terms of the Act, however, these powers cannot come into force unless and until they have been approved in a further Welsh referendum (s 103). If they come into force the Assembly's powers to pass Assembly Measures would lapse. In the event that 'Assembly Acts' powers do come into force, there will be a notable difference between the structure of the Welsh Assembly's primary legislative powers and the structure of such powers in respect of the Scottish Parliament. As we saw above, the scheme under the Scotland Act 1998 is for the reserved powers (those remaining at Westminster) to be listed, and for all remaining powers to be devolved. Under the Government of Wales Act 2006, by contrast, it is those powers devolved to Cardiff that are expressly listed (in Schedule 7 to the Act). The rationale behind this difference, according to a joint statement by the Secretary of State for Wales and the First Minister for Wales (given as evidence to the House of Commons Welsh Affairs Committee, *Better Governance for Wales*, HC 551 of 2005–06) was that:

> If the Assembly had the same general power to legislate as the Scottish Parliament then the consequences for the unity of the England and Wales legal jurisdiction would be considerable. The courts would, as time went by, be increasingly called upon to apply fundamentally different basic principles of law and rules of general application which were different in Wales from those which applied in England. The practical consequence would be the need

> for different systems of legal education, different sets of judges and lawyers and different courts. England and Wales would become separate legal jurisdictions. In order to avoid this result the simplest solution is to . . . [limit] the legislative competence of the Assembly to specified subjects.

(See further on these issues, Jones and Williams, 'Wales as a jurisdiction' [2004] *PL* 78.)

Whether the Government of Wales Act 2006 will lead to a settlement for Wales that proves to be any more durable or satisfactory than was the 1998 scheme, we shall have to wait and see. Rawlings' verdict after the first four years of Welsh devolution was that among its 'basic defects' were 'an underlying lack of stability', 'an excessive fragmentation of powers', 'a strange internal architecture' and 'a failure of constitutional vision' (*Delineating Wales* (2003), p 20). How many of these have been addressed by the 2006 reforms? And how many have been resolved? Rawlings himself was cautious in his initial assessment. Writing of the Government's White Paper that preceded the 2006 Act, he wrote that 'as a matter of institutional design, interim constitution is about to be piled on interim constitution in Welsh devolution . . . [H]astening slowly, but not in a way calculated to make interim arrangements easy to understand, is an apt characterisation of the next phase' ('Hastening slowly: the next phase of Welsh devolution' [2005] *PL* 824, 851–2).

(d) Northern Ireland

Northern Ireland, a land of 5,000 square miles, has a population of 1.7 million or 2.5 per cent of the total United Kingdom population. Ruled, if not entirely controlled, by the English Crown since the twelfth century, all Ireland was united with Great Britain by Acts of Union of the British and Irish Parliaments in 1800. (The Act of the Irish Parliament was passed in unedifying circumstances but was doubtless formally valid.) The Acts of Union ended the life of the Irish Parliament and transferred its authority to a Parliament of the United Kingdom, which was to include Irish members. The two countries were to be united into one Kingdom 'for ever after'; and the union of the Churches of England and Ireland was declared to be established for ever as 'an essential and fundamental part' of the Union.

As with the earlier Acts of Union between England and Scotland (see above), it can be argued that the Acts of Union of 1800 were constituent Acts of a new (United Kingdom) Parliament which set legal limits to the powers of that Parliament. But in this instance the argument has not fared well. The Irish Church Act 1869 disestablished the Church of Ireland, dissolving its union with the Church of England, notwithstanding the explicit provision of the Acts of Union. A challenge to the validity of the Act (although not expressly for its non-conformity with the Acts of Union) was unsuccessful: *Ex p Canon Selwyn* (1872)

36 JP 54. The Acts of Union were abrogated in a fundamental respect in 1921–22 when the Irish Free State was separated from the United Kingdom as a free dominion within the Commonwealth. (See the Irish Free State (Agreement) Act 1922, the Irish Free State Constitution Act 1922 and the Irish Free State (Consequential Provisions) Act 1922.) It became a republic with the name Éire or, in the English language, Ireland, in 1937 and withdrew from the Commonwealth in 1949.

The six counties of the north-east remained within the United Kingdom, with their own Parliament and government in Belfast established by the Government of Ireland Act 1920. The Ireland Act 1949 included, in statutory form, a political assurance to the Unionist (mainly Protestant) community of Northern Ireland which was reaffirmed in subsequent legislation and now appears in the following terms in section 1(1) of the Northern Ireland Act 1998:

> It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.

Subsection (2) makes provision for action to be taken if the vote in such a poll is in favour of Northern Ireland becoming part of a united Ireland:

> But if the wish expressed by a majority in such a poll is that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland, the Secretary of State shall lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland.

(i) Devolved government 1921–72

The constitution of Northern Ireland established by the Government of Ireland Act 1920 endured until 1972. The Act provided for a system of devolved government, with a bicameral Parliament of Northern Ireland and an Executive headed by a Governor as the representative of the Crown.

The Parliament of Northern Ireland consisted of a Senate and a House of Commons. Elections to the House of Commons were by proportional representation (the single transferable vote system) until 1929, and from then by the plurality ('first past the post') system used in UK parliamentary elections. The United Kingdom Parliament retained its entire sovereignty in matters affecting Northern Ireland, but there was an extensive transfer of legislative power to the Parliament at Stormont in Belfast, the Act specifying the subjects to be *retained* at Westminster rather than those to be *transferred*. The convention was soon established that the United Kingdom Parliament should not legislate for Northern Ireland in the 'transferred' area unless requested to do so by the Northern Ireland Government. Representation of Northern Ireland in the

United Kingdom Parliament continued, but with a reduced number of seats while the system of devolved government remained in place (thirteen until 1948, thereafter twelve).

Report of the Royal Commission on the Constitution (Kilbrandon Report), vol 1, Cmnd 5460/1973

> 172. . . . [T]he constitution was placed under . . . stresses stemming from the division of the population into two sharply distinct communities, a majority, predominantly Protestant and in favour of the maintenance of the union with Great Britain, and a minority, predominantly Roman Catholic and opposed to the union. For the whole period of the existence of the Northern Ireland Parliament, politics in the province were dominated by this single issue. Parliamentary elections were concerned almost exclusively with it, and only those political parties whose positions in relation to it were clearly defined were able to attract substantial support. . . .
>
> 1251. . . . [T]he Act applied to Northern Ireland the system of Parliamentary democracy in use at Westminster, which depends for its smooth working on an alternation between Government and Opposition. The rule that the 'winner takes all' – that the Government is formed exclusively from the party that has a majority, be it large or small, in the legislature, and that the Opposition is totally excluded – is far easier to accept when electoral victory passes from party to party. Balance and equity are achieved by alternation. But in Northern Ireland the winner was always the Unionist Party. There was nothing contrived or improper about this; whatever may have been true, from time to time and from place to place, about local government elections, there is no room for doubt that at every general election for the Northern Ireland House of Commons a clear majority of the electors deliberately intended the Unionist Party to form the government. The permanent majority was a permanent and cohesive majority in the electorate. But such a result, so often repeated, and apparently so likely to continue, inevitably produced great dissatisfaction in the minority and raised the question of the suitability of that particular form of government in the special circumstances of Northern Ireland.

Despite these flaws the Kilbrandon Commission was in agreement with other commentators who judged the devolved or 'home rule' government of Northern Ireland to have been broadly successful in providing laws and administration suitable to the particular needs of the province. It had been an instrument of progress at all events 'in the large areas of government which were unaffected, or at least were not dominated, by the community problem' (para 1264). But a different aspect of the period of home rule was emphasised in the 1984 *Report of the New Ireland Forum* (composed of representatives of democratic nationalist parties of North and South). The identity of the nationalist community in the North, it said (para 3.9), had been effectively disregarded:

> The symbols and procedures of the institutions to which nationalists are required to give allegiance have been a constant reminder of the denial of their identity. . . . [T]hey have had virtually no involvement in decision-making at the political level. For over 50 years they

lived under a system of exclusively unionist power and privilege and suffered systematic discrimination. They were deprived of the means of social and economic development, experienced high levels of emigration and have always been subject to high rates of unemployment.

Civil liberties were not well protected during this period. The Civil Authorities (Special Powers) Act (Northern Ireland) enacted by the Stormont Parliament in 1922 established a wide-ranging system of controls, including powers of arrest, search, internment and the banning of organisations, which did not in general prove to be amenable to successful challenge in the courts. (See eg, *McEldowney v Forde* [1971] AC 632, of which case it has been said that it finally convinced the minority community of 'the futility of pursuing the civil rights campaign through the courts': K Boyle *et al, Law and State: the Case of Northern Ireland* (1975), p 15.)

For the whole period 1921–72 the Unionist Party had an absolute majority in the Northern Ireland House of Commons. (No such long-lasting single-party hegemony has been known at Westminster since the Reform Act of 1832.) The dominance of the Unionist Party extended to local government, where Unionist majorities were sometimes assured by gerrymandering and the manipulation of housing allocations. Inflexible single-party rule contributed to the resentments of a disadvantaged Catholic community in the poorest part of the United Kingdom, and these resentments were at last to explode in the so-called 'troubles' – the political violence and terrorism – of 1968 and the following years.

Between 1968 and 1972 some important constitutional reforms were instituted by the Northern Ireland Government, under a degree of pressure from Whitehall. Electoral law was reformed and local government reorganised. A Northern Ireland Parliamentary Commissioner for Administration and a Commissioner for Complaints were appointed to investigate complaints of maladministration by public authorities. A Community Relations Commission was set up to promote action to improve community relations, and a Housing Executive took over responsibility for public housing in the province. Despite these reforms, the nationalist community was 'still discriminated against in social, economic, cultural and political terms' (*Report of the New Ireland Forum* (1984), para 3.17) and the province experienced continuing violence and disorder, the despatch of troops and the reintroduction of internment. The deepening crisis elicited increasing involvement by the United Kingdom Government in the affairs of Northern Ireland, and finally in March 1972 direct rule from Whitehall was imposed on the province. By the Northern Ireland (Temporary Provisions) Act 1972 the Parliament of Northern Ireland was prorogued, and provision was made for legislation by Order in Council on the subjects within its competence. The powers of the Northern Ireland Government were transferred to a Secretary of State for Northern Ireland.

(ii) Direct rule

The first period of direct rule ran from 1972 to 1974. A considerable amount of time was given at Westminster to legislation for Northern Ireland (Acts and Orders in Council). A Northern Ireland (Border Poll) Act 1972 provided for a referendum in the province on the question whether Northern Ireland should remain part of the United Kingdom or be joined with the Republic of Ireland. In the 'border poll' of March 1973, only 58.7 per cent of the electorate cast their votes (nationalist political leaders had urged their supporters not to vote): 591,820 voted to remain part of the United Kingdom, 6,463 to join with the Republic of Ireland.

A new system of devolution, based on the principle of power-sharing between the two communities, was instituted by the Northern Ireland Constitution Act 1973 and the Northern Ireland Assembly Act 1973. There was to be an Assembly, with legislative powers, elected by proportional representation, and an Executive constituted from parties representative of both communities. The Assembly was duly elected and the Secretary of State appointed an Executive, composed of members of the Official Unionist Party, the Social Democratic and Labour Party (SDLP) and the Alliance Party. The leaders of these parties joined with ministers of the United Kingdom and Irish Governments in a conference at Sunningdale in December 1973, and agreement was reached on the formation of a Council of Ireland which would be an instrument for cooperation between the province and the Republic.

This first attempt to achieve an inter-communal constitutional settlement in Northern Ireland collapsed when a general strike of loyalist workers organised by the Ulster Workers' Council brought down the Executive in May 1974, after only five months. The Assembly was dissolved and direct rule from Whitehall was resumed under arrangements made by the Northern Ireland Act 1974. Direct rule was to have been for an 'interim period' of one year but was extended annually by orders made under the Act, in the conviction that a return to single-party government in Northern Ireland would offer no prospect of a solution to the problems of the province.

Renewed attempts were made to devise a scheme of devolved government which would have broad support in the two communities. A Northern Ireland Assembly was reconstituted by the Northern Ireland Act 1982 with scrutinising, deliberative and consultative functions and a requirement to bring forward proposals for a broadly acceptable scheme of devolution. Within a few years the endeavour broke down in dissension and the Assembly was dissolved by Order in Council in 1986. Direct rule continued until 1998.

Under the system of direct rule the government of Northern Ireland was the responsibility of a Secretary of State, assisted latterly by four subordinate ministers. Policy on law and order, constitutional development, etc was directed by the Northern Ireland Office in Whitehall; departments in Belfast (staffed by the Northern Ireland Civil Service, which is a distinct service under the Crown)

administered agriculture, economic development, education, the environment, and health and social services.

Acts of Parliament might be enacted for or extend to Northern Ireland, but the Northern Ireland Act 1974 conferred a wide power to legislate specifically for Northern Ireland by Order in Council, subject to affirmative resolutions of both Houses of Parliament, and this was the method usually adopted. Various other enactments, however, allowed the 'negative resolution' procedure – with less scope for parliamentary control (see below, p 457) – to be used for Orders in Council relating to Northern Ireland.

The representation of Northern Ireland in the United Kingdom Parliament was increased by the House of Commons (Redistribution of Seats) Act 1979, in providing that the number of constituencies for Northern Ireland should be seventeen, unless the Boundary Commission for Northern Ireland should find it necessary to vary this number to sixteen or eighteen for the time being. (Equivalent provision is now made by the Parliamentary Constituencies Act 1986, Schedule 2, r 1(4).) There are at present eighteen Northern Ireland seats in the House of Commons.

A Northern Ireland Grand Committee was established in the House of Commons, consisting of all MPs for Northern Ireland constituencies and up to twenty-five other members. Its business has included the holding of short debates, hearing ministerial statements, putting Questions to ministers for oral answer and considering bills, proposed Orders in Council and statutory instruments relating to Northern Ireland. A select committee on Northern Ireland Affairs was constituted to examine the expenditure, administration and policy of the Northern Ireland Office and the Northern Ireland departments in Belfast. Both committees continue to have a role, under new standing orders, in the devolution settlement (below).

Direct rule was unavoidable while agreement could not be reached on a system of devolved government with broad support in the two communities, but it lacked legitimacy in Northern Ireland, was wanting in democratic credentials and did not assure the effective accountability of government.

(iii) Renewed search for a settlement

In the 1980s and 1990s the United Kingdom Government sought the active cooperation of the Government of the Republic of Ireland in the quest for a political settlement.

On 15 November 1985, at an inter-governmental meeting held at Hillsborough Castle near Belfast, a formal and binding agreement was signed by the Prime Minister of the United Kingdom and the Taoiseach of the Republic of Ireland (Cmnd 9657). The Anglo-Irish Agreement provided for improved cooperation between the North and South of Ireland in cross-border security and other matters, and set up an Intergovernmental Conference which would meet regularly and be concerned with Northern Ireland affairs and with relations between the two parts of the island of Ireland.

The Agreement was unwelcome to Unionists in Northern Ireland and members of the Ulster Unionist Council sought leave to apply for judicial review to challenge its implementation, principally on the ground that the proposed Intergovernmental Conference 'would amount to the establishment in the United Kingdom of a new standing body for the purpose of influencing the conduct of the government without the authority of the Queen in Parliament, and would be contrary to law'. In *Ex p Molyneaux* [1986] 1 WLR 331, the court refused leave to apply, holding that the establishment of the Intergovernmental Conference, which would have no legislative or executive power, did not contravene 'any statute, any rule of common law or any constitutional convention'.

Among changes that were influenced by the discussions in the Intergovernmental Conference may be instanced the enactment of the Fair Employment (Northern Ireland) Act 1989, strengthening the existing legislation to eliminate religious discrimination and promote equality in employment, as well as the repeal of the Flags and Emblems (Display) Act (Northern Ireland) 1954, the establishment of an Independent Commission for Police Complaints and the introduction of a Code of Conduct for the Royal Ulster Constabulary (as it then was).

In the 1990s discussions continued with the main parties in Northern Ireland on new political institutions for the province and between the United Kingdom and Irish Governments on 'fundamental aspects of relationships within the island of Ireland' and new structures for cooperation between the two Governments. Despite the IRA's repudiation in 1996 of the first 'ceasefire' maintained by the nationalist and loyalist armed movements since 1994, a continuing effort was made to proceed with negotiations between all democratically mandated political parties in Northern Ireland. The Northern Ireland (Entry to Negotiations, etc) Act 1996 made provision for negotiations to take place between elected delegates of Northern Ireland political parties that had expressed their commitment to democracy and non-violence (the 'Mitchell principles'). Representatives of the British and Irish Governments would also take part. The all-party negotiations, which began in June 1996, were intended to lead to 'a comprehensive political settlement in relation to Northern Ireland'. Initially they showed little promise of doing so but an impetus to progress was given by a renewed ceasefire by the IRA on 20 July 1997, in response to a more flexible approach taken by the British Government to the Northern Ireland question after the 1997 general election. Agreement – styled 'the Multi-Party Agreement' and since known as the Belfast Agreement (or Good Friday Agreement) – was reached by the participants in the talks on 10 April 1998 (Cm 3883/1998). It set out the agreed arrangements for the devolution of legislative and executive powers to an elected Northern Ireland Assembly. At the same time a new Agreement was concluded between the British and Irish Governments, replacing the Anglo-Irish Agreement of 1985. It entered into force on 2 December 1999.

Writing in 2001, Brendan O'Leary said of the British-Irish Agreement (or Treaty) and the Multi-Party (Belfast) Agreement that they represented 'the most

comprehensive, ambitious, and successful attempt at constitutional conflict regulation of the last three decades' (in A Reynolds (ed), *The Architecture of Democracy* (2002), p 294).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland, Cm 4705/2000, Article 1

The two Governments:

(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;

(ii) recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;

(iii) acknowledge that while a substantial section of the people in Northern Ireland share the legitimate wish of a majority of the people of the island of Ireland for a united Ireland, the present wish of a majority of the people of Northern Ireland, freely exercised and legitimate, is to maintain the Union and accordingly, that Northern Ireland's status as part of the United Kingdom reflects and relies upon that wish; and that it would be wrong to make any change in the status of Northern Ireland save with the consent of a majority of its people;

(iv) affirm that, if in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish;

(v) affirm that whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos and aspirations of both communities;

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

In Article 2 the two Governments undertook to support and implement the provisions of the Belfast Agreement.

A referendum was held in Northern Ireland on 22 May 1998 in accordance with the Northern Ireland Negotiations (Referendum) Order 1998, SI 1998/1126 (made under power conferred by section 4 of the Northern Ireland (Entry to Negotiations, etc) Act 1996). Of the 81 per cent of electors who voted on the question whether they supported the Belfast Agreement, 71 per cent expressed their support. In a simultaneous referendum held in the Republic of Ireland, 94 per cent of those voting approved the changes to the Irish Constitution, acknowledging the existing status of Northern Ireland, that were required by the Agreement.

Following the approval of the Belfast Agreement in the referendum, a new Northern Ireland Assembly was elected by proportional representation (single transferable vote) on 25 June 1998, in accordance with the Northern Ireland (Elections) Act 1998. It was initially to be a 'shadow' Assembly, which would settle its standing orders and working practices and elect a First Minister and Deputy First Minister. Provision for the devolution of legislative and executive powers to the Assembly was made subsequently by the Northern Ireland Act 1998. Devolved government was to be brought into operation once it appeared to the Secretary of State that 'sufficient progress has been made in implementing the Belfast Agreement' (Northern Ireland Act 1998, s 3). In November 1999 the Secretary of State determined that there had been sufficient progress and an Order in Council made under section 3 brought devolution into effect on 2 December 1999. The devolved institutions assumed their functions, but a continuing political failure to achieve full implementation of the Belfast Agreement, marked by dissension in regard to decommissioning of arms, demilitarisation and policing arrangements, as well as outbreaks of paramilitary activity, resulted in repeated suspensions of devolved government, the last of which, on 15 October 2002, has continued to the present time. Direct rule has been resumed, with legislation by Order in Council in matters that would have been within the competence of the Northern Ireland Assembly.

The commitment of the British and Irish Governments to renewed efforts to reach a settlement was expressed in a Joint Declaration in April 2003. This was followed in December 2004 by joint proposals of the two Governments for a comprehensive agreement that would lead to the restoration of devolved government. Discussions continued on the issues that divide the parties. A momentous event occurred in July 2005 when the IRA announced an end to its armed campaign and in September 2005 the Independent Commission on Decommissioning (the de Chastelain Commission) reported – and confirmed in a further report in January 2006 – that the IRA had put all its arms beyond use. A significant step was taken by the British Government in including provision in the Northern Ireland (Miscellaneous Provisions) Act 2006 for the devolution of policing and justice functions (for long a source of contention) to the Assembly when reconstituted.

The Northern Ireland Act 2006 provides for meetings to be held of the existing members of the (suspended) Northern Ireland Assembly for the purpose of

selecting a First Minister and Deputy First Minister before a deadline of 25 November 2006. Intensive talks were held in St Andrews, Scotland, between the British and Irish Governments and the various Northern Ireland parties in October 2006, designed to facilitate the meeting of the 25 November deadline. In the St Andrews Agreement of 13 October 2006 the two Governments reaffirmed their full commitment to the 'fundamental principles' of the Belfast (or Good Friday) Agreement:

> consent for constitutional change, commitment to exclusively peaceful and democratic means, stable inclusive partnership government, a balanced institutional accommodation of the key relationships with Northern Ireland, between North and South and within these islands, and for equality and human rights at the heart of the new dispensation in Northern Ireland.

The St Andrews Agreement sets out a rigid timetable for the restoration of devolved power in Northern Ireland. The Northern Ireland parties are required to confirm their acceptance of the Agreement by 10 November 2006; the Assembly will then meet to nominate the First Minister and Deputy First Minister on 24 November 2006; there will then follow some form of electoral endorsement of the St Andrews Agreement (either by way of referendum or through fresh Assembly elections) in March 2007; following such endorsement power will be devolved with effect from 26 March 2007.

Since the end of 2004 the two Governments have made it clear that failure to meet the 25 November 2006 deadline would result in the immediate dissolution of the Assembly. It is reiterated in the St Andrews Agreement that failure 'at any stage' to agree on the establishment of the Executive will have the same result. In this event, Northern Ireland would be governed not on a scheme of devolution, but on the basis of new British-Irish partnership arrangements – a revised form of direct rule that would substantially involve Dublin in aspects of the government of Northern Ireland. This, at the time of writing, appears to be the choice facing Northern Ireland: devolution with the DUP and Sinn Fein as the largest parties (meaning, presumably, that Ian Paisley would be First Minister and Martin McGuinness Deputy First Minister), or a new form of joint direct rule between the British and Irish Governments.

(iv) Devolution under the Northern Ireland Act 1998

The following account of the devolutionary scheme of the Northern Ireland Act 1998 is given on the (perhaps overly optimistic?) basis that its essential features may endure – albeit with whatever modifications that may yet be agreed and embodied in legislation amending the Act.

The purpose of the Northern Ireland Act 1998 was to give legal effect to the substantive provisions of the Belfast Agreement in their entirety, establishing a polity in which power would be shared and opposed viewpoints accommodated.

Strand One of the Agreement, setting out the terms of the proposed devolutionary settlement, was closely adhered to in the Act. The system of devolution adopted for Northern Ireland drew on the previous scheme of devolved government under the Northern Ireland Constitution Act 1973 and on the model of the Scotland Act 1998.

The Northern Ireland Assembly has 108 members, elected for a four-year term by the single transferable vote system, each of the eighteen Northern Ireland parliamentary (Westminster) constituencies returning six members. The Assembly has powers of primary legislation in respect of all *transferred* matters, that is, all matters that are not 'excepted' or 'reserved' in terms of the Act (Schs 2 and 3 respectively). Transferred matters include the wide range of social and economic matters that were within the responsibility of the six Northern Ireland departments immediately prior to devolution. These matters include agriculture and rural development, arts and culture, economic development, education, the environment, health, social services, training and employment. (The Northern Ireland departments were to continue in existence, subject to the power of the Assembly to transfer functions between them or to create or dissolve departments.)

The *excepted* matters listed in Schedule 2 are not within the competence of the Assembly and cannot be transferred to it (otherwise than by Act of Parliament amending the Northern Ireland Act). They include international relations and relations with the European Communities, defence and the armed forces, national security, the appointment and removal of judges, taxation, elections and the main provisions of the Northern Ireland Act itself. The Act includes some further specific limitations of the Assembly's competence. Certain enactments are 'entrenched' by section 7 of the Act, so that they may not be modified by an Act of the Assembly (or by subordinate legislation made by a Northern Ireland minister): these include the European Communities Act 1972 and the Human Rights Act 1998. An Act of the Assembly is outside competence if it is incompatible with a Convention right under the Human Rights Act or with Community law or if it discriminates against persons on the ground of religious belief or political opinion: section 6(2).

The *reserved* matters listed in Schedule 3 are not within the competence of the Assembly but are capable of being transferred. They include criminal justice and policing, public order, firearms and explosives, financial services and markets, import and export controls, intellectual property, telecommunications and broadcasting, and consumer safety. Transfer of reserved matters to Assembly competence may be effected by Order in Council, provided that the Assembly has passed, with cross-community support (see below), a resolution requesting the transfer and a draft of the order has been approved by each House of Parliament. (Removal of a transferred matter to the reserved list may be effected in the same way.) The possibility of transfer from the reserved list introduces an element of flexibility into the devolution settlement. Additional flexibility ensues from provisions of the Act which enable the Assembly to legislate on a reserved

matter with the consent of the Secretary of State given in any particular instance, subject to parliamentary controls. (See ss 8, 10, 14 and 15.)

The Belfast Agreement provided for safeguards 'to ensure that all sections of the community can participate and work together successfully' in the Assembly. The Act accordingly provides that certain important decisions of the Assembly may be taken only with 'cross-community support'. The mechanism for achieving this requires that Assembly members must identify themselves and be designated as 'Nationalist' or 'Unionist' (or 'Other'). 'Cross-community support' is defined as follows (s 4(5)):

(a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting [parallel consent]; or
(b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting [weighted majority].

Parallel consent is the method stipulated for the joint election of the First Minister and Deputy First Minister. Cross-community support in either form is required for the election of the Presiding Officer of the Assembly and, among other matters, for the making of Assembly standing orders, exclusion of ministers from office and approval of the annual budget. In addition, a petition by thirty members of the Assembly on a matter of concern to them ensures that an Assembly vote on the matter shall require cross-community support (s 42).

Questions of vires arising in relation to Assembly legislation are dealt with in the Act (ss 9–12 and Sch 10) in a manner similar to the corresponding provision made in the Scotland Act 1998 (see above).

Executive authority in transferred matters is exercised on behalf of the Assembly by a First Minister and Deputy First Minister and up to ten Northern Ireland Ministers. The number and functions of ministerial posts are determined by the First Minister and Deputy First Minister acting jointly, subject to approval by the Assembly on a cross-community basis.

The First Minister and Deputy First Minister are elected jointly by the Assembly, by parallel consent, in effect so as to represent, respectively, the largest Unionist and the largest Nationalist party. The remaining ministerial posts are allocated in proportion to party strengths in the Assembly (in accordance with a formula known as the 'd'Hondt system', set out in section 18). Statutory committees of the Assembly are appointed 'to advise and assist each Northern Ireland Minister in the formulation of policy' (s 29). They scrutinise the work of ministers and their departments and can initiate legislation. The person who chairs a statutory committee must not be of the same party as the minister.

A coordinating Executive Committee of the Assembly consists of all Northern Ireland Ministers presided over jointly by the First Minister and Deputy First Minister. It agrees on a policy programme and budget for each year, subject to approval by the Assembly on a cross-community basis.

The First Minister, Deputy First Minister and Northern Ireland Ministers (and also any junior ministers appointed in accordance with section 19) must affirm the Pledge of Office (set out in Schedule 4). This includes a 'commitment to non-violence and exclusively peaceful and democratic means' as well as undertakings 'to serve all the people of Northern Ireland equally, and . . . to promote equality and prevent discrimination', 'to support, and act in accordance with, all decisions of the Executive Committee and Assembly' and 'to comply with the Ministerial Code of Conduct' set out in Schedule 4. Failure of a minister to observe any term of the Pledge of Office may result in exclusion from office by resolution of the Assembly passed with cross-community support (s 30).

If either the First Minister or the Deputy First Minister resigns, both must relinquish office and the Assembly is required to elect their successors within six weeks. Its failure to do so following the resignation of the First Minister, Mr Trimble, on 1 July 2001 was followed by successive temporary suspensions of devolved government (see above; see also on this issue *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, discussed in chapter 2). There continues to be a Secretary of State for Northern Ireland at Whitehall, with a seat in the Cabinet, who has the principal responsibility for excepted and reserved matters relating to Northern Ireland. The Secretary of State has certain 'override' powers, for instance to ensure that the Northern Ireland Assembly and Administration comply with international obligations, or to safeguard the interests of defence, national security or public order.

The devolution of legislative competence to the Northern Ireland Assembly does not, it goes without saying (but is said in section 5(6) of the Act), 'affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland'. Parliament may indeed have occasion to make such laws in relation to excepted or reserved matters (and has done so in the Northern Ireland (Miscellaneous Provisions) Act 2006, providing for the devolution of police and justice) but will undoubtedly be at pains to respect fully the terms of the original devolutionary settlement or subsequent revisions of it that may be agreed upon. In respect of some reserved matters the Order in Council procedure may be used instead of parliamentary enactment. This is permitted by section 85.

(v) Human rights and equality

The Northern Ireland Constitution Act 1973 established a Standing Advisory Commission on Human Rights to advise the Secretary of State on the 'adequacy and effectiveness' of the law in preventing, and providing redress for, religious or political discrimination. In practice, with the approval of successive Secretaries of State, the Commission assumed responsibility to advise on the whole range of human rights issues in Northern Ireland. It produced valuable reports and was forthright in its criticism of some government policies and legislation for Northern Ireland, but had only a limited influence on the decisions taken. The parties to the Belfast Agreement affirmed their commitment to 'the

civil rights and the religious liberties of everyone in the community' and to a number of specific rights of special concern in the Northern Ireland context, among them 'the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity'. These goals were translated into law by the Human Rights Act 1998, which extends to Northern Ireland, and by the Northern Ireland Act 1998.

The Northern Ireland Act established a new Northern Ireland Human Rights Commission, with a membership reflecting the community balance, which is to 'keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights' (s 69(1)). The Commission has a responsibility for advising the Assembly whether bills are compatible with human rights and for advising the Secretary of State and the Executive Committee of the Assembly on measures which ought to be taken to protect human rights. It also has the power to assist individuals in proceedings relating to the protection of human rights and may itself bring proceedings in such cases.

The Commission was also given the task of advising the Secretary of State on the scope for defining a Bill of Rights for Northern Ireland, supplementing the 'Convention rights' included in the Human Rights Act 1998 and reflecting, as provided in the Belfast Agreement, 'the particular circumstances of Northern Ireland' and 'principles of mutual respect for the identity and ethos of both communities and parity of esteem'. It has published draft proposals for consultation and has engaged in discussions with political parties, human rights lawyers and other representatives of civil society on the terms of a Bill of Rights. These have proved contentious, but the Commission is continuing its efforts 'to build political consensus around a strong and inclusive Bill of Rights' (*Annual Report of the Northern Ireland Human Rights Commission for 2005*, HC 763 of 2005–06, p 19; see further Smith, 'The drafting process of a Bill of Rights for Northern Ireland' [2004] *PL* 526).

In the Act's provisions relating to the Human Rights Commission, 'human rights' include but are not restricted to the 'Convention rights' (see s 69(11)). The Act gives effect to a principle of equality of opportunity. Public authorities operating in Northern Ireland are obliged to 'have due regard to the need to promote equality of opportunity' with respect to religion, political opinion, race, age, gender, marital status, sexual orientation, disability or dependants (s 75(1)). On the principle that 'social cohesion requires equality to be reinforced by good community relations' (Secretary of State Marjorie Mowlam, HC Deb vol 317, col 109, 27 July 1998), public authorities are also to have regard 'to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group' (s 75(2)). The authorities concerned are required to draw up schemes showing how they propose to fulfil these duties (see Sch 9).

A single Equality Commission established by the Act amalgamated and assumed the executive responsibilities of four Northern Ireland bodies: the

Equal Opportunities Commission, the Fair Employment Commission, the Commission for Racial Equality and the Disability Council. The Commission's powers and responsibilities have been extended by regulations prohibiting discrimination in employment and training on grounds of sexual orientation. The Commission also monitors the equality obligations of public authorities under section 75 (above), reviews the schemes submitted by them as to the fulfilment of those obligations and investigates complaints of non-compliance with approved schemes.

It is unlawful for a public authority operating in Northern Ireland to discriminate against persons on the ground of religious belief or political opinion (s 76).

(vi) North-South ministerial council and British-Irish council

It was intended that these bodies should make it possible 'to develop positive relationships and practical cooperation within the island of Ireland and within these islands' (Lord Dubs, Parliamentary Under-Secretary of State, Northern Ireland Office, HL Deb vol 593, col 1445, 21 October 1998).

The United Kingdom and Irish Governments agreed in 1999 on the establishment of a North-South Ministerial Council in accordance with Strand Two of the Belfast Agreement. (See the *Agreement on the North/South Ministerial Council*, Cm 4708/2000.) Northern Ireland is represented on the Council by the First Minister, Deputy First Minister and any relevant ministers (on a cross-community basis), the Irish Government by the Taoiseach and relevant ministers. The Council is to further cooperation between the two administrations on matters of mutual interest and seek to reach agreement on common policies. Its decisions on policies may be implemented either separately in each jurisdiction or by specialised implementation bodies operating on a cross-border or all-island level (eg on inland waterways, food safety, trade and business development and language: Irish and Ulster Scots).

The North-South Council was to be accountable to both the Irish Parliament and the Northern Ireland Assembly. Decisions requiring legislation or money must be returned to the Assembly for the laws to be enacted or the money voted. Following the suspension of the Northern Ireland Assembly in October 2002, it was agreed between the British and Irish Governments that decisions relating to the implementation bodies should for the time being be taken by the two Governments.

The British and Irish Governments also agreed in 1999 on the establishment of a British-Irish Council, in accordance with Strand Three of the Belfast Agreement and as a concession to Unionist concerns about an institutionalised participation of the Republic of Ireland in the affairs of the Province. (See Cm 4710/2000.) This Council comprises representatives of the British and Irish Governments, of the devolved administrations in Northern Ireland, Scotland and Wales, and of the Crown dependencies of the Channel Islands and Isle of Man. The Council seeks cooperation on matters of mutual interest (such as

transport links, tourism, agricultural, environmental, cultural, health and education matters and issues arising in the European Union). It may reach agreement on common policies and actions and decide on the means of implementing them.

The Intergovernmental Conference set up in 1985 was subsumed in a standing British-Irish Intergovernmental Conference established by agreement of the two governments in 1998 (Cm 4709/2000) in accordance with the Belfast Agreement. This is a forum for cooperation between the two governments on all matters of common concern. It enables the Irish Government to contribute to United Kingdom policy-making in relation to non-devolved Northern Ireland matters, but when these are under discussion, representatives of the Northern Ireland Administration may also take part.

The Belfast Agreement and the enactment of its terms in the Northern Ireland Act 1998 were achieved by a mixture of pressure and goodwill, by hard bargaining, concession and compromise. The outcome was a skilfully contrived power-sharing scheme which, if it is to be revived (in whatever form), will demand a sustained political will on all sides for it to bring stability and lasting peace to Northern Ireland.

(See further C Harvey (ed), *Human Rights, Equality and Democratic Renewal in Northern Ireland* (2001); R Wilford (ed), *Aspects of the Belfast Agreement* (2001); Hadfield, 'The Belfast agreement, sovereignty and the state of the union' [1998] *PL* 599; O'Leary, 'The Belfast agreement and the British-Irish agreement', in A Reynolds (ed), *The Architecture of Democracy* (2002); C Campbell *et al*, 'The frontiers of legal analysis: reframing the transition in Northern Ireland' (2003) 66 *MLR* 317; McGarry and O'Leary, 'Stabilising Northern Ireland's agreement' (2004) 75 *Political Quarterly* 213; McCrudden in J Jowell and D Oliver (eds), *The Changing Constitution* (5th edn 2004), ch 8; Anthony and Morison in R Hazell and R Rawlings (eds), *Devolution, Law Making and the Constitution* (2005), ch 5.)

(e) Devolution: conclusions

Devolution in Britain, as it has been experienced since 1998, 'is variable, an untidy, asymmetrical constitutional architecture' (O'Neill, 'Great Britain: from Dicey to devolution' (2000) 53 *Parliamentary Affairs* 69, 78). Similarly Robert Hazell, in *The State and the Nations* (2000), p 269, remarks: 'Asymmetry runs through every clause and schedule of the devolution legislation, from the fundamentals of powers and functions down to the niceties of nomenclature'. Hazell goes on to stress that these variations are not accidental:

> They are deliberate differences chosen to emphasise the difference in style and substance between the three devolved assemblies, and in particular between each of the devolved assemblies and their parent body at Westminster.

The different constitutional structures were devised so as to match the particular historical and political circumstances of each country. This is not to say that the match is in every respect apposite, and it is evident that we cannot think of the settlement as being in each case fixed and permanent. This is, indeed, acknowledged in provisions of the devolution statutes which allow for future extensions of the areas of competence of the devolved institutions.

The former Secretary of State for Wales, Mr Ron Davies, in insisting that devolution was 'a process, not an event', highlighted a feature not only of the settlement for Wales but of the whole devolution project. It is in the arena of politics that devolved government in the three countries will be tested and adjusted; and as the various political parties have differing perspectives of devolution and envisage different outcomes, the course of constitutional development is not easily predicted. It is in Northern Ireland, where political conflict is sharpest and expectations of what may be gained from devolution diverge most radically, that the settlement is least stable; and it is there that most is demanded in political imagination and flexibility if the experiment is to succeed. Even in Scotland and Wales, where the devolution of powers seems realistically, although not legally, irreversible, there are elements of uncertainty and transience. In Wales, for instance, the demand has intensified for powers of primary legislation to be devolved. A Scottish administration that encounters a United Kingdom Government of a different political complexion may strain at the limits on its powers and the carefully devised arrangements for cooperation may break down.

Although it is clear that devolution has not resulted in a federal constitution of the United Kingdom, it has been remarked that 'in political terms, these new settlements are significantly closer to the federalist end of the continuum than their predecessors in the Northern Ireland Act 1920 and the abortive Scotland Act 1978' (Walker, 'Beyond the unitary conception of the United Kingdom constitution?' [2000] *PL* 384, 396). This author goes on to say (at p 397) that:

> the British state has come closer than ever before to conceding that its retention of legislative omnicompetence in the context of a devolution process is a matter of legal form rather than political substance; in other words, while ritual deference continues to be paid to the legal theory of the unitary state, the developing culture of negotiation and balanced settlement reflects a rather different political understanding.

3 Local government

Every modern state, unless of minute size, needs a system of local administration. Even if all important decisions were taken at the centre there would need to be local agencies to implement them, issuing commands and services to local populations, and some subsidiary decision-making would have to be delegated to these agencies. Of course, there are many possible kinds of arrangement for local administration. In the United Kingdom, part of this task is performed by

local branches of central government, such as the outposts of HM Revenue and Customs and of the Department of Work and Pensions, as well as by a host of unelected local public spending bodies (local 'quangos'); but the most wide-ranging responsibilities fall to elected local government.

It would be generally agreed that local government in the United Kingdom has the following main objectives.

- to reduce the load on the centre; central government in the modern state would be greatly overloaded if the burden of administration were not shared with local institutions;
- to provide opportunities for democratic choice and popular participation in the government of local areas; in this way government can be made more accountable to local communities, and ordinary citizens can take a fuller part in the democratic process and in public life;
- to achieve more responsive and rational decision-making through institutions which are well informed about local conditions and aware of local needs and demands; specific policies can be developed to match local circumstances, and national policies can be adapted to the needs of different areas and communities.

The Redcliffe-Maud Commission, in its report on the structure of local government in England, gave some attention to the purposes of local government.

Report of the Royal Commission on Local Government in England (Redcliffe-Maud Report) vol 1, Cmnd 4040/1969

28. Our terms of reference . . . require us to bear in mind the need to sustain a viable system of local democracy: that is, a system under which government by the people is a reality. This we take to be of importance at least equal to the importance of securing efficiency in the provision of services. Local government is not to be seen merely as a provider of services. If that were all, it would be right to consider whether some of the services could not be more efficiently provided by other means. The importance of local government lies in the fact that it is the means by which people can provide services for themselves; can take an active and constructive part in the business of government; and can decide for themselves, within the limits of what national policies and local resources allow, what kind of services they want and what kind of environment they prefer. More than this, through their local representatives people throughout the country can, and in practice do, build up the policies which national government adopts – by focussing attention on local problems, by their various ideas of what government should seek to do, by local initiatives and local reactions. Many of the powers and responsibilities which local authorities now possess, many of the methods now in general use, owe their existence to pioneering by individual local authorities. Local government . . . being, by its nature, in closer touch than Parliament or Ministers can be with local conditions, local needs, local opinions, is an essential part of the fabric of democratic government. Central government tends, by its nature, to be bureaucratic. It is only by the combination of local representative institutions with

the central institutions of Parliament, Ministers and Departments, that a genuine national democracy can be sustained.

29. We recognise that some services are best provided by the national government: where the provision is or ought to be standardised throughout the country, or where the decisions involved can be taken only at the national level, or where a service requires an exceptional degree of technical expertise and allows little scope for local choice. Even here, however, there is a role for local government in assessing the impact of national policies on places and on people, and in bringing pressure to bear on the national government for changes in policy or in administration, or for particular decisions. And wherever local choice, local opinion and intimate knowledge of the effects of government action or inaction are important, a service is best provided by local government, however much it may have to be influenced by national decisions about the level of service to be provided and the order of priorities to be observed.

30. We conclude then that the purpose of local government is to provide a democratic means both of focussing national attention on local problems affecting the safety, health and well-being of the people, and of discharging, in relation to these things, all the responsibilities of government which can be discharged at a level below that of the national government. But in discharging these responsibilities local government must, of course, act in agreement with the national government when national interests are involved.

The Widdicombe Committee, in its report on *The Conduct of Local Authority Business* (Cmnd 9797/1986) saw the value of local government as stemming from its attributes of *participation* (by the local community) and *responsiveness* (to local needs) and, as well, from that of *pluralism*, or 'the spreading of power within the state' (paras 3.13–13.17).

In a balanced assessment of the claimed benefits of local government, Anne Phillips concludes that its strongest justification is to be found in its role in 'enhancing and developing democracy', in particular through providing 'the most accessible avenue for political participation'. She argues for the development of procedures for the 'deepening' of local democracy, so that 'the locality can play a crucial role in extending discussion and deliberation and debate' ('Why does local democracy matter?', in L Pratchett and D Wilson (eds), *Local Democracy and Local Government* (1996).)

Martin Loughlin has identified four 'key characteristics' of the system of local government in the United Kingdom as follows.

Martin Loughlin, 'Restructuring of Central-Local Government Relations', in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (4th edn 2000), pp 139–40

The first [characteristic] is that of *multifunctionality*, that a single body assumes responsibility for a number of different functions. If tasks were allocated to local bodies simply by reference to a technical conception of efficiency then we might expect central government to establish single-purpose agencies to undertake defined tasks. The standard pattern of

allocating tasks to multifunctional councils may thus be taken to indicate that local government does not exist solely for its ability to provide certain services efficiently. The second characteristic is that of *discretion*. Local councils are not generally subject to specific duties. Rather they are vested with discretionary powers which enable them to tailor activities or services to local needs. This means that local authorities are free to decide on the precise pattern of the services which they deliver and even to redefine the nature of the service they provide. Notwithstanding the *ultra vires* doctrine, they are given the capacity to innovate. The third characteristic of our local government tradition is that of *taxation*. Local councils are vested with the power of taxation, which gives them a degree of financial independence which is unique amongst the subordinate institutions of government. The final characteristic is that of *representation*. Local councils in England are the only governmental institutions outside Parliament which are subject to direct periodic election.

These four basic characteristics of local government – multifunctionality, discretion, taxation, and representation – should be viewed as mutually reinforcing characteristics. As multifunctional bodies with broad discretionary powers, local authorities are vested with the capacity to innovate and determine local priorities. As elected bodies they have legitimacy to exercise broad discretionary powers, most crucially the power to tax. They are, in short, complex organizations equipped with a capacity for effective governmental action and vested with the political legitimacy to authorize such action. These characteristics reveal the values on which our tradition of local government is founded.

(a) Structure of local government

Until well into the nineteenth century the local government of England and Wales was a Byzantine structure of borough corporations, parishes, justices of the peace and ad hoc authorities of various kinds – 'a chaos of institutions, areas and rates' (P Richards, *The Reformed Local Government System* (4th edn 1980), p 15). The Local Government Acts of 1888 and 1894 created a more rational system, which was to endure in essentials until the reorganisation effected by the Local Government Act 1972.

The structure of local government established by the Acts of 1888 and 1894 was based on democratically elected local authorities. County councils were the upper-tier authorities in the counties; below them were rural district councils and, for the smaller towns, urban district councils or non-county borough councils. Within the rural districts some minor functions were retained by parishes. Larger towns were separately administered as 'county boroughs' by all-purpose authorities independent of the counties. London was given its own county government – the London County Council (LCC) – in 1888, and the London Government Act 1899 created twenty-eight metropolitan borough councils within the area of the LCC. (The City of London kept its own ancient institutions.)

The system created by these enactments assumed a separation between town and country which was to become ever more unreal. Suburban development,

population growth and mobility, and the increasing scale of local government activity (including such new services as education, health, housing, environmental planning and social welfare) demanded a radical reorganisation of the structure and working of local government. The groundwork for reform was done by a series of Royal Commissions, on *Local Government in Greater London* (Herbert Report, Cmnd 1164/1960), on *Local Government in England* (Redcliffe-Maud Report, Cmnd 4040/1969) and on *Local Government in Scotland* (Wheatley Report, Cmnd 4150/1969).

The Herbert Commission's proposals were implemented by the London Government Act 1963. The LCC was replaced by the Greater London Council (GLC), with jurisdiction extending over a much larger built-up area, and responsibilities in such matters as strategic planning, transport, main roads, fire protection, etc. The bulk of local services, including education, local planning, housing, health and social welfare, were to be discharged by thirty-two London borough councils. The Redcliffe-Maud Commission's proposals for the rest of England were criticised on their merits and generated political contention. In the result the Local Government Act 1972 departed in some important respects from the Redcliffe-Maud scheme, in particular in adopting a two-tier structure of local government instead of the Redcliffe-Maud proposal of all-purpose unitary authorities. The Act reorganised local government in both England and Wales, replacing the 1,391 existing counties, boroughs and urban and rural district councils with 422 new authorities. Outside the metropolitan areas, 47 county councils were given a wide range of functions, including education, personal social services, strategic planning, roads, transport policy and police. The 333 district councils were to provide the remaining local government services (public health, housing, local planning, etc). Parish councils (community councils or meetings in Wales) were to continue, with minor functions in their local areas. In Scotland there was, from 1975, a two-tier system of nine regional councils (responsible for education, social work, strategic planning and transport) and fifty-six district councils (responsible for local planning and housing).

If these proposals and reforms were directed to increasing the efficiency of local government, the scheme as implemented, and the reduction in the number of local authorities, may have furthered a movement towards greater centralisation of powers. Martin Loughlin, for instance, has suggested that 'the reforms which were enacted were not part of a programme of creating functionally effective units through which the trend towards centralisation could be reversed . . . but part of the centralisation process itself' (*Local Government in the Modern State* (1986), p 9). The process of centralisation continued after the return of Conservative government in 1979. The new Government was resolved to abolish the GLC and the metropolitan councils as 'a wasteful and unnecessary tier of government' (Conservative Party manifesto, 1983. They also had the demerit of being strongholds of opposition to the Government's policies.) Their dissolution was accomplished by the Local Government Act 1985.

The functions of the extinguished councils were assumed respectively by London borough or metropolitan district councils, or by new statutory authorities or quasi-governmental organisations, and were carried out through a variety of fragmented and untidy arrangements – all within a framework of ministerial powers of guidance and control. A strategic overview for London was no longer maintained by an elected authority but by a ministerial sub-committee on London and civil servants in central government departments.

The reformed local government system of 1972–73 was not universally acclaimed. It had endured for less than twenty years when the Government embarked on a further reorganisation of local government in England, Scotland and Wales. In announcing the review to be undertaken for England, the Secretary of State for the Environment remarked that 'local government cannot be a fully independent power in the land. It traditionally derives its power from Parliament, and it must complement and not compete with central Government in its activities' (HC Deb vol 188, col 401, 21 March 1991). In a consultation paper (*Local Government Review: The Structure of Local Government in England* (1991)), the Government found the two-tier system of county and district councils to be unsatisfactory in several respects. Although it was not proposed to establish a uniform pattern of authorities throughout England, it was contemplated that single-tier government would be the norm. Similar consultation produced a like result in Scotland.

The Local Government Act 1992 established a Local Government Commission for England with the task of reviewing local government areas as directed by the Secretary of State and recommending appropriate boundaries, electoral changes and administrative structures for each such area. The Act empowered the Secretary of State to give effect to the Commission's recommendations, in his discretion, by laying orders before Parliament, to be subject in some cases (eg, if effecting a structural change) to the affirmative resolution of each House. (The machinery for electoral reviews has since been changed, and the functions of the Local Government Commission have been transferred to the Electoral Commission and the Boundary Committee for England established by the Political Parties, Elections and Referendums Act 2000: see below, p 497.)

The Commission completed its review at the beginning of 1995; its recommendations for fifty new all-purpose authorities, while retaining a two-tier structure in most counties, fell far short of the Government's preference for an England of predominantly single-tier local government. The Secretary of State's insistence on a radical reconsideration by the Commission provoked the resignation of its chairman. The review was resumed under his successor, the Government requiring further consideration to be given to a number of areas, and the process was completed in 1996. In the result forty-six new unitary local authorities were established in England, but the two-tier structure of county and district councils remains in place in most of the non-metropolitan counties. This new 'hybrid' structure of local government lacks a logical foundation and it has been doubted whether it will prove a durable solution. The claimed merits of

a general adoption of unitary local government – more effective management, planning and service delivery – are much debated, but the Government has no present intention of replacing existing two-tier arrangements.

In 1998 the Labour Government published new proposals for the government of London, 'to fill the democratic deficit created by the abolition of the GLC in 1986, to provide strong strategic leadership and restore accountability' (*A Mayor and Assembly for London*, Cm 3897/1998). The Government's proposals were approved in a referendum held in Greater London on 7 May 1998 and were implemented by the Greater London Authority Act 1999, establishing a Greater London Authority (GLA), a new type of city government in the United Kingdom, consisting of a Mayor of London and a London Assembly, each elected for a term of four years. The Mayor is elected, if there are three or more candidates, by the Supplementary Vote system in which each voter may express a first and second preference. A candidate who wins more than half the first-preference votes is elected as Mayor; otherwise all but the two candidates with the most votes are eliminated and the second-preference votes of the eliminated candidates are allocated between the two who remain in the contest: the candidate who then has the most votes is elected. (If there are only two candidates the election is by the 'first past the post' system.) The twenty-five London Assembly members are elected by the Additional Member system, each voter having a constituency vote and a London vote. Fourteen 'constituency members' are elected by 'first past the post' in single-member constituencies and eleven 'London members' by the party list system (or as independents) on a London-wide vote.

The GLA has responsibility, and a general power, to promote economic development and wealth creation, social development and the improvement of the environment in Greater London. London borough councils continue to have responsibility for a wide range of local services (housing, education, social services, local roads and traffic, sport and recreation, etc). Strategic policies are formulated by the Mayor in published 'strategies' relating to such matters as transport, spatial development (land use planning), biodiversity, air quality and culture. The Mayor must consult and is accountable to the Assembly, which scrutinises the Mayor's performance of his or her functions and approves the Mayor's budget. The Greater London Authority Act also established four 'functional bodies', answerable to the GLA. These are the London Development Agency, Transport for London, the Metropolitan Police Authority and the London Fire and Emergency Planning Authority. (See generally, B Pimlott and N Rao, *Governing London* (2002).)

Local authorities in English towns and cities were given the option by the Local Government Act 2000 of having a directly elected mayor, if this pattern of government should be approved in a local referendum. In the result a mayoral system of government was chosen by only eleven local electorates. This scheme does not extend to Scotland. In 2006 the Government suggested removing the

requirement for a referendum (see its White Paper, *Strong and Prosperous Communities*, Cm 6939/2006).

The structure of local government in Scotland and Wales was reorganised in 1994 by legislation instituting single-tier local government in the two countries. The Local Government (Scotland) Act 1994 established thirty-two all-purpose authorities for Scotland – fewer elected councils and larger areas than before. Responsibility for local government in Scotland (including questions of structure) was devolved to the Scottish Parliament by the Scotland Act 1998, but no structural reorganisation is yet contemplated. The Local Governance (Scotland) Act 2004 introduced the single transferable vote system for local government elections with effect from 2007. (See further Himsworth, 'Local government in Scotland', in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006), ch 8 and see further below.)

The Local Government (Wales) Act 1994 replaced the existing eight county and thirty-seven district councils in Wales with twenty-two unitary authorities. (It was observed that the effect of the Act would be to reduce the number of elected councillors in Wales to some 1,250, while the number of persons appointed by the Secretary of State to public bodies in Wales had reached 1,450 (Lord Prys-Davies, HL Deb vol 550, col 1276, 14 December 1993).) The devolution settlement for Wales left responsibility for the structure and boundaries of local government with the Secretary of State, and the Welsh Assembly was not empowered to remove functions from local authorities. The Assembly was required by the Government of Wales Act 1998, section 113 to establish an advisory Partnership Council for Wales consisting of Assembly members and members of local authorities. It had also to adopt a scheme for sustaining and promoting local government in Wales. (See further *Local Voices: Modernising Local Government in Wales*, Cm 4028/1998, and R Rawlings, *Delineating Wales* (2003), ch 10.)

Local government in Northern Ireland was reformed by the Local Government (Northern Ireland) Act 1972, following the recommendations of a review body chaired by Sir Patrick Macrory (Cmd 546/1970). The Act established a lower tier of twenty-six district councils with very limited functions, while many local government services were to be discharged for the whole province by the Parliament and Government of Northern Ireland as the upper tier. The imposition of direct rule in 1972 resulted in the so-called 'Macrory gap', with upper-tier local government functions being discharged by civil servants and appointed boards instead of elected bodies. A Review of Public Administration was undertaken by the Northern Ireland Executive in 2002 and completed in November 2005, after the suspension of devolution, by ministers in the Northern Ireland Office. (See *Better Government for Northern Ireland* (2006), www.rpani.gov.uk.) Decisions were taken in the Review to reduce the number of local authorities from twenty-six to seven, covering larger areas and with substantially increased responsibilities and powers, which are to

be transferred from central government departments and non-departmental public bodies (and with a new general power to take action to improve the 'well-being' of the local community).

Local government elections in Northern Ireland are held under the single transferable vote system of proportional representation. (District council elections and the franchise are an excepted matter, not within the competence of the Assembly.)

(b) Functions of local authorities

Martin Loughlin has identified 'multi-functionality' as one of the basic characteristics 'of critical importance in shaping the institution of local government' (see above). In *Legality and Locality: the Role of Law in Central-Local Government Relations* (1996), pp 80–1, he instances the transfer of functions, in the late nineteenth and early twentieth century, from single-purpose local boards (eg, for education and for poor relief) to local authorities, as exemplifying the idea 'that the local inhabitants might look to a single institution for the basic services which government should provide at the level of the locality'. During this period local authorities steadily acquired additional functions, such that their total spending came to be roughly a quarter of all public expenditure. Loughlin observes, however, that since the 1930s 'local authorities have been stripped of various responsibilities, including trunk roads in 1936, electricity in 1947, gas in 1948, water and sewerage in 1974, public assistance between 1934 and 1948, hospitals in 1946 and the remaining local health services in 1974' (*Local Government in the Modern State* (1986), p 6).

The removal of functions from local government was intensified after 1979 under the auspices of a Conservative Government committed to a fundamental transformation of local authorities, to become, in the words of a Secretary of State for the Environment, 'enablers and regulators rather than providers of services' (*Municipal Review*, April 1989, p 9; see also *Competing for Quality*, Cm 1730/1991, p 22). In the 1980s and 1990s a tide of legislation curtailed local government responsibilities in respect of education, housing, public transport and police services. While, on the other hand, local authorities acquired some new functions, notably in assuming community care responsibilities from the Department of Social Security (National Health Service and Community Care Act 1990), in general there was a dispersal of local functions, resulting in 'an institutionally differentiated structure of local governance' (M Loughlin, *Legality and Locality* (1996), p 108).

The loss of functions by local government was a matter of concern to the House of Lords Select Committee on Relations between Central and Local Government. It noted the view of the local authority associations that local authorities had become mere agents of central policy, 'at the expense of an independent role in their own communities'.

Report of the Select Committee on Relations between Central and Local Government, vol I, HL 97 of 1995–96, paras 6.2–6.3

For a long time, and under different governments, power in this country has been moving away from local authorities, either to central government or to appointed or elected bodies, often not involving local authorities, some of which operate at a local level, and which are mostly single-purpose bodies. We do not believe this movement to be necessarily due to any over-arching central philosophy aimed at attacking local government itself. Central government has on occasions wished to promote national standards, to correct perceived mismanagement or overspending by local authorities, or to deal with those which have overstepped their place. It has found that the easiest way to achieve these aims is to take powers away from local government.

There have been many such changes which, while individually explicable, have, taken together, resulted in a significant if incremental shift in the balance of power to the centre.

The fragmentation of local responsibilities had resulted in the loss of an overall view of the needs of the local area and a blurring of accountability (see paras 4.46 and 6.9 of the report). The committee concluded that if nothing was done to strengthen the position of local government, there was a risk of 'a continued attrition of powers and responsibilities' from local authorities 'until nothing meaningful is left' (para 6.30).

Local authorities nevertheless retain a wide range of functions, relating to such matters as consumer protection, culture and entertainment, education, environmental health, fire, highways and public transport, housing, licensing, personal social services, planning and development control. Multi-functional local authorities are the primary agencies in a system of local governance which includes a large number of appointed, special-purpose local bodies ('quangos'). A House of Commons select committee numbered local public bodies at over 5,000, including health authorities, National Health Service trusts, city technology colleges, foundation schools, Learning and Skills Councils, registered social landlords, police authorities, etc. (See *Fifth Report, Public Administration Committee*, HC 367 of 2000–01, paras 23–7.)

David Wilson in Gerry Stoker and David Wilson (eds), *British Local Government into the 21st Century* (2004), pp 10–11

At the sub-national level in Britain since the 1980s there has been a shift from local *government* to local *governance*, in which elected local authorities have become just one of a number of bodies 'governing' at local level. The advent of appointed boards, local quangos and partnership organizations means that elected members are less central to the delivery of services than in the past. Local government is frequently a *collaborator* in multi-level partnerships with central government departments, Government Offices for the Regions (GOs), Regional Development Agencies (RDAs), private-sector and voluntary organizations. Many of

the new bodies inhabiting the world of local governance are appointed directly or indirectly by central government, performing functions and providing services that were, until quite recently, provided mainly or exclusively by elected local authorities. They add greatly to the complexity of sub-central government as well as increasing the influence of their respective 'sponsoring' departments at the local level. They are in a sense agents for the centre

(i) Powers

Local authorities owe their existence to statute and their powers are conferred on them (and can be taken away) by Parliament. All local government expenditure requires statutory authorisation.

Many statutes give powers to local authorities to enable them to carry out their functions. If an English local authority needs additional powers, for example, to provide some new local facility or service – say to operate a municipal caravan park – it may promote a private bill in Parliament to obtain the necessary power. (Authority to do this is given by the Local Government Act 1972, section 239.) This is a rather troublesome and costly process, and sometimes the required power can be more easily obtained from the Secretary of State, who is authorised by various statutes to make orders, subject to a special parliamentary procedure, conferring powers on local authorities: the procedure allows for approval, annulment or amendment of the order by Parliament. (See the Statutory Orders (Special Procedure) Act 1945, as amended. See also the Transport and Works Act 1992, making provision for many matters previously dealt with by the private bill procedure.)

The statutory powers of local authorities are marginally extended by section 111 of the Local Government Act 1972, which provides that a local authority 'shall have power to do any thing . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'. As to the limits (some would say the emasculation) of this power see the controversial decision of the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (for a detailed critique of which, see M Loughlin, *Legality and Locality* (1996), ch 6; see also *R v Richmond upon Thames London Borough Council, ex p McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48; *Crédit Suisse v Allerdale Borough Council* [1997] QB 306; *Akumah v Hackney LBC* [2005] UKHL 17, [2005] 2 All ER 148).

Local authorities are constrained in taking action for the benefit of their communities by the ultra vires principle: they can act only within the limits of the powers conferred upon them. The House of Lords Select Committee on Relations between Central and Local Government received evidence that vires was 'a "straitjacket" on the ability of local authorities to act as representatives of their local communities' and to innovate (HL 97-I of 1995–96, para 3.2). One of the committee's recommendations was that local authorities should be given a new general power 'to act in the interests of the local community', but this was not accepted in the Conservative Government's response (Cm

3464/1996). In 1997 the new Labour Government signed the European Charter of Local Self-Government which affirms the right of local authorities 'to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population' (Art 3(1)). A proposal made in the Government's White Paper, *Modern Local Government* (Cm 4014/1998), was enacted in the Local Government Act 2000, section 2, which empowers local authorities to do anything which they consider is likely to promote or improve the economic, social or environmental wellbeing of their local community. (See as to the extent of this power *R (Theophilus) v Lewisham London Borough Council* [2002] EWHC 1371, [2002] 3 All ER 851 and Howell, 'Section 2 of the Local Government Act 2000' [2004] *Judicial Review* 72.) The position in Scotland is broadly similar, as is outlined in the following extract.

Chris Himsworth, 'Local government in Scotland', in Aileen McHarg and Tom Mullen (eds), *Public Law in Scotland* (2006), pp 159–60

Turning to the actual powers of local authorities, the UK tradition has been for these to be enumerated – often with a high degree of specificity – in statutes relevant to a particular functional sector. Thus, an authority's education powers are currently contained in the Education (Scotland) Act 1980 (as amended and supplemented . . .). An authority's planning powers are contained in the Town and Country Planning (Scotland) Act 1997 (as amended) and so on. Much of this legislation continues to be contained in pre-devolution Westminster statutes, but increasingly supplemented or replaced by Holyrood Acts. Only a relatively small number of local authorities' powers are set out in the Local Government Acts themselves although their important general powers to make by-laws for their areas are, for instance, contained in the Local Government (Scotland) Act 1973 . . .

Under section 69 of the Local Government (Scotland) Act 1973 a local authority has 'the power to do anything . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of [its] functions'. Whilst conferring a degree of statutory flexibility, section 69 does not confer the power to go beyond the powers otherwise laid down. In particular, it does not confer a 'general competence' to do things thought by an authority to be in the interests of its area . . .

[S]ection 20 of the Local Government in Scotland Act 2003 . . . enables a local authority 'to do anything which it considers likely to promote or improve the well-being of (a) its area and persons within that area; or (b) either of those'. The power to advance well-being is further defined to include the power to incur expenditure, give financial assistance to any person, enter into arrangements or agreements, co-operate with, or facilitate or co-ordinate the activities of any person or exercise functions on behalf of a person, or provide staff, goods, materials, facilities, services or property . . . The use of the power is subject to the need to have regard to guidance provided by the Scottish Ministers. There are also a number of specific restrictions on the use of the power, including a prohibition on doing something forbidden by another enactment or to impose charges for the delivery of services such as schools, libraries and fire fighting.

(ii) By-laws

District councils and London borough councils have a general power under section 235 of the Local Government Act 1972 to make by-laws 'for the good rule and government' of the district or borough and for 'the prevention and suppression of nuisances therein'. (The equivalent power for local authorities in Scotland is the Local Government (Scotland) Act 1973, section 201.) In addition, specific powers to make by-laws are given to local authorities by a variety of other statutes. By-laws have to be confirmed by the minister responsible for the matters to which the by-law relates: approval is not given, for instance, for by-laws which attempt to deal in general terms with essentially national issues or which conflict with government policy (see Home Office Circular 25/1996). Government departments issue model by-laws for the guidance of local authorities, and since the models embody the experience of many years and are widely followed they constitute in effect a body of common local government law. It has been remarked that 'a by-law in the form of the model is unlikely to be upset in the courts' (SH Bailey (ed), *Cross on Principles of Local Government Law* (3rd edn 2004), para 6–05). By-laws, like other acts of local authorities, must be within the powers conferred. They must also be consistent with the general law and must not be unreasonable or uncertain. (For examples of by-laws held to be invalid because unreasonable, see *Arlidge v Islington Corpn* [1909] 2 KB 127 and *Nicholls v Tavistock Urban District Council* [1923] 2 Ch 18; and cf *Kruse v Johnson* [1898] 2 QB 91. On the test for uncertainty see *Percy v Hall* [1997] QB 924.)

(iii) Ultra vires and judicial control

The act of a local authority is ultra vires and unlawful if it goes beyond the powers conferred, as in *Attorney General v Fulham Corpn* [1921] 1 Ch 440, where the corporation undertook a laundry service, washing clothes for residents in its area, although authorised by statute only to provide a wash-house where persons could wash their own clothes. An authority may also be found to have acted ultra vires if it has disregarded statutory requirements, as by non-observance of a duty of consultation (*Re Westminster City Council* [1986] AC 668) or, as in *R v Somerset County Council, ex p Fewings* [1995] 3 All ER 20, where the authority's decision was reached on moral grounds without any regard to the statutory criteria that should have been applied (compare this last authority with *Adams v Scottish Ministers*, above, p 206).

In addition the act of a local authority may be unlawful if, although apparently covered by statutory authority, it is vitiated by any of the following factors (which may overlap): (1) bad faith (*Cannock Chase District Council v Kelly* [1978] 1 WLR 1; *R v Derbyshire County Council, ex p Times Supplements Ltd* [1991] COD 129); (2) irrationality, or something that no reasonable authority would have done (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *West Glamorgan County Council v Rafferty* [1987] 1 WLR 457); (3) misuse of the power for an improper purpose (*R v Lewisham London*

Borough Council, ex p Shell UK Ltd [1988] 1 All ER 938; *Porter v Magill* [2002] 2 AC 357); (4) reliance upon extraneous or irrelevant considerations, or failure to take account of relevant considerations (*Roberts v Hopwood* [1925] AC 578); (5) failure to proceed fairly or in accordance with natural justice in relation to individuals affected by the action (*R v Liverpool Corpn, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299); (6) abuse of power in frustrating a legitimate expectation (*R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213).

All these factors are relevant to the exercise of discretionary powers by public authorities in general (see further chapter 10), and together they provide a formidable array of weapons for challenging official action. The courts have, however, often said that it is not their function to substitute their own view of what is good policy or sound administration for that of an elected local authority. (See eg, *Pickwell v Camden London Borough Council* [1983] QB 962 and *Puhlhofer v Hillingdon London Borough Council* [1986] AC 484.)

Local authorities, being public authorities in terms of the Human Rights Act 1998, cannot lawfully act in a way which is incompatible with a 'Convention right' protected by that Act. (See further Leyland, 'The Human Rights Act and local government' (2003) 54 *NILQ* 136.)

In some cases the courts have held local authorities to be constrained, in decisions involving the expenditure of money, by a duty – commonly if dubiously characterised as a 'fiduciary' duty – owed to local taxpayers (formerly 'ratepayers'). For instance, in *Prescott v Birmingham Corpn* [1955] Ch 210 the Court of Appeal decided, on this principle, that the Corporation's scheme of free travel facilities for old people in the city was ultra vires and illegal. Although the Corporation was authorised by statute, in operating its passenger transport service, to charge such fares as it thought fit, it was held that it owed a duty to its ratepayers to run the undertaking 'on business lines' and was not permitted to confer rights of free travel 'on any class or classes of the local inhabitants appearing to them to be deserving of such benefits by reason of their advanced age and limited means'. (The effect of this restrictive decision was removed, in respect of local public transport service undertakings, by the Public Service Vehicles (Travel Concessions) Act 1955; see now the Transport Act 1985, ss 93–105.)

The principle of a fiduciary duty to ratepayers was again invoked in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768. The GLC, in implementing an election manifesto promise of its Labour majority to cut London transport fares by 25 per cent, paid a subsidy to the London Transport Executive (LTE), which then ran London's buses and tubes, to enable it to make the reduction. To raise money for the subsidy the GLC issued a supplementary rate precept to the London boroughs, to be met from additional rates, and this decision was challenged by the Bromley council. The House of Lords ruled that the GLC, in exercising in this way its discretionary power under the Transport (London) Act 1969 to make grants to the LTE, had acted ultra vires

and unlawfully. Their Lordships held that the Act required the GLC to strike a fair balance between users of London transport and the ratepayers from whose resources any subsidy would be supplied. The GLC, in the view of the House, had failed properly to strike this balance in introducing low fares without due regard to ratepayers' interests or the requirement of the Act that the LTE should, so far as practicable, break even in its operations. In reaching this conclusion their Lordships interpreted the Act as requiring that London transport should be run on business principles, not for objects of social policy, and placed a strong emphasis on the GLC's fiduciary duty to ratepayers, interpreting provisions of the Act as being implicitly qualified by this duty.

The reasoning of the five Law Lords in the *Bromley* case differed markedly in detail, in interpreting a statute which was by no means explicit as to the extent of the GLC's power to pay revenue subsidies to the LTE. 'It is very remarkable', said one commentator, 'that there is such a range of interpretation from a court from which there is no appeal' (Foster, 'Urban transport policy after the House of Lords' decision' (1982) 8(3) *Local Government Studies* 105, 111). Moreover the concept of a fiduciary duty to ratepayers is more problematic than was realised in this and other cases in which it has been pressed into service. (See further Foster, above; P Craig, *Administrative Law* (5th edn 2003), pp 557–9; Dignan, 'Policy-making, local authorities and the courts: the "GLC fares" case' (1983) 99 *LQR* 605; Griffith, 'Judicial decision-making in public law' [1985] *PL* 564, 575–82.) The courts have acknowledged that local authorities also owe duties to other classes of residents – for example, to transport users – and must themselves balance one duty against the other. But this discretionary judgement is subject to judicial control, and a policy which may appear to a local authority to contribute to social welfare and an improved urban environment (and to be justified by an election manifesto commitment) may seem to a judge to be 'a hasty, ill-considered, unlawful and arbitrary use of power': Watkins LJ in the *Bromley* case (at 796). (Cf the response of the Divisional Court in the subsequent cases of *R v Merseyside County Council, ex p Great Universal Stores Ltd* (1982) 80 LGR 639I; *R v London Transport Executive, ex p Greater London Council* [1983] QB 484; *Pickwell v Camden London Borough Council* [1983] QB 962.)

The fiduciary principle is anachronistic and incoherent. It is of little help in marking out the limits of lawful action by local authorities. (See generally M Loughlin, *Legality and Locality* (1996), ch 4.)

In a number of cases the courts have had to consider the relevance of financial resources in decision-making by local authorities. Whether an authority may take resources into account is a matter to be decided on interpretation of the relevant statute. In general we may say, following Lord Browne-Wilkinson in *R v East Sussex County Council, ex p Tandy* [1998] AC 714, 749, that if Parliament has imposed a duty, rather than a power, on a local authority, requiring it to do certain specific things, the authority may not avoid performing the duty on the ground that other objects have a greater claim on its limited resources. To

permit this would be 'to downgrade a statutory duty to a discretionary power'. If, on the other hand, the authority is given a discretionary power by statute, it has itself to decide whether and how to exercise the power and may take account of cost and of the resources available to it, subject to any statutory constraints and to 'reasonableness' in the *Wednesbury* sense (on which see chapter 10). See further *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 898; *R v Gloucestershire County Council, ex p Barry* [1997] AC 584; *R v Birmingham City Council, ex p Mohammed* [1999] 1 WLR 33; *R (G) v Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208. (See further Alder, 'Incommensurable values and judicial review: the case of local government' [2001] *PL* 717.)

(c) Central-local government relations

Part of the constitutional importance of local government is that power in the state is dispersed: the autonomy of local authorities, answerable to their own electorates, is a counterweight to the authority of Whitehall. On the other hand central government, ever since it assumed a responsibility for economic progress and social welfare, has laid claim to the support of local government for national policies and has intervened to maintain uniform standards in local services.

Since we have no written constitution which fixes the boundary between central and local government, it can be shifted by the actions of successive governments so that, as George Jones and John Stewart say (*The Case for Local Government* (1983), pp 110–11), 'Apparently minor and administrative changes can accumulate into a fundamental constitutional change, unnoticed until too late'. The Widdicombe Committee showed an awareness of this danger in warning that 'care is needed before taking decisions which, singly or cumulatively, might alter local government's status in the political system. This need is increased rather than diminished by the lack of a written constitution' (*The Conduct of Local Authority Business*, Cmnd 9797/1986, para 3.51). Both Labour and Conservative governments have extended central control over local authorities, and this trend accelerated after 1979 with an avalanche of legislation affecting the resources, functions and powers of local authorities and, in its cumulative effect, significantly reducing local autonomy.

A flourishing local democracy requires that elected authorities should have substantial freedom to raise and spend money in the interest of their local communities, but in the 1980s and 1990s central government took firm control of local government finance. At the present day local discretion in making spending decisions is limited by the fact that only about a quarter of local government income is raised by local authorities through the council tax. The rest (apart from a relatively small amount from charging for services) is provided by central government in grants (a general revenue support grant and specific grants, some of these being 'ring-fenced') and through distribution of the national business rate. The determination of the grant depends largely on the central government's assessment of local expenditure needs. In addition, the raising of revenue by local

taxation has been restricted by a series of enactments designed to limit local government expenditure. A 'capping' regime, applied initially to local rates and afterwards to the community charge or 'poll tax' and then to the council tax, enabled central government to prevent local authorities from setting levels of tax regarded as 'excessive'. Central government controls have also been applied to local authority borrowing and capital finance. Measures of these kinds confirmed the financial hegemony of central government. The Labour Government brought about a modest increase in the financial freedom of local authorities, in particular through the abolition of universal 'capping' (while retaining more flexible reserve powers to limit increases in council tax). (See *Modern Local Government*, Cm 4014/1998, chs 5, 9 and 10, and the Local Government Act 1999.) More radical changes in the system of local government finance, giving greater freedom to local authorities – in particular those identified as 'high performing' – were proposed in the Government's White Paper, *Strong Local Leadership: Quality Public Services* (Cm 5327/2001), ch 6 and implemented by the Local Government Act 2003.

This Act (applying in general to both England and Wales, as agreed with the Welsh National Assembly) increased the power of local authorities to raise finance for capital expenditure without government consent, setting their own 'prudential' borrowing limits, and provided new freedoms to trade and charge for services and greater local discretion in making investments. The Act also enables any minister to make a grant to a local authority for any purpose, with the consent of the Treasury. Some central government controls remain in place but in general are relaxed. The Secretary of State is given power to fix the minimum allowance for reserves to be made by local authorities in setting their budgets. The Government has since introduced a system of 'three-year settlements' – allocations of local authority revenue and capital funding on a three-year forward basis, intended to provide greater certainty so as to facilitate local financial planning and management.

The arrangements for local government funding remain under review. The Government has established an independent inquiry, led by Sir Michael Lyons, to consider the case for changes to the present system of funding, in the context of the changing role of local government in providing services to the community (see www.lyonsinquiry.org.uk).

Memorandum by the Local Government Information Unit: Evidence to the Housing, Planning, Local Government and the Regions Committee, HC 402-II of 2003–04, p 14

Finance is an integral part of the wider debate on the status, role and purpose of local government. If central government perceives local government to be primarily an agent for delivering national services, with a limited wider role, it will not consider that local government needs to raise a substantial percentage of its own resources. If local government is, however, seen as a political institution, with a strong community leadership role, which

should allow for a degree of local choice and diversity, then it needs the authority and the means to act, including adequate financial resources, and a reasonable degree of autonomy and discretion in relation to local taxes.

Statutes provide central government with a range of administrative controls of local government action. Some acts of local authorities are subject to ministerial *approval* – for example, local development schemes, compulsory purchase orders and sales of school playing fields. Local authorities may be required by statute to 'have regard' to *guidance* issued by ministers (eg, the code of guidance on homelessness issued under section 182 of the Housing Act 1996). Some statutes empower ministers to give *directions* to local authorities – examples can be found in the Local Government, Planning and Land Act 1980, section 98 (the Secretary of State may require an authority to dispose of land which in his opinion is not being used for the authority's purposes), and in the School Standards and Framework Act 1998, section 19, as amended (direction to a local education authority to close a failing school). There are also various statutory 'default powers' by which a minister may, for instance, issue directions to a local authority which has failed to perform its duty, or may transfer its responsibilities to another authority, or assume them himself. (See eg, the extensive powers of intervention conferred on the Secretary of State by the Local Government Act 1999, section 15.) Default powers are a radical expedient and their use may raise in critical and dramatic form the constitutional issue of the respective roles of central and local government. See in this connection *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; Bull, '*Tameside* Revisited' (1987) 50 *MLR* 307; and *R v Secretary of State for the Environment, ex p Norwich City Council* [1982] QB 808.

Another means available to central government for regulating the conduct of local authorities is the making of *regulations*, where this is authorised by statute. For instance, the placing by local authorities (as well as by other public bodies) of contracts for public works or for the purchase of supplies or services is governed in detail by regulations made under section 2(2) of the European Communities Act 1972, implementing Community Directives. Ministerial regulations or orders apply to many local government services, such as education, housing and planning.

While the relationship between central and local government has traditionally and in general been one of cooperation or partnership, conflicts of interest naturally arise, especially when different parties rule at the centre and in the locality. A local authority may pursue a set of policies that are discordant with those of the centre, reflecting the interests and expressed preferences of the local electorate. This is not something to be deplored, for it is a consequence of a diffusion of power which helps to keep the constitution in balance. In the latter years of the twentieth century the balance shifted in favour of the centre, as local authorities performed a diminished range of functions on conditions and

within limits increasingly determined by central government. At the same time central government pursued its objectives in a manner which disregarded the conventional restraints and understandings that had previously characterised central-local government relations. In the result, as Martin Loughlin has observed, there took place a 'politicisation' of the central-local government relationship and also, with increasing recourse to law by both sides, a 'juridification' of that relationship, such that 'the traditional framework' within which central-local government relations had been conducted 'was rapidly disintegrating' ('Restructuring of central-local government relations' in J Jowell and D Oliver (eds), *The Changing Constitution* (4th edn 2000). See also M Loughlin, *Legality and Locality* (1996), chs 2 and 7, and Loughlin in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003), ch 13.)

In Scotland, central-local government relations now have to be viewed through the prism of devolution. Although the Scotland Act 1998 'made no provision directly affecting the structure or functions of local authorities in Scotland' (Himsworth in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006), p 168), devolution has nonetheless had a significant impact on local government in Scotland. Scottish local government is not a reserved matter under the Scotland Act and has in recent years been an area of 'vigorous legislative activity' by the Scottish Parliament (Himsworth, *ibid*). See eg, the Ethical Standards in Public Life (Scotland) Act 2000, the Scottish Local Government (Elections) Act 2002, the Local Government in Scotland Act 2003 and the Local Governance (Scotland) Act 2004. Moreover, as Himsworth reports:

> The new planning legislation foreseen in the [Scottish] Executive's White Paper *Modernising the Planning System* (2005) will increase central intervention in the planning process. Intervention in school education has already been seen in the shape of new powers for the Scottish Ministers under the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004. Housing is ceasing to be the local authority service it once was, with substantial transfers of stock to housing associations.

As Himsworth concludes, local authorities both north and south of the border are losing their 'political distinctiveness' and are becoming 'merely a part of a new pattern of local administration – made up of a variety of bodies both public and private – which is malleable' at the instigation of central (or, in Scotland, devolved) government.

The Labour Government which took office in 1997 committed itself, in signing the European Charter of Local Self-Government in 1997, to the Charter's principles of democratic local government. The Government undertook a programme for 'modernisation' of the management, performance and accountability of local government in England and Wales, and declared its aim to revive the 'partnership' of central and local government. The programme has evolved in successive White Papers (*Modern Local Government*, Cm 4014/1998, *Local Leadership, Local Choice*, Cm 4298/1999 and *Strong Local Leadership:*

Quality Public Services, Cm 5327/2001), administrative measures and legislation (Local Government Acts of 1999, 2000 and 2003).

In 2004 the Government announced a new 'Vision for the future' which would 'develop a longer term strategic approach to local government in England'. This was intended to 'establish a more coherent and stable relationship between local and central government'; 'clarify accountabilities and responsibilities at each level for the delivery of services'; 'improve local community leadership'; 'increase levels of citizen engagement'; 'secure improvements in public services'; and 'ensure the finance system is fair and fit for the purpose'. (*The Future of Local Government: Developing a 10 Year Vision* (ODPM 2004).) A debate on these ambitious goals was conducted in a series of discussion documents, leading to the publication of a Government White Paper in October 2006: *Strong and Prosperous Communities*, Cm 6939/2006. (See Leach and Pratchett, 'Local government: a new vision, rhetoric or reality' (2005) 58 *Parliamentary Affairs* 318.)

These reforms are a potentially ambitious project for strengthening local democracy, responsiveness, leadership and accountability. There are some inconsistencies and tensions in the reforms and they have met with a mixed response: there has been criticism of their prescriptive nature and of the extensive powers of intervention retained by central government. Yet, if successful, they may yet encourage something of a renewal in the effectiveness and vitality of local government.

(See generally M Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (1996); I Leigh, *Law, Politics, and Local Democracy* (2000); P Carmichael and A Midwinter (eds), *Regulating Local Authorities: Emerging Patterns of Central Control* (2003); J Stewart, *Modernising British Local Government: an Assessment of Labour's Reform Programme* (2003); G Stoker and D Wilson (eds), *British Local Government into the 21st Century* (2004); G Stoker, *Transforming Local Governance: From Thatcherism to New Labour* (2004); Loughlin, 'The demise of local government' in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003); Leigh, 'The new local government' in J Jowell and D Oliver, *The Changing Constitution* (5th edn 2004); Himsworth, 'Local government in Scotland', in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006).)

5

The European dimensions

Contents

No successful account of the British constitution can now be confined to institutions, events or laws which are exclusively British. Over the past half century, as the constitutional importance of the Commonwealth has declined, so has the significance of 'Europe' grown and grown again. 'Europe', in this context, denotes two international organisations in particular: first, the Council of Europe and its European Convention on Human Rights and secondly the European Union. As was made clear in chapter 2 (see p 62), it is imperative not to confuse these two legal 'Europes' with one another. This is not least because the impact which each has had on the British constitution is different. In this chapter attention will first be given to the European Convention on Human Rights. We shall then go on to consider the nature and structure of the European Union and the impact of European Union membership and Community law on the United Kingdom.

1 European Convention on Human Rights

The European Convention on Human Rights (ECHR) is an international treaty made under the auspices of the Council of Europe, which is based in Strasbourg in eastern France. The United Kingdom was the first country to ratify the

ECHR, in March 1951. The Convention came into force in 1953 and the European Court of Human Rights handed down its first judgment in 1961. From these slow post-War beginnings has grown an extraordinary and genuinely pan-European human rights regime. The Council of Europe now has forty-six member states, all of whom are parties to, and are hence bound by, the Convention. This membership stretches from Iceland to Turkey, from Finland to Malta, and from Portugal to Russia. Ukraine, Azerbaijan, Armenia and Georgia are all members, as are all twenty-seven Member States of the European Union. In the past twenty-five years the increase in the number of cases brought before the Court of Human Rights has been exponential: 1980, for example, saw 404 applications registered; by 1997 this number had risen more than ten-fold to 4,750. The Court delivered a mere seven judgments in 1981; in 1997 it delivered 119.

The year 1998 saw a significant change in the structure of the Strasbourg organs. Until that year there had been a European Commission of Human Rights as well as the European Court of Human Rights. The Commission gave the initial assessment of applications, weeding out those – the large majority – which were inadmissible (the criteria for admissibility are set out in the Convention) and judging the merits of those which were admissible. Cases could be referred to the Court only after they had first been dealt with by the Commission. Protocol No 11 to the Convention, which came into force in 1998, abolished the Commission and turned the Court into a full-time body. There is one judge on the Court for each state party to the Convention – judges are elected to the Court by the Parliamentary Assembly of the Council of Europe from lists of three candidates submitted by the governments of the states parties. Since 1998, however, the Court's caseload has continued to grow at an explosive rate: the number of new applications increased from 18,200 in 1998 to over 44,000 in 2004. As a result, further reforms of the structure and working methods of the Court are needed and a new Protocol to the Convention (No 14), which would effect further reforms, was opened for signature in 2004. It cannot come into force, however, until it has been ratified by all forty-six parties to the Convention (the United Kingdom ratified the Protocol in January 2005). It has been suggested that even this reform is 'a missed opportunity and is likely, at best, to be only a partial success' (Greer, 'Protocol 14 and the future of the European Court of Human Rights' [2005] *PL* 83, 85).

Under present arrangements any individual claiming to be a victim of a violation of the Convention may lodge an application directly with the European Court of Human Rights in Strasbourg (a list of the principal rights protected under the Convention was given above, p 63). Applications are initially considered by Committees of three judges, who decide whether the application is admissible. Applications may be declared inadmissible only if the Committee of three is unanimous. If there is disagreement, or if the

application is found to be admissible, it is referred to a Chamber of seven judges. Such Chambers determine both the admissibility and the merits of applications. Chambers may relinquish jurisdiction in favour of the Grand Chamber (composed of seventeen judges) where a case raises a serious question of interpretation of the Convention or where there is a risk of departing from existing case law (for more detail see Mowbray, 'The composition and operation of the new European Court of Human Rights' [1999] *PL* 219). (Protocol No 14, if it comes into force, would allow individual judges to consider questions of admissibility alone and would allow Committees of three judges to consider applications on their merits; it would also change the terms of appointment to the Court from the current renewable term of six years to a single term of nine years.)

In 2005 the Court delivered 1,105 judgments, of which only 12 were delivered by the Grand Chamber. These figures reveal two things: first that it continues to be the case that the overwhelming majority of applications received by the Court are inadmissible (only 1,036 of the 41,510 applications received in 2005 were admissible); and secondly that among those applications which are admissible the vast majority of the Court's caseload is routine, with only a dozen cases requiring a decision by the Grand Chamber. In 2005 more than 60 per cent of the Court's caseload (ie, of the Court's 1,105 judgments handed down in that year) concerned just five states: Turkey, Ukraine, Greece, Russia and Italy. Moreover, more than half the Court's caseload concerned just five matters of substance, on all of which the Court has ruled many times before: the length of court proceedings, the non-enforcement of judicial decisions (which is a particular issue in Ukraine), delays in the payment of compensation (a particular problem in Turkey), the independence and impartiality of State Security Courts in Turkey, and the use of a certain form of expropriation in Italy. The length of court proceedings (an aspect of the right to a fair trial) is the subject-matter of about 25 per cent of the Court's caseload.

(See further C Ovey and R White, *Jacobs and White: The European Convention on Human Rights* (4th edn 2006) and D Harris, C Warbrick, E Bates and M O'Boyle, *Law of the European Convention on Human Rights* (3rd edn 2007).)

(a) European Court of Human Rights and its impact on British constitutional law

What impact have the judgments of the European Court of Human Rights had on British constitutional law? This matter is addressed in the following extract. (By way of explanation, states parties to the Convention were not required to accept the jurisdiction of the Court (as opposed to that of the now defunct Commission) until 1998: before that date this was optional among states that had ratified the Convention. The United Kingdom accepted the jurisdiction of the Court with effect from January 1966.)

Lord Lester and Lydia Clapinska, 'Human Rights and the British Constitution', in J Jowell and D Oliver (eds), *The Changing Constitution* (5th edn 2004), pp 67–9

In December 1965, the first Wilson government decided to accept the right of individual petition and the jurisdiction of the European Court of Human Rights to rule on cases brought by individuals against the United Kingdom. It was to prove to be a momentous decision, for it meant that, in fact if not in a formal sense, political (if not legal) sovereignty was henceforth to be shared with the European institutions created by the Convention. In spite of the importance of the decision and its controversial implications in making Acts of Parliament subject to [the] judicial review [of the Court of Human Rights], the matter was not discussed in Cabinet or in a Cabinet Committee. Unlike the decision to join the European Community and make Community law directly effective in our courts, Parliament was not asked to legislate . . .

In January 1966, when the right of individual petition was accepted for the United Kingdom, the Convention was a sleeping beauty (or slumbering beast, depending upon one's viewpoint). The staff of the European Commission of Human Rights were building confidence in the system among governments, overcoming objections based upon their concern to preserve national sovereignty over domestic legal systems, so as to encourage them to accept the right of individual petition. The European Court of Human Rights had by then decided only two cases. No one foresaw how the Court's jurisprudence would develop or what a powerful impact its case law would have upon the British constitutional and legal system . . .

[Since that time] there have been [more than] one hundred and thirty judgments of the European Court finding breaches by the UK, many of them controversial and far-reaching. They include: the inhuman treatment of suspected terrorists in Northern Ireland; inadequate safeguards against telephone tapping by the police; unfair discrimination against British wives of foreign husbands under immigration rules; unjust restrictions upon prisoners' correspondence and visits; corporal punishment in schools; corporal punishment by a stepfather; criminal sanctions against private homosexual conduct; the exclusion of homosexuals from the armed services; the lack of legal recognition of transsexuals; ineffective judicial protection for detained mental patients, or would-be immigrants, or individuals facing extradition to countries where they risk being exposed to torture or inhuman treatment, or homosexuals whose private life is infringed; the dismissal of workers because of the oppressive operation of the closed shop; interference with free speech by unnecessarily maintaining injunctions restraining breaches of confidence, or because of a jury's award of excessive damages for libel, or by punishing a journalist for refusing to disclose his confidential source; the right to have a detention order under the Mental Health Act reviewed; parental access to children; access to child care records; review of continuing detention of those serving discretionary life sentences and mandatory life sentences; access to legal advice for fine and debt defaulters; unfair court martial procedures; lack of availability of legal aid in some criminal cases; and lack of access to civil justice.

This is a somewhat breathless list, but it indicates the range of issues in respect of which the United Kingdom has been required to alter its law – or at least its practice – because of the influence of European human rights law. Conor Gearty, in a compelling analysis, has suggested that the core of the ECHR's influence can be reduced to three main areas: the first is due process, or the procedural safeguards afforded to individuals in criminal, civil or administrative law; the second is the protection of minority groups, most notably prisoners or those detained under mental health legislation, in respect of which there has been a considerable volume of Strasbourg case law emanating from the United Kingdom; and the third is what Gearty calls the protection of 'traditional civil liberties' such as privacy, freedom of expression and freedom of assembly. In this category there are relatively few cases – in the period Gearty surveyed (from the earliest case law until 1995) there were only four cases from the United Kingdom concerned with free speech, for example. (See C Gearty, 'The United Kingdom', in C Gearty (ed), *European Civil Liberties and the ECHR: A Comparative Study* (1997).)

A good example of a case in Gearty's first category is *Brogan v United Kingdom* (1988) 11 EHRR 117, in which the Court held that a provision of the (now repealed) Prevention of Terrorism Act 1984 allowing detention without charge for up to seven days violated Article 5(3) of the Convention, which provides that those arrested or detained should be brought 'promptly before a judge'. Unfortunately the British Government's response to this judgment was to derogate from the Convention, arguing that the troubles of Northern Ireland rendered the requirements of Article 5(3) inapplicable. Equally unfortunately, the European Court of Human Rights later upheld the legality of the derogation (see *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; on derogations from the Convention, see Article 15 ECHR and see further chapter 11. On *Brannigan and McBride*, see Marks (1995) 15 *OJLS* 69). The Government withdrew the derogation in February 2001 after the Terrorism Act 2000 had repealed the earlier legislation and made provision for extensions of detention to be authorised by a judicial officer.

Perhaps the best known example of a case in Gearty's second category is *Golder v United Kingdom* (1975) 1 EHRR 524. While Golder was an inmate in a British jail he wished to sue a prison officer for libel, but the authorities refused him permission to consult a solicitor. After his release Golder took the case to Strasbourg, where the Court ruled that the authorities' action had infringed both Golder's right under Article 8(1) of the Convention to respect for his correspondence (part of the right to privacy) and his right under Article 6(1) to access to the courts (part of the right to a fair trial). The Government's response was to amend the Prison Rules so as to allow a prisoner 'to correspond with a solicitor for the purpose of obtaining legal advice concerning any cause of action in relation to which the prisoner may become a party to civil proceedings or for the purpose of instructing the solicitor to issue such proceedings'. (In more recent times prisoners' rights have received rather more robust protection from the domestic courts than was normal at the time *Golder* was

decided. A number of the more important cases decided in light of the Human Rights Act 1998 have concerned prisoners' rights, and may be seen to continue the work started in *Golder*: see eg, *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (above, p 62) and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (chapter 10).)

Finally, a good example of a case in Gearty's last category is *Sunday Times v United Kingdom* (1979) 2 EHRR 245. The *Sunday Times* wished to publish an article alleging that Distillers, a pharmaceutical company, had taken insufficient care before putting the drug thalidomide on the market. Thalidomide was a sedative that had been prescribed to numerous pregnant women, many of whom then gave birth to babies with severe deformities. At the material time almost 400 negligence actions had been brought against Distillers. The Attorney General brought proceedings seeking an injunction preventing the *Sunday Times* from running its story. The House of Lords granted the injunction, holding that it would be in contempt of court for a newspaper to publish an article where there was a possibility that publication would prejudice legal proceedings (see *Attorney General v Times Newspapers* [1974] AC 273). The *Sunday Times* took the matter to Strasbourg, where the European Court of Human Rights ruled that the test applied by the House of Lords failed to give sufficient weight to the newspaper's freedom of expression. The Government's reaction was to place much of the law of contempt of court (which had previously been largely common law) on a statutory footing, the new Contempt of Court Act 1981 changing the test so that publication could be prevented in the future only where there was a substantial risk of serious prejudice to legal proceedings (s 2(2)). (Other important cases in this category include *Malone v United Kingdom* (1984) 7 EHRR 14, concerned with telephone tapping and considered in chapter 2, and the '*Spycatcher*' cases, concerned with the restrictions sought by the Thatcher Government on the publication of the memoirs of a former Security Service (MI5) officer: see *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153 and *Sunday Times v United Kingdom (No 2)* (1991) 14 EHRR 229.)

These examples illustrate something of the range of responses that the British Government has taken to judgments of the European Court of Human Rights where the Court has found a violation of the Convention. In the first, the Government derogated and the offensive provision of the Prevention of Terrorism Act continued in force; in the second the defect was cured by a change in the Prison Rules (delegated legislation made under the authority of the Prison Act); and in the third a new Act of Parliament was passed. The Contempt of Court Act 1981 is far from the only statute to have been directly influenced by a judgment of the European Court of Human Rights. Other examples include the Interception of Communications Act 1985 (which followed the ruling in *Malone*; see now the Regulation of Investigatory Powers Act 2000); the Mental Health Act 1983, the Education (No 2) Act 1986, the Criminal Justice Act 1991, the Special Immigration Appeals Commission Act 1997, as well as numerous others. The Human Rights Act 1998, section 10, authorises the use

of 'fast-track' remedial action by ministerial order to amend legislation that has been held to be incompatible with Convention rights.

It is also to be noted that not all of the cases outlined here concerned *legislative* violations of the Convention. It was the *common law* judgment of the House of Lords that was found wanting in the *Sunday Times* case, as it was the common law of breach of confidence that was found to be violative of the right to freedom of expression in the '*Spycatcher*' cases. For all their embracement of human rights since the 1998 Act, British judges have not always been the keenest practitioners of European human rights standards, as these cases illustrate. When it is the common law that is found wanting in Strasbourg, the response may be to enact legislation to replace the common law (as with the Contempt of Court Act 1981) or it may be to issue a Practice Direction or some similar instruction so that the common law may change course. Under the Human Rights Act 1998, section 2, domestic courts are, in all cases concerning Convention rights, required to take into account the judgments and decisions of the European Court of Human Rights. Domestic courts are not required to follow or to implement the judgments of the European Court, but they are at least required to take them into account.

(b) Domestic influence of the ECHR

So much for the impact of decisions of the European Court of Human Rights on our constitutional affairs. What remains to be considered is the influence of the Convention within the case law of the domestic courts. This is a matter that has, of course, been completely transformed by the Human Rights Act 1998 (HRA). Accordingly, we will consider first the position within domestic law before the HRA, before moving to consider the present position.

(i) Before the Human Rights Act 1998

The mere conclusion of a treaty by the Crown cannot itself effect any alteration in the domestic law of the United Kingdom. Since the Convention came into force on 3 September 1953 its provisions have been binding on the United Kingdom in international law, but prior to the entry into force of the Human Rights Act 1998 they did not have direct internal legal effect and were not enforceable by the courts of this country: *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696.

Even though the domestic courts could not enforce the terms of the Convention, however, this does not mean to say that the Convention had no indirect effect on domestic courts before the HRA. Indeed, in the period before the HRA the English courts were neither oblivious of the existence of the Convention nor unreceptive to the principles it embodies (Scots courts, by contrast, were considerably more resistant to the influence of the Convention: in *Kaur v Lord Advocate* 1980 SC 319 it was ruled that Scots courts should not have regard to the Convention even in cases of statutory ambiguity. This line was overturned only

in 1997: see *T, Petitioner* 1997 SLT 724.) English courts applied the 'prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations': *Salomon v Customs and Excise Comrs* [1967] 2 QB 116, 143 (Diplock LJ). Accordingly if a statutory provision was ambiguous or unclear, the courts would interpret it in the sense that was more consonant with the provisions of the Convention (see eg, *Waddington v Miah* [1974] 1 WLR 683). As Lord Bridge remarked in *R v Secretary of State for the Home Department, ex p Brind*, above, at 747–8, 'it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it'.

The courts also showed an increasing willingness to take account of the European Convention in developing the common law, sometimes taking the view that provisions of the Convention marched with or were an articulation of principles underlying the common law (see eg, *Rantzen v Mirror Group Newspapers* [1994] QB 670, 691). The Convention was seen as having a particular relevance when questions of legal or public policy had to be determined: see, for example, *Blathwayt v Lord Cawley* [1976] AC 397, 425–6; *Cheall v APEX* [1983] QB 126, 146; *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429. In *Derbyshire County Council v Times Newspapers* [1992] QB 770 the Court of Appeal ruled that when developing a previously unclear rule of common law, the courts *must* have regard to relevant provisions of the Convention. The House of Lords, while agreeing with the Court of Appeal in the result, did not expressly endorse this reasoning, however (see [1993] AC 534). Further remarks about the relationship between domestic law and the Convention were uttered in various of the '*Spycatcher*' cases: *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

A limit was reached with the *Brind* case, however, in which the House of Lords unanimously ruled that breach of the Convention did not, of itself, constitute a ground of judicial review. That is to say, until the Human Rights Act it could not be argued in a domestic court that government ministers or other public authorities had acted unlawfully solely because they had acted in a way that was in breach of a Convention right: see *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. Under domestic law as it stood before the HRA, judicial review was available only where it could be shown that government ministers or other public authorities had acted illegally, irrationally or procedurally unfairly. (The law of judicial review is discussed in more detail in chapter 10.)

(ii) Human Rights Act 1998: its general scheme

The scheme of the HRA is to incorporate most of the substantive provisions of the European Convention into domestic law, with the effect that these become directly enforceable by British courts. The Scotland Act 1998 likewise makes

Convention rights enforceable against the Scottish Parliament and against the Scottish Ministers. It is to be noted that not quite all of the substantive provisions of the Convention are incorporated: in particular, Article 13 of the Convention, the right to an effective remedy, is not incorporated (for the consequences of this, see chapter 10). The provisions of the Convention are incorporated in two main ways. The first regards Parliament and the second government and other public authorities. As we saw in chapter 2, sections 3 and 4 of the HRA govern the relationship between Convention rights and Acts of Parliament. Section 3(1) provides that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Section 4 provides that, if a court is satisfied that a provision of primary legislation is incompatible with a Convention right, the court 'may make a declaration of that incompatibility'. Such a declaration 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given' (section 4(6)(a)). Thus, as we saw in chapter 2, courts in the United Kingdom do not have the power, even after the Human Rights Act, to strike down Acts of Parliament which they deem to be incompatible with Convention rights. All they may do is 'declare' the incompatibility. It is then a matter for Parliament to decide whether it wishes to continue with the legislation, to amend it or to replace it.

Section 6 of the HRA governs the relationship between Convention rights and the government and other public authorities. It provides that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. This provision effectively overturns the ruling in *Brind* (above) and makes breach of a Convention right a ground of judicial review in domestic law.

It is to be noted that it is only the *text* of certain Convention *Articles* that is incorporated under the HRA. The case law of the European Court of Human Rights is not incorporated, although, as we saw above, section 2 of the HRA provides that domestic courts must take it into account in appropriate cases. This means that the techniques of interpretation employed by the European Court need not be followed by our domestic courts (see further on this matter chapter 10).

Two further provisions of the HRA should be noted at this stage: section 10, which empowers ministers to make orders amending legislation where that legislation has been found to be violative of a Convention right; and section 19, which provides that:

> A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill
>
> (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ('a statement of compatibility'); or
>
> (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

Section 10 raises concerns about ministerial powers to legislate (considered in connection with the separation of powers in chapter 2); section 19 reminds us that when we think about the impact of the Human Rights Act we must think not only of its impact on the case law of the courts but also of its impact on legislation and on parliamentary affairs generally (see below). Two points are worth making about section 19: the first is that it applies only to primary legislation. It does not apply to delegated legislation (although Explanatory Memorandums accompanying affirmative instruments do, as a matter of practice, include statements of ministerial views as to compatibility with Convention rights). The second is that ministers do not have to give reasons as to why they consider that a bill is or is not compatible with Convention rights. As a matter of practice the explanatory notes that accompany bills do now include such reasons, but this is not a requirement of the Human Rights Act.

(In this section we have endeavoured only to outline the broad scheme of the Act. More detailed consideration of the relationship between human rights law and the sovereignty of Parliament may be found in chapter 2; discussion of the impact of the HRA on the law and practice of judicial review may be found in chapter 10; and analysis of the contribution made by the Human Rights Act to the protection of liberty in Britain may be found in chapter 11. For a thorough exposition, see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn 2006).)

(iii) Impact thus far of the Human Rights Act 1998

In this section we will outline something of the overall impact of the Human Rights Act thus far. We will start with its impact on legislation and on Parliament, before moving on to consider its impact on case law.

While the section 19 statements (above) are undoubtedly important, the more pressing reminder within Parliament of the importance of compliance with European human rights standards has come from the impressive and persistent work of Parliament's Joint Committee on Human Rights. The committee was established with effect from January 2001. Among other tasks, it examines the compatibility with human rights of all bills introduced in Parliament. The committee's first legal adviser, David Feldman, has written that, as a result of the section 19 statements and, even more, as a result of the work of the Committee, 'human rights are gaining in influence, particularly at the drafting stage of legislation'.

D Feldman, 'The impact of human rights on the UK legislative process' (2004) 25 *Statute LR* 91, 93

> Fewer initiatives seemed to me to give rise to serious human rights concerns in Bills introduced in the 2002–03 session of Parliament than was the case in 2000–01 or 2001–02. Fewer provisions are now drafted in ways that leave rights subject, in my view, to inadequate safeguards. Of course, this could be because of changes in the subject-matter of the Bills,

> but even in relation to Bills operating in similar fields the position is, I think, improving. For example, compare the Criminal Justice and Police Bill of 2000–01 with the Criminal Justice Bill of the 2002–03 session, and two differences stand out: first, the relatively small proportion of controversial policy initiatives in the later Bill as originally introduced that gave rise to serious concerns of incompatibility with human rights (although other concerns arose as a result of amendments during the passage of the Bill through the House of Commons); and secondly, the greater clarity and facility with which Departments are now able to respond to human rights queries. Both these features indicate to me that human rights are being more fully considered, and planned into the Bill, at an earlier stage now than was the case four years ago.

Feldman cites a number of examples of bills that were substantially amended as a result of concerns expressed by, and pressure exerted by, the Committee. In the Anti-terrorism, Crime and Security Bill 2001, the Government was forced to concede that the Home Secretary must have reasonable grounds for suspecting that someone is an international terrorist before ordering his indefinite detention (following the House of Lords judgment in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 this procedure was repealed and replaced with a regime of 'control orders' by the Prevention of Terrorism Act 2005; for further analysis of the passage of the Anti-terrorism, Crime and Security Act 2001, see Tomkins, 'Legislating against terror' [2002] *PL* 205). In the Criminal Justice and Police Bill 2001 provisions permitting various bodies to share information for the purposes of criminal investigations had to be withdrawn in order for the Government to push the legislation through before Parliament was dissolved in preparation for the general election of that year. When similar provisions were reintroduced in the Anti-terrorism, Crime and Security Bill they were attended with safeguards that had been absent from the earlier Bill. Another accommodation was made in the Enterprise Bill 2002. As Feldman reports (pp 104–5):

> The Bill made provision for courts to make interim enforcement orders (sometimes called 'Stop Now orders') to halt allegedly unlawful activities of traders in carrying on business in breach of various legal requirements. In certain circumstances, the orders could be made *ex parte* and without notice to the trader. Although an interim order would not determine the trader's civil rights and obligations [within the meaning of Article 6 ECHR], or any criminal charge, it could disrupt the trader's ability to carry on business. This would engage the right to quiet enjoyment of possessions under Article 1 of Protocol 1 to the ECHR [an Article which is incorporated into domestic law under the Human Rights Act]. The Joint Committee on Human Rights considered the safeguards in the Bill. It was particularly concerned that the Bill did not expressly require the person applying for an order to make full disclosure to the judge of all relevant matters, including those favouring the trader. The Department took the view that the judge would insist on such disclosure, treating the application as analogous to an application for an injunction in civil proceedings. The Committee

was not convinced . . . and therefore reported . . . that it was concerned that the safeguards in the Bill would be insufficient to ensure respect for rights under Article 1 of Protocol 1. After giving further consideration to the issue, the Department agreed to move an amendment to the Bill, and the Act now expressly imposes an obligation on the applicant to make full disclosure to the judge.

As Feldman states, this is a 'small' example of making legislation responsive to human rights. Where matters are more politically controversial, where there is more, politically, at stake, or even where the matter is more high profile, Parliament and its human rights committee have found it considerably more difficult to make a telling impact. The Government has shown itself to be more receptive to taking on board human rights considerations earlier rather than later in the legislative process. This has a welcome aspect, as Feldman states, as 'the growing trend towards public consultation, and particularly publishing Bills in draft for consultation before finalizing them and introducing them to Parliament, increases the possibility of making influential contributions on the protection of human rights' (p 107). Feldman cites two examples of where this has worked well: with regard to the draft Extradition Bill and with regard to the draft Mental Health Bill, both in 2002.

Assessing the impact of the Human Rights Act on domestic case law and on the jurisprudence of the domestic courts is something of a treacherous exercise. It is too soon, of course, to come to a definitive conclusion. Early assessments, respectively negative and positive, are offered by two of the protagonists in the argument preceding enactment of the HRA as to whether Britain needed a Bill of Rights: see KD Ewing, 'The futility of the Human Rights Act' [2004] *PL* 829 and Lord Lester, 'The utility of the Human Rights Act' [2005] *PL* 249 (Professor Ewing was opposed to Britain having a Bill of Rights modelled on the ECHR while Lord Lester was in favour). See also B Dickson, 'Safe in their hands? Britain's Law Lords and human rights' (2006) 26 *LS* 329.

One impact that the Human Rights Act has already had is to alter the grounds on which the courts will review the legality of government and administrative action. *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 is an important decision of the House of Lords, the effect of which is to incorporate into domestic law notions of proportionality derived from European human rights law. Before this decision, proportionality was a ground of judicial review that English courts were largely sceptical of, on the basis that it is too intrusive into decisions that are better left to government (see eg, the comments of Lord Donaldson MR in the Court of Appeal and Lord Ackner in the House of Lords in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 722 and 762, respectively). After *Daly*, however, proportionality has come centre-stage, at least in cases in which it is argued that a Convention right has been breached. This will be examined in more detail in chapter 10.

A further impact that the Human Rights Act may well have is to increase the availability of damages and compensation as judicial remedies in public law. As we shall see later in this chapter, this is also a feature of EU law. Damages and compensatory remedies have not traditionally played a major role in British public law, which has tended to focus instead on remedies declaratory of the legal position and on orders which seek to quash or to prevent unlawful administrative action. Section 8 of the Human Rights Act, however, empowers courts to award damages in respect of breaches of Convention rights where the court considers it to be 'just and appropriate' (see *Anufrijeva v Southwark LBC* [2004] QB 1124 and *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 (HL); for commentary see Amos (2001) 21 *LS* 1, Fairgrieve [2001] *PL* 695 and Clayton [2005] *PL* 429; see also Scotland Act 1998, section 100).

Another impact may come in the law of standing. At the moment, in English law, litigants may seek judicial review whenever they have a 'sufficient interest' in the matter. This requirement has been interpreted broadly by the English courts (see further chapter 10; the position in Scots law is different, and the test for standing in judicial review is considerably narrower – see Lord Hope [2001] *PL* 294). Under the Human Rights Act, s 7, litigants may bring proceedings only if they are the 'victim' of a breach, or of a potential breach, of Convention rights. This is the same test as is used in the Convention itself, and may result in a narrowing of the English law of standing.

This is all very well, but the Human Rights Act was hardly enacted for the principal purpose of altering either the law of remedies or the law of standing. Such changes as these, important as they may be, are secondary in comparison with the core purpose of the HRA, which was, of course, to enhance the protection of the human rights or civil liberties which the Convention covers. It is assessing the impact of the Human Rights Act on this score that is perhaps most difficult. What difference has the Act made? What value has it added to the protection in Britain of rights and liberties?

There are some cases where the courts have gone out of their way to minimise the Act's impact. For example, the courts have been anxious to ensure that the HRA may not be used to undermine or overturn Britain's system of administrative justice. Much welfare provision, for example, is determined by local or central government officials, rather than by independent and impartial judges. On one, arguably overly literalistic interpretation, such a position could be seen to violate Article 6(1) of the Convention, which provides that 'civil rights and obligations' are to be determined by an 'independent and impartial tribunal', not by government officials. In a pair of important House of Lords judgments their Lordships were eager to construct a reading of Article 6 requirements which did not alter these sorts of schemes: *R (Alconbury) v Secretary of State for the Environment* [2003] 2 AC 295 and *Begum v Tower Hamlets LBC* [2003] 2 AC 430.

There are other cases where the HRA has not made the impact that the civil liberties campaigners who argued that Britain needed a Bill of Rights might

have hoped for. A good example is *R v Shayler* [2003] 1 AC 247. This case was a challenge to the compatibility with Article 10 ECHR of certain provisions of the Official Secrets Act 1989. At the time of its enactment critics saw the 1989 Act as one of the Thatcher Government's most obnoxious assaults on freedom of political expression (see eg, Griffith (1989) 16 *JLS* 273). Section 1 of the 1989 Act makes it a criminal offence for a member or former member of the security and intelligence services to disclose any information relating to security or intelligence which came into that person's possession by virtue of his employment in the services. No damage to Britain's national security need actually (or even potentially) be caused by the disclosure and it is no defence to a charge under section 1 that the disclosure was in the public interest (on the ground that, for example, it revealed corruption in the services). In *Shayler* the House of Lords ruled that, notwithstanding the breathtaking scope of this section, it did not breach the protection of freedom of expression afforded by Article 10. Another case in the same category is *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, in which the House of Lords ruled that what had been described in a lower court as the 'extraordinary' and 'sweeping' stop and search powers contained in the Terrorism Act 2000 (ss 44–7) may lawfully be used in the context of the police stopping apparently peaceful protesters from approaching an international arms fair to protest against Britain's involvement in the arms trade. The appellants' argument that the powers should be read as being available only where there were reasonable grounds for considering that their use was necessary and suitable for the prevention of terrorism was dismissed.

In contrast to *Shayler* and *Gillan*, the best known and most important case to date in which the Human Rights Act has been used to promote individual liberty is, without doubt, the extraordinary decision of the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68: 'extraordinary' because the case goes against a long line of case law dating back to the First World War in which the courts have declined to overturn government decisions made on the basis of perceived threats to national security. In *A* the House of Lords, by a majority of eight to one, held that the power contained in the Anti-terrorism, Crime and Security Act 2001 to detain suspected international terrorists indefinitely without charge was in violation of Articles 5 and 14 ECHR (respectively, the right to liberty and the right to freedom from discrimination). The invasion of liberty was held to be disproportionate, while the fact that only foreign nationals (and not British nationals) could be detained in this manner was unlawfully discriminatory, their Lordships ruled. The case has been heralded as a great vindication of the Human Rights Act (see Lord Lester [2005] *PL* 249) but we should be wary of premature celebration (for further analysis of the case, see Tomkins [2005] *PL* 259 and the collection of articles at (2005) 68 *MLR* 654). Their Lordships' decision was followed by further legislation (the Prevention of Terrorism Act 2005), which replaced the impugned power to detain with a broad range of

powers to impose 'control orders', orders which may be imposed by the government not only on foreign nationals but also on British nationals. A number of control orders have since been found by the courts to have been unlawfully made, although (at the time of writing) the statutory powers to make them have not been declared to be incompatible with Convention rights (see *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin) (Sullivan J), approved by the Court of Appeal at [2006] EWCA Civ 1141). This is, however, a fluid area, which may well see further development in the near future. (See further chapter 11.)

2 The European Union

For the remainder of this chapter we shall consider the impact on the British constitution of the United Kingdom's membership of the European Union. Our discussion of this sometimes difficult but centrally important aspect of constitutional law will be divided into four main parts. We start with a general overview of the European Union, of its development and of its purposes. We then consider the structure of the European Union, its institutions and its law-making procedures. Thirdly, we outline some of the main principles of EU law to have had an impact on the constitutional law of the Member States: here we consider the principles of supremacy, of direct and indirect effect and of state liability, among other matters. In the final part we examine the key British legislation and case law that has sought to address these issues and to accommodate them within the fabric of the British constitution. As we shall see, membership of the European Union has had an unprecedented impact on law and administration in the United Kingdom, and has raised issues concerning such fundamentals of the constitution as parliamentary sovereignty and ministerial responsibility.

(a) Nature and development of the European Union

First, let us get our terminology right. What the United Kingdom joined in 1972 was, at that time, called the European Economic Community (EEC). In the early 1990s this organisation changed its name to the European Community (EC). At the same time the EC became one of the three 'pillars' of the newly created European Union. The 'Community pillar' is the first pillar of the EU and dates from the EEC's inception in 1957. The second pillar is known as the common foreign and security policy (CFSP) and the third pillar, originally known as justice and home affairs (JHA), is now known as police and judicial cooperation in criminal matters (PJCCM). These pillars date only from the early 1990s. Thus, the European Community is a constituent element of the European Union. Moreover, for our purposes, it is the most important element. You will often see the EC and the European Union being used interchangeably, as if they mean the same thing. While this is not technically correct – the EC is

technically but one part of the European Union – it is, in some circumstances, forgivable. (What is completely *un*forgivable is to confuse either the EC or the European Union with the Council of Europe and its ECHR, which was dealt with in the previous section.)

Each of the pillars is concerned with different subject matter: the first pillar is concerned with economic union whereas the second and third pillars are concerned with aspects of political union. They are also structurally different from one another. While the whole of the European Union shares a common set of institutions (principally, as we shall see in the next section, the Commission, the Council of Ministers, the European Parliament and the Court of Justice), the balance of powers between the institutions and the Member States is different in the three pillars. The Commission and the Court of Justice have more powers with regard to the Community pillar than they do in respect of the second and third pillars. This is because the second and third pillars remain politically more sensitive than is most of the Community pillar, meaning that the national governments of the Member States wish to maintain a higher degree of control (and more powers of veto) in these fields. As such, the Community pillar may be described as being more 'supranational' in character, whereas the second and third pillars remain more 'inter-governmental', the difference between the two labels signifying the different level of policy and law-making control that continues to vest in the national governments of the Member States. Another way of putting this is that a greater degree of national sovereignty has been ceded (or 'pooled', as the European Court of Justice puts it) to the Community pillar than is the case in the second and third pillars.

This difference is important, as many of the features of the European Union that raise the most significant constitutional concerns are features that are either confined to, or at least more prominent in, the Community pillar. The doctrine of direct effect, for example, is a principle of *Community* law, not *EU* law: legislation (known as 'framework decisions') adopted under the third pillar is expressly stated not to entail direct effect (Art 34 TEU).

The European Economic Community was established in 1957 by six founding Member States: France, West Germany, Italy, Belgium, the Netherlands and Luxembourg. Its creation was a key part of the international attempts made in the aftermath of the Second World War to rebuild Europe, and to do so in a manner that sought to prevent the recurrence of war. The core idea behind the EEC was to find ways of making the economies of the Member States (and especially of France and West Germany) so mutually entwined and interdependent that it simply ceased to be in the economic interests of the states to go to war with one another. To this day, economic union remains a central theme of the European Union.

The story of the EEC from the 1950s until the present day is one of growth. That growth can be expressed in three main ways: through the enlargement of its membership, through the series of Treaties that have amended it, and through the new powers it has accumulated. Enlargement started with effect

from 1 January 1973, when three countries joined the original six: the United Kingdom, Denmark and Ireland. Following this, Greece became a member in 1981, Portugal and Spain became members in 1986 and Austria, Finland and Sweden joined in 1995 to make a European Union of fifteen Member States. The largest and most controversial enlargement took place in 2004, when ten new countries joined, eight of which are countries of central or eastern Europe, from the former Soviet, or Communist, bloc. The ten are: Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta. In addition, Romania and Bulgaria joined with effect from January 2007, making a European Union of twenty-seven Member States. This is unlikely to be the last enlargement, however, as accession negotiations have now commenced with Croatia and also with Turkey, a country which is not universally seen as 'European' (whatever that may actually mean) and which has a bigger population than any of the present Member States (the largest of which is Germany).

The Treaty establishing the EEC was known as the Treaty of Rome. It has been amended several times, first by the Single European Act (1986) and subsequently by Treaties signed at Maastricht (coming into force in 1993), Amsterdam (1997) and Nice (2001). All of these Treaties were to be replaced with a new Constitutional Treaty, but while the Constitutional Treaty was signed by all the Member States its ratification proved problematic in several countries and in May and June 2005 it was rejected in popular referendums in France and the Netherlands. Since that time the Constitutional Treaty has been 'on hold' as Europe 'pauses to reflect' (see the statement of the Foreign Secretary, HC Deb vol 434, col 991, 6 June 2005). At the time of writing it seems unlikely that it will be resuscitated, at least in its present form, although some of the amendments it would have made may be introduced through other, less dramatic, means. (For the background to, reasons for, content of and failure of the Constitutional Treaty, see D Chalmers, C Hadjiemmanuil, G Monti and A Tomkins, *European Union Law: Text and Materials* (2006), ch 2 (hereafter referred to as 'Chalmers *et al*'); for analysis of what may happen next, see de Búrca, 'The European constitution project after the referenda' (2006) 13 *Constellations* 205.)

Of the various rounds of Treaty amendment, what happened at Maastricht is the most significant. It was at Maastricht that the European Union was created. While the first pillar (the Community) had existed since the Treaty of Rome in 1957, the second and third pillars date only from Maastricht. The significance of this lies in the fact that, unlike the Community pillar, the second and third pillars are not principally devoted to *economic* union, but to various aspects of *political* union. This was the first major decision taken by the governments of the (then twelve) Member States at Maastricht: namely, the commitment to embark on a form of European political union. The second major decision taken at Maastricht was to press ahead with the single European currency, the Euro. For our purposes, both decisions were of monumental importance, not least because of the

eruptions they caused in British politics. It is political union and monetary union, more than any other European policy, that so divided the Major Government in the 1990s and that has caused deep rifts within both the Labour and the Conservative Parties. (On the difficulties faced by the Major Government in seeking to persuade Parliament to pass the legislation necessary to give domestic legal force to the changes agreed at Maastricht, see Rawlings [1994] *PL* 254 and 367; on Prime Minister John Major's subsequent resignation from and re-election to the leadership of the Conservative Party, see Brazier [1995] *PL* 513.)

Since Maastricht there have been two Treaties in force. The first, the EC Treaty, is the amended Treaty of Rome that governs the Community pillar. The second, the Treaty on European Union (TEU) governs the second and third pillars. Both these Treaties continue in force, as subsequently amended at Amsterdam and at Nice and it is important, when citing provisions from them, to be clear as to which Treaty is meant. The amendments agreed at Amsterdam and at Nice, while significant in some respects, were not as important as those made at Maastricht, and we do not need to concern ourselves with their detail here (for an overview, see Chalmers *et al* (2006), pp 32–43). (That said, one change made at Amsterdam was to renumber the Treaty Articles. In this book, only the current, post-Amsterdam numbers are used.)

The various rounds of Treaty amendment have served numerous purposes. They have adjusted the composition and powers of the European Union's various institutions and bodies (on which, see below). They have added new concepts into EU law: the notion of a European citizenship, for example, was added at Maastricht (see now Arts 17–22 EC). But most importantly, they have extended the range and the reach of the European Union's various powers. It was pointed out above that the EEC was based on the idea of economic union between the Member States. Legally, at the heart of economic union lie the four 'fundamental freedoms' of EU law: the free movement of goods (Art 23 EC), the free movement of persons (Art 39 EC), the free movement of services (Art 49 EC) and the free movement of capital (Art 56 EC). To this day, these principles continue to form the core of the European Union's single or internal market. Alongside these provisions, the other major features of economic union concern competition law (Arts 81–9 EC) and the common agricultural policy (Arts 32–8 EC). All of these matters have been central to the European project since the EEC's foundation in the 1950s, and they continue to be so. In addition, the Treaty of Rome contained a number of provisions concerned with social policy. Among the most important of these is what is now Article 141 EC, which provides that 'Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'. As we shall see in the final section of this chapter, this provision was central to a number of early disputes in the British courts about the domestic effects of EU law.

Since the 1950s a range of matters have been added to the legislative and policy-making competence of the European Union. For example, provisions

concerning environmental law were added by the Single European Act; provisions concerning common foreign and security policy and certain matters of criminal justice were added at Maastricht; and provisions on employment policy and on visas, asylum and immigration were added into the EC Treaty at Amsterdam.

The preamble to the EC Treaty includes a general and somewhat rhetorical declaration of principles, the first being 'to lay the foundations of an *ever closer union* among the peoples of Europe' (emphasis added). This is followed by a statement of the objectives of the Community in Article 2:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

From this it appears that the goals of the Community are to be attained by the mechanisms of a 'common market' and 'economic and monetary union' as well as by a range of common policies and activities. Article 3 presents a list of these:

> 1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:
>
> (a) the prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
> (b) a common commercial policy;
> (c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
> (d) measures concerning the entry and movement of persons as provided for in Title IV;
> (e) a common policy in the sphere of agriculture and fisheries;
> (f) a common policy in the sphere of transport;
> (g) a system ensuring that competition in the internal market is not distorted;
> (h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
> (i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
> (j) a policy in the social sphere comprising a European Social Fund;
> (k) the strengthening of economic and social cohesion;
> (l) a policy in the sphere of the environment;

(m) the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans-European networks;
(p) a contribution to the attainment of a high level of health protection;
(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r) a policy in the sphere of development cooperation;
(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t) a contribution to the strengthening of consumer protection;
(u) measures in the spheres of energy, civil protection and tourism.

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Articles 5 and 10 EC concern aspects of the constitutional relationship between the Community's institutions on the one hand and the Member States on the other. Article 5 EC sets out three principles designed to constrain the Community institutions, known as the principles of conferred powers, of subsidiarity and of proportionality:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Article 10 EC, in many ways the counterpoint to Article 5, sets out the obligations of the Member States (this is sometimes known as the duty of fidelity, or the loyalty principle):

Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Articles 5 and 10 EC are judicially enforceable by the European Union's court, the European Court of Justice (on the powers of which, see below). Both provisions have been central in the development of the constitutional law of the

European Union. On the principle of conferred powers see, for example, Opinion 2/94 *Accession to the ECHR* [1996] ECR I-1759 (where the Court of Justice ruled that the European Union lacked the power to accede to the European Convention on Human Rights) and Case C-376/98 *Germany v Parliament and Council ('Tobacco Advertising')* [2000] ECR I-8419 (where the Court of Justice ruled that the Tobacco Advertising Directive had been unlawfully adopted). On subsidiarity, see Case C-377/98 *Netherlands v Parliament and Council ('Biotechnology Directive')* [2001] ECR I-7079, a case which illustrates how immensely reluctant the Court of Justice is to impugn legislation on this ground – indeed, the Court has yet to invalidate a single piece of legislation on the basis of its violation of the principle of subsidiarity. And on proportionality, see Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco* [2002] ECR I-11453, concerning the European Union's controversial Directive on the sale and marketing of certain tobacco products.

While subsidiarity is, in principle, justiciable, it is as much a political principle as it is a legal requirement. As the *Netherlands v Parliament* case illustrates, the interpretation of subsidiarity bristles with difficulties, and the attempt was made in the Treaty of Amsterdam to clarify and strengthen the principle of subsidiarity in introducing a new Protocol on the Application of the Principles of Subsidiarity and Proportionality, now annexed to the EC Treaty. The institutions of the Community are directed by the Protocol to ensure that the principle of subsidiarity (as well as that of proportionality) is complied with in exercising their powers. For any proposed Community legislation, the reasons on which it is based are to be stated and justified (by reference to qualitative or quantitative indicators) as complying with the principles of subsidiarity and proportionality: the Protocol sets out guidelines for examining whether the requirements of subsidiarity are met. The Community is to legislate 'only to the extent necessary' and, other things being equal, 'directives should be preferred to regulations and framework directives to detailed measures'. Community measures 'should leave as much scope for national decisions as possible'. The Protocol includes provisions to ensure that the actions of the Commission, the Council and the Parliament in the process of legislation are informed by due consideration of the requirements of Article 5. The Commission has to report annually on the application of the principle of subsidiarity. Unfortunately, however, the Commission's reporting has been as lacklustre as has the Court's willingness to take subsidiarity seriously – its effective enforcement remaining extremely problematic, notwithstanding the Amsterdam Protocol (see further Chalmers *et al* (2006), pp 219–30 and Dashwood, 'The relationship between the Member States and the EU/EC' (2004) 41 *CML Rev* 355).

Cases in which the Court of Justice has relied on Article 10 EC include Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 and Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, both of which are discussed further below (see pp 312–14).

Notwithstanding the requirements of Article 10 EC, it should be pointed out that the European Union has admitted a degree of flexibility (sometimes said to result in a 'variable geometry' of the Union) in the participation of Member States in its activities. (Note in this connection the United Kingdom's opt-out from the third stage of monetary union: ie, the adoption of the Euro as its currency.) 'Flexibility' was institutionalised at Amsterdam, allowing groups of Member States to pursue closer cooperation among themselves, to the exclusion of non-participating Member States, on certain conditions, 'as a last resort' and with the approval of the Council of the European Union. Nice extended the possibility of recourse to 'enhanced cooperation', in particular for implementing foreign and security policies. Member States taking part in enhanced cooperation are to 'apply, as far as they are concerned, the acts and decisions adopted for the implementation of the enhanced cooperation in which they participate. Such acts and decisions shall be binding only on those Member States which participate in such cooperation' (Art 44(2) TEU, as amended at Nice).

The Schengen Agreement of 1985 provided for the abolition of checks at the common borders of the participating Member States, which did not include the United Kingdom or Ireland. At Amsterdam a new objective of the European Union was adopted, declared in the amended Article 2 TEU, to maintain and develop the Union 'as an area of freedom, security and justice', assuring the free movement of persons. At the same time the Schengen Agreement was incorporated into the Treaties, but a Protocol permits the United Kingdom and Ireland to continue to operate frontier controls on persons entering their territories from other Member States. A further Protocol exempts the United Kingdom (and also Ireland and Denmark) from action taken under Title IV EC (on visa, asylum and immigration policies), with provision for opting-in to particular measures. Thus, it may be said that despite the apparent simplicity of the constitutional provisions of Articles 5 and 10 EC, the reality is rather more complex and considerably more untidy, with various Member States (including the United Kingdom) eager to preserve aspects of law- and policy-making to themselves. (See further Curtin, 'The constitutional structure of the Union: a Europe of bits and pieces' (1993) 30 *CML Rev* 17 and Chalmers *et al* (2006), ch 5.)

A key theme of EU law is non-discrimination. To this end Article 12 EC provides that 'Within the scope of application of this Treaty . . . any discrimination on grounds of nationality shall be prohibited'. Further, Article 13 EC provides that the European Union may make laws 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

A further provision of constitutional importance is Article 6 TEU, which provides as follows:

> The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

> The Union shall respect fundamental human rights, as guaranteed by the European Convention on Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Thus, it is a legal obligation of the European Union to respect fundamental rights. Action taken by the European Union which fails to do so may be quashed by the Court of Justice as being in breach of the 'general principles of Community law'. None the less, the European Union has no enforceable bill of rights of its own. Every one of the Member States happens to have ratified and is therefore bound by the ECHR, but while this is true of the Member States, it is not true of the European Union itself. The European Union has drawn up a Bill of Rights of its own, known as the Charter of Fundamental Rights and Freedoms, but while this document was 'proclaimed' by the governments of the Member States at Nice, it is not, as the law currently stands, legally enforceable. The Constitutional Treaty would have made it so had it come into force, but as we have seen this is, for the present time at least, unlikely to happen. (See further S Peers and A Ward (eds), *The EU Charter of Fundamental Rights* (2004) and Chalmers *et al* (2006), ch 6).

(b) Institutional structure and law-making powers

Formally, the European Union has five institutions: the Commission, the Council of Ministers, the European Parliament, the Court of Justice and the Court of Auditors (Art 7 EC). In this section we outline the composition and powers of each of these, as well as of the European Council and a number of other EU bodies, such as the European Ombudsman, the Economic and Social Committee and the Committee of the Regions. At the end of this section we outline something of the EU's law-making procedures.

(i) Institutions and bodies of the European Union

The Commission

The Commission is a body of about 24,000 staff that is best understood as being divided into three categories: the College of Commissioners, the Directorates-General and the Cabinets. The College of Commissioners contains, at present, twenty-seven members, one from each Member State. They are appointed for a renewable five-year term, to run concurrently with that of the European Parliament (which is elected every five years – see below). Each Commissioner is allocated a portfolio by the President of the Commission; thus there is a Commissioner for competition, a Commissioner for agriculture, a Commissioner for the environment, and so on (for the current list in full, consult the Commission's website http://ec.europa.eu/index_en.htm). Article 213 EC provides that the Commissioners shall act 'in the general interest of

the Community' and that they must be 'completely independent in the performance of their duties'. In particular, 'in the performance of their duties, they shall neither seek nor take instructions from any government'. The President of the Commission is nominated by the governments of the Member States, the nomination then needing to be approved by the European Parliament before he can take office (Art 214 EC). The President of the Commission then nominates the other members of the College of Commissioners in consultation with the national governments. The nominations are collectively approved by the European Parliament, which holds nomination hearings during which nominees are subjected to detailed political scrutiny (for a comprehensive account of the most recent such hearings, which resulted in a series of changes having to be made to the composition of the Commission, see Eijsbouts *et al* (2005) 1 *Eu Const L Rev* 153).

The Directorates-General, in which most of the Commission's staff work, are akin to government departments. The Cabinets are the political offices of each Commissioner. These are small, comprising no more than six individuals each (except the President's Cabinet, which may have up to ten members).

As for the Commission's powers and functions, Article 211 EC provides as follows:

> the Commission shall:
>
> - ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
> - formulate recommendations or deliver opinions on matters dealt with in this Treaty . . .;
> - have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
> - exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

As this provision reveals, the Commission has a wide range of duties under the Treaty. In broad terms it acts as the guardian of the Treaties, it initiates Community policies, and it executes decisions. More specifically, we may view the Commission's powers as falling within four categories: *legislative* powers, *agenda-setting* powers, *executive* powers and *supervisory* powers (see further Chalmers *et al* (2006), pp 93–101). Of these, probably the least significant are the Commission's legislative powers. Its legislative powers are concerned mainly with delegated legislation and arise principally where the Council confers power on the Commission to make rules implementing decisions taken by the Council (see Art 202 EC). Its agenda-setting powers are more considerable. The Commission is responsible for initiating the policy process (at least within the first, Community, pillar). As such, it sets the Community's annual legislative programme. Yet even this, in practice, is not such a broad power as may

be imagined: 'very few proposals are at the Commission's own initiative. It enjoys, instead, a gate-keeper role, where different interests – national governments, industry, NGOs – come to it with legislative suggestions' (Chalmers *et al* (2006), p 96). That said, 'nothing can happen without the Commission deciding to make a proposal in the first place, and it can frame the terms of debate and legislation' (Chalmers *et al* (2006), p 97). Among the Commission's executive powers are the following: it collects the European Union's revenue, it coordinates a large part of the Community's expenditure (such as the European Social Fund and the European Regional Development Fund), it administers EU aid to third countries and it represents the European Union in some international bodies, such as the World Trade Organization. Finally, the Commission has extensive supervisory powers. For example, it can declare state aids unlawful (Art 88 EC) and it can declare certain anti-competitive practices unlawful (Regulation 1/2003, Art 7). More generally, it has the power to bring Member States before the Court of Justice when it considers them to be in breach of Community law. To this end, Article 226 EC provides as follows:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

This is an extremely important provision, which enables the Commission to enforce Community law against the Member States. The provision is widely used. It will be noted that the Article 226 procedure is in two parts. The first part, culminating in the Commission's 'reasoned opinion', is the administrative stage in which the Commission seeks compliance with Community law without having to refer the matter to the Court. The second stage is the judicial stage. Most Article 226 cases are resolved at the administrative stage. In 2003, for example, the Commission formally notified a Member State that it was in breach of Community law on 1,552 occasions; 553 reasoned opinions were delivered and 215 cases were referred to the Court of Justice (see further Chalmers *et al* (2006), pp 349–65).

An example of Commission enforcement proceedings being taken against the United Kingdom is the following case.

Case 61/81 *Commission v United Kingdom* [1982] ECR 2601 (ECJ)

Article 141 EC Treaty (before Amsterdam renumbering, Article 119 of the EC Treaty) requires Member States to ensure the application of the principle that men and women should receive equal pay for equal work. To reinforce and clarify this provision the Council in 1975 adopted Directive 75/117/EEC, the

Equal Pay Directive, with which Member States were bound to comply. Article 1 of the Directive provided:

> The principle of equal pay for men and women outlined in Article [141 EC] . . . means, for the same work *or for work to which equal value is attributed,* the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex [emphasis added].

The Sex Discrimination Act enacted by Parliament in 1975 was intended to fulfil the United Kingdom's obligations under the Treaty and the Equal Pay Directive; it included amendments to the Equal Pay Act 1970. In terms of the Equal Pay Act, as amended, a woman was entitled to equal pay if she was doing 'like work' to that of a man in the same employment, or if her work was 'rated as equivalent' with that of a male employee. By section 1(5), a woman was to be regarded as employed on work rated as equivalent to that of a man, only if their jobs had been given equal value on a job evaluation study. However an employer was under no obligation to introduce a job evaluation scheme, and his failure to do so would prevent a woman from claiming equal pay under the Act on the basis that her work was equivalent to that of a male employee.

The Commission took the view that the United Kingdom had not fully implemented the Equal Pay Directive. It duly delivered to the United Kingdom Government its 'reasoned opinion' that Article 1 of the Directive had been 'incorrectly applied' in the Equal Pay Act, and invited the United Kingdom to adopt appropriate measures of compliance within two months. The Government replied that it considered the UK legislation to be in conformity with the Directive, whereupon the Commission took proceedings in the Court of Justice under (what is now) Article 226 EC, claiming a declaration that the United Kingdom had failed to fulfil its obligations under the Directive.

> **European Court of Justice:** . . . Comparison of [Article 1 of the Directive and section 1(5) of the Equal Pay Act 1970, as amended] reveals that the job classification system is, under the directive, merely one of several methods for determining pay for work to which equal value is attributed, whereas under the provision in the Equal Pay Act . . . the introduction of such a system is the sole method of achieving such a result.
>
> It is also noteworthy that, as the United Kingdom concedes, British legislation does not permit the introduction of a job classification system without the employer's consent. Workers in the United Kingdom are therefore unable to have their work rated as being of equal value with comparable work if their employer refuses to introduce a classification system.
>
> The United Kingdom attempts to justify that state of affairs by pointing out that Article 1 of the directive says nothing about the right of an employee to insist on having pay determined by a job classification system. On that basis it concludes that the worker may not insist

on a comparative evaluation of different work by the job classification method, the introduction of which is at the employer's discretion.

The United Kingdom's interpretation amounts to a denial of the very existence of a right to equal pay for work of equal value where no classification has been made. Such a position is not consonant with the general scheme and provisions of Directive 75/117. The recitals in the preamble to that directive indicate that its essential purpose is to implement the principle that men and women should receive equal pay contained in Article [141 EC] and that it is primarily the responsibility of the Member States to ensure the application of this principle by means of appropriate laws, regulations and administrative provisions in such a way that all employees in the Community can be protected in these matters.

To achieve that end the principle is defined in the first paragraph of Article 1 so as to include under the term 'the same work', the case of 'work to which equal value is attributed', and the second paragraph emphasizes merely that where a job classification system is used for determining pay it is necessary to ensure that it is based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

It follows that where there is disagreement as to the application of that concept a worker must be entitled to claim before an appropriate authority that his work has the same value as other work and, if that is found to be the case, to have his rights under the Treaty and the directive acknowledged by a binding decision. Any method which excludes that option prevents the aims of the directive from being achieved.

That is borne out by the terms of Article 6 of the directive which provides that Member States are, in accordance with their national circumstances and legal systems, to take the measures necessary to ensure that the principle of equal pay is applied. They are to see that effective means are available to take care that this principle is observed.

In this instance, however, the United Kingdom has not adopted the necessary measures and there is at present no means whereby a worker who considers that his post is of equal value to another may pursue his claims if the employer refuses to introduce a job classification system.

The United Kingdom has emphasized . . . the practical difficulties which would stand in the way of implementing the concept of work to which equal value has been attributed if the use of a system laid down by consensus were abandoned. The United Kingdom believes that the criterion of work of equal value is too abstract to be applied by the courts.

The Court cannot endorse that view. The implementation of the directive implies that the assessment of the 'equal value' to be 'attributed' to particular work, may be effected notwithstanding the employer's wishes, if necessary in the context of adversary proceedings.

As a result of this judgment, the United Kingdom Government was bound to introduce new legislation to give full effect to the Equal Pay Directive. The Equal Pay Act 1970 was accordingly amended by the Equal Pay (Amendment) Regulations 1983, S1 1983/1794, allowing claims for equal pay whether or not a job evaluation scheme had been carried out.

(For more detailed analysis of the European Commission, see D Dimitrakopoulos (ed), *The Changing European Commission* (2004); D Spence (ed), *The European Commission* (2006) and N Nugent, *The European Commission* (2001).)

The Council of Ministers

The Council of Ministers consists of representatives of the governments of the Member States at ministerial level. Its membership varies according to the subject under consideration – ministers responsible for agriculture, for example, meeting as the 'Agriculture Council' when issues of the common agricultural policy are to be discussed. The office of President of the Council is held in rotation among the Member States for terms of six months.

The Council represents the interests of the Member States but as an institution of the Community it has responsibilities under the EC Treaty for furthering Community objectives. It has a duty to ensure coordination of the general economic policies of the Member States and it takes the most important decisions on Community matters. It is the principal legislative authority of the Community, but now acts together with the European Parliament (in the co-decision procedure) in most areas of its legislative activity (see further on law-making procedures, below). Chalmers *et al* (2006), p 101 offer the following summary of the Council's powers:

> The Council's powers are fivefold. First, in areas of policy where responsibility lies with the Member States, such as general economic policy, foreign and security policy, justice and home affairs, it acts as a forum within which Member States can consult with each other and coordinate their behaviour. Secondly, the Council can take the other institutions before the Court, either for actions which contravene EC law or for failing to act when required by Community law. Thirdly, the Council can request the Commission to undertake studies or submit legislative proposals. Fourthly, the Council can delegate legislative powers to the Commission. The fifth and most influential role is the power of final decision on the adoption of legislation in most areas of EU policy. This power of assent bolsters the Council's influence at earlier stages in the decision-making process because the other institutions are aware that a proposal will only become law if it has the Council's approval and, thus, tailor their actions accordingly.

Almost all substantive decisions in Council are made through either one of two means: unanimously, or by 'qualified majority voting' (QMV) (for some procedural matters a simple majority is all that is required). Clearly, when unanimity is required, the power of each Member State government is increased, as each has a veto. Where legislation may be adopted by QMV, on the other hand, it may be passed even against the wishes of a number of Member State governments. The rules of QMV are complex and, whenever the prospect of their reform arises, hotly contested. At present the largest countries, Germany, the United Kingdom, France and Italy, have twenty-nine

votes each; Spain and Poland have twenty-seven each; the Netherlands thirteen; Greece, the Czech Republic, Belgium, Hungary and Portugal have twelve each; Sweden and Austria ten each; Slovakia, Denmark, Finland, Lithuania and Ireland seven each; Latvia, Slovenia, Estonia, Cyprus and Luxembourg four each; and Malta three. For a measure to pass it requires 232 out of 321 possible votes, with at least thirteen Member States voting for it. The aim here is to achieve some sort of balance between preserving each national voice on the one hand and reflecting the vastly different population sizes of the Member States on the other. The current numbers, however, reveal several anomalies. The fifteen smallest Member States, for example, have a combined population of about 58 million, just over two-thirds of the size of Germany's population, yet they have between them 102 votes, almost four times the number accorded to Germany. The most overrepresented states are Spain and Poland. Their populations are each less than half that of Germany, yet they have only two votes less (see Chalmers *et al* (2006), p 103; for the ways in which this would have been reformed by the Constitutional Treaty, see *ibid*, pp 104–5).

The preference for majority voting expressed in the EC Treaty reflects a perception of the Council as a Community body pursuing Community goals, and not a mere inter-governmental forum for representing national interests, yet in comparison with the Commission, the European Parliament and the Court of Justice, it remains significantly more inter-governmental and less supranational in character.

The Council is assisted by a Committee of Permanent Representatives (COREPER) which consists of representatives of the Member States who have ambassadorial rank and head the staffs of officials constituting the permanent representation of each Member State to the Community. This Committee has responsibility (under Article 207 EC) 'for preparing the work of the Council and for carrying out the tasks assigned to it by the Council'. It sets up its own specialised working groups of national officials, examines proposals that have been submitted to the Council and tries to reach an accommodation of national viewpoints. COREPER and its working groups take no decisions themselves but exercise an important influence in settling and defining the issues for Council decision. These official bodies operate beyond the reach of democratic control and accountability. Uncontroversial proposals agreed by COREPER are generally adopted without debate by the Council. Decisions of the Council on more contentious matters are the product of inter-governmental bargaining and compromise. Ministers may often be compelled to make concessions on one issue in return for support on another.

(See further J Peterson and M Shackleton (eds), *The Institutions of the European Union* (2nd edn 2006), ch 4, and, in more detail, F Hayes-Renshaw and H Wallace, *The Council of Ministers* (2006) and D Galloway and M Westlake, *The Council of the European Union* (3rd edn 2004).)

The European Council

The heads of government of the Member States have met regularly for many years as the European Council, a body (confusingly enough) to be distinguished from the Council of Ministers, considered above. The European Council lacked formal recognition in the Treaty until the Single European Act in 1986. Article 4 TEU now sets out the tasks of the European Council:

> The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.
>
> The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council.
>
> The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

The European Council has been accurately described as 'the most politically authoritative institution' of the European Union (S Bulmer and W Wessels, *The European Council* (1987), p 2). It determines the future institutional shape and tasks of the European Union and it develops the broad principles EU policy is to adopt. It plays a particularly dominant role in the second pillar (the common foreign and security policy).

The European Parliament

The original Treaties established an Assembly to represent the peoples of the Community; since 1962 it has been known as the European Parliament and this name was confirmed by the Single European Act in 1986. Initially composed of delegations from national Parliaments, the first direct elections to the European Parliament took place in 1979. Since then such elections have taken place every five years. The European Parliament currently has 732 Members (or MEPs). Each Member State is allocated a certain number of MEPs, with the bigger states having more in absolute terms, but with the smaller states being overrepresented in proportionate terms. Thus, for example, Germany has ninety-nine MEPs, the United Kingdom has seventy-eight and Luxembourg has six. This means that Germany has one MEP for every 820,000 of its citizens whereas Luxembourg has one for every 65,000 of its citizens.

Initially, there was no agreement on a uniform electoral system for elections to the European Parliament and it was decided that the Member States should be free for the time being to use the system of their choice. For the first four elections, of 1979, 1984, 1989 and 1994, the United Kingdom adopted the plurality or 'first past the post' system for the elections in Great Britain and proportional representation (the single transferable vote) for Northern Ireland, while the

other Member States used one or other system of proportional representation. The European Parliamentary Elections Act 1999 introduced a regional list system of proportional representation for elections to the European Parliament in Great Britain. The 'closed list' system adopted enables electors to vote for a party, rather than for individual candidates, the successful candidates being chosen from lists drawn up by the political parties, in the order of preference set by each party list (there was much controversy over the use of the 'closed list' system, such that the 1999 Act had to be passed using the Parliament Act procedure – ie, without the assent of the House of Lords; for an extensive analysis of the background, see House of Commons Library Research Paper 98/102, available from the parliamentary website). The single transferable vote continues to be used in Northern Ireland (see now the European Parliamentary Elections Act 2002).

Members of the European Parliament (MEPs) are required to vote 'on an individual and personal basis' and they 'shall not be bound by any instructions and shall not receive a binding mandate' (Article 4(1) of the Act annexed to Council Decision 76/787/EEC on direct elections). On the other hand MEPs form political groups, as permitted – indeed encouraged – by Article 191 EC. They are elected, however, not as representatives of European political parties (such beings do not (yet?) exist) but as representatives of their national parties. When in plenary session MEPs sit in their political groups, not in national groups. Most of the European Parliament's work, however, is carried out in its twenty or so specialised committees (for a full list of which, consult the European Parliament's website, www.europarl.europa.eu/).

The European Parliament has traditionally been something of a poor relation to the Commission and the Council, but over the course of the last twenty years its powers have gradually grown, such that it has now become an institution that cannot be overlooked. It has five different sorts of powers. First are its legislative powers. These vary according to which legislative procedure is adopted (see further below). Most procedures give the European Parliament a subordinate legislative role to that of the Commission and Council. It is only with regard to 'co-decision' procedure that the European Parliament may claim a voice equal to that of the Council. This procedure is, however, being used more and more. Secondly, the European Parliament has certain powers of appointment and dismissal. We saw above that the College of Commissioners is nominated by the President of the Commission but approved by the European Parliament (see Art 214 EC). The European Parliament also has the power to pass a motion of censure on the Commission: if such a motion is passed by a two-thirds majority, the Commission is required to resign (Art 201 EC). This has never happened: when the Commission resigned in disgrace in 1999 it did so without the European Parliament having passed a motion of censure against it (see Tomkins, 'Responsibility and resignation in the European Commission' (1999) 62 *MLR* 744). Thirdly, the European Parliament has certain powers of inquiry and investigation (Art 193 EC), although these have not been as widely used as

they might have been. Fourthly it has powers of litigation: it may bring the other institutions before the Court of Justice if it considers them to have breached Community law (Art 230 EC). Finally, and importantly, it has a range of powers over the European Union's budget (Art 272 EC).

(See further J Peterson and M Shackleton (eds), *The Institutions of the European Union* (2nd edn 2006), ch 6 and, in more detail, R Corbett, F Jacobs and M Shackleton, *The European Parliament* (6th edn 2005) and D Judge and D Earnshaw, *The European Parliament* (2003).)

The European Court of Justice

The European Court of Justice (ECJ), which has its seat in Luxembourg, consists of one judge per Member State, appointed by common accord of the governments of the Member States for renewable terms of six years. The judges are chosen 'from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence' (Art 223 EC). A judge can be removed only by the unanimous decision of the other judges and the Advocates General of the Court. Most cases are heard not by the full court but by a Chamber of three or five judges or – if requested by a Member State or Community institution that is a party to the proceedings – a Grand Chamber of thirteen judges. The judges are assisted by eight Advocates General, who are themselves members of the Court, also appointed by agreement of the governments of the Member States and enjoying the same status and security of tenure as the judges. The office of Advocate General is similar to that of the *commissaire du gouvernement* of the French Conseil d'Etat. The Advocate General's role is to make, in open court, impartial and independent submissions on cases brought before the Court (Art 222 EC). When the arguments in a case have been concluded, the Advocate General gives his or her opinion to the Court, reviewing the facts and the law and suggesting how the case should be decided. The opinions of the Advocates General are published in advance of the judgment of the Court being reached. While the Court is not obliged to agree with the Advocate General it does so in a majority of cases. Advocate General opinions and Court judgments differ considerably from one another in character. The judgments of the Court are usually quite short and are always unanimous (ie, there are no dissenting judgments) whereas the opinions of the Advocates General can be longer and are usually considerably more discursive (and, therefore, often more interesting). They are, as such, an excellent resource.

The Court of First Instance (CFI), created in 1989, includes at least one judge per Member State and consists at present of twenty-seven judges who are appointed by agreement of the governments of the Member States for renewable terms of six years. The judges are chosen 'from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office' (Art 224 EC). Cases are normally heard in

Chambers of three or five judges. The jurisdiction of the Court of First Instance includes staff disputes and cases brought by individuals or companies (eg claims against the Community for damages and actions for annulment under Article 230 EC). The Treaty of Nice extended its jurisdiction, for example, to include references for preliminary rulings (see below) in certain specific areas. There is, in general, a right of appeal against judgments of the Court of First Instance to the Court of Justice on points of law. A judgment or ruling of the Court of Justice is not subject to appeal. Its decisions on the interpretation of the Treaty cannot be reversed by legislation but only by the more difficult process of amendment of the Treaty, although the Court may itself depart from its previous decisions.

'The Court of Justice', says Article 220 EC, 'shall ensure that in the interpretation and application of this Treaty the law is observed'. (The like obligation is placed upon the Court of First Instance.) Other Articles of the Treaty provide in detail for the Court's manifold jurisdiction, of which the following are the main categories:

1. *Judicial review*: the Court's jurisdiction, in proceedings brought by a Community institution, a Member State or, more rarely, a private party, to determine the legality of an act (Art 230 EC), or failure to act (Art 232 EC), of a Community institution.

2. *Infringement proceedings*: the Court's jurisdiction in proceedings brought against a Member State by the Commission (Art 226 EC – see above) or, more rarely, another Member State (Art 227 EC) for a breach of Community obligations. Since Maastricht the Court has been empowered to impose a financial penalty on a Member State that fails to comply with its judgment (Art 228 EC).

3. *Preliminary rulings*: the Court's jurisdiction to rule on questions of Community law arising in national courts and tribunals (Art 234 EC).

Proceedings in the first two jurisdictional categories are brought and concluded in the European Court of Justice itself, but preliminary rulings arise from a reference to the Court of Justice made in the course of proceedings in a national court. Infringement proceedings were considered in relation to the powers of the Commission (see above), and we need not say more about them here. A word more on judicial review cases and on preliminary references is, however, necessary.

The most important provision of the Treaty in relation to judicial review is Article 230 EC. This provides as follows:

> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB [the European Central Bank], other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
>
> It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence,

infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

It will be seen that actions for judicial review may be brought by a Member State or by one of the European Union's institutions. Actions may be brought by private parties only if they have 'direct and individual concern' in the matter. The Court of Justice has interpreted this condition very narrowly, meaning that it is extremely difficult for private parties to access the Court under Article 230 EC. Indeed, they will generally be able to do so only where they can distinguish themselves, not only actually but potentially, from all other persons (see Case 25/62 *Plaumann v Commission* [1963] ECR 95 and Case C-50/00 P *UPA v Council* [2002] ECR I-6677). Four grounds of review are set out in Article 230: lack of competence, breach of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, and misuse of powers. The third of these has been interpreted broadly by the Court to include a number of (essentially judge-made) 'general principles of EU law', the most important of which are proportionality, legal certainty, non-discrimination and respect for fundamental rights. All of these have, in effect, become grounds of review in EU law (see eg, Case C-331/88 *R v Minister of Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023). (See further Chalmers *et al* (2006), ch 10).

The preliminary reference procedure is commonly seen to be the most important of the Court's various jurisdictions. This is for two main reasons: first, because of the large volume of case law generated through this procedure (from 2000–04, for example, the Court delivered more than 1,200 judgments on the basis of Article 234 EC). Secondly, the preliminary reference procedure has produced most of the seminal, or leading, cases in EC law. The key constitutional principles of supremacy, direct effect and state liability, for example, which we shall consider later in this chapter, were each developed by the Court in cases that arose from preliminary references. The terms of Article 234 EC are as follows:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB [European Central Bank];

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Article 234 emphasises and is designed to preserve the uniformity of Community law as an independent legal order with the same force and meaning throughout the European Union. Without the discipline of this provision, national courts might develop Community law in divergent ways and the result would be a fragmented system which failed to sustain the common objectives of the Union.

A reference under Article 234 can be made only by the national court or tribunal itself: the Article does not provide an avenue of recourse to the Court of Justice for the parties to litigation. What is referred to the Court is not the case as a whole but a specific question of Community law that is relevant to the determination of the case. When the Court of Justice has given its ruling on the question the proceedings continue in the national court, which is bound to adopt the ruling of the Court of Justice but retains its independence of decision on all other aspects of the case. In practice, however, the ruling on the applicable Community law will often determine the result of the case. The Court of Justice has no authority to rule on questions of *national* law.

A national court is always *entitled* to refer to the Court of Justice a question of Community law that it considers relevant to the case before it, but a court from which there is no appeal is *bound* to refer such a question. A final court of appeal like the House of Lords is therefore obliged by Article 234 to refer to the Court of Justice, and the better view is that any other court or tribunal is also bound to refer if there can be no appeal from its decision in the particular case. A court of final appeal is bound to refer, however, only if it considers that a decision on the question is necessary to enable it to give judgment. Moreover, no reference need be made if the question has already been resolved by the Court of Justice, or if the national court is convinced that the Community law on the question is clear beyond reasonable doubt (this is known as the doctrine of *acte clair*: see Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415). The doctrine has to be applied with caution, however, for it depends upon a degree of clarity in the relevant legal provisions which is not often present. In *R v Henn* [1978] 1 WLR 1031 (CA), [1981] AC 850 (ECJ and HL), while the Court of Appeal had no doubt at all about the right solution to a question of Community law that arose before it, the House of Lords, having given leave to appeal, decided that there was sufficient doubt to require a reference to be made

to the Court of Justice. The judgment of that court showed that the Court of Appeal had indeed misconstrued the relevant provision of the EC Treaty. (See further Arnull (1989) 52 *MLR* 622 and (1990) 15 *EL Rev* 375, and Lord Diplock in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771–2. Note also the differences of opinion between the Law Lords in *R v Secretary of State for Health, ex p Imperial Tobacco Ltd* [2001] 1 WLR 127 as to whether a question arising in that case was *acte clair*.)

A court which is not sitting as a final court of appeal has a discretion whether or not to refer a relevant question of Community law for decision by the European Court. In regard to the exercise of this discretion an English judge, Bingham J, said in *Customs and Excise Comrs v ApS Samex* [1983] 1 All ER 1042, 1055–6:

> Sitting as a judge in a national court, asked to decide questions of Community law, I am very conscious of the advantages enjoyed by the Court of Justice. It has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue. Where the interests of member states are affected they can intervene to make their views known. . . .Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court.

In *Bulmer v Bollinger* [1974] Ch 401 Lord Denning gave more specific guidelines for the exercise of the discretion to refer, the tenor of which gave encouragement to the English courts to reach their own conclusions on points of Community law. Lord Denning's guidelines were given a rather different emphasis by Sir Thomas Bingham MR in *R v International Stock Exchange Ltd, ex p Else (1982) Ltd* [1993] QB 534, 545:

> I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue

> itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer.

(See further Walsh (1993) 56 *MLR* 881 and *Chequepoint SARL v McClelland* [1997] QB 51, 60.)

The Court of Justice is an innovative court which has developed principles of Community law in a bold and far-reaching manner. Many of the constitutionally most important – and most sensitive – doctrines of EU law originate not from the Treaties but from the case law of the Court. This is true, for example, of the doctrines of supremacy, direct and indirect effect and state liability, to be considered in the next section. The Court's activism has not always found favour in the Member States – and not only in the United Kingdom – and it has been criticised for exceeding its proper bounds. As Sionaidh Douglas-Scott reports (*Constitutional Law of the European Union* (2002), p 199):

> It is not always the case that international courts arouse strong feelings, but this has been so with the European Court in Luxembourg. On the one hand, a former French Prime Minister, Michel Debré, said in 1979, '*J'accuse la Cour de Justice de mégalomanie maladive*'. A more measured, but equally vehement, account was given by Margaret Thatcher, in the parliamentary debates on the Maastricht Treaty when she reported that 'some things at the Court are very much to our distaste'. Attacks on it have also been made by the German press and it has been accused of 'revolting judicial behaviour' by the Danish academic, Hjalte Rasmussen.

(For consideration of the arguments, see Hartley (1996) 112 *LQR* 95; Lord Howe (1996) 21 *EL Rev* 187; and Tridimas (1996) 21 *EL Rev* 199.)

(The literature on the Court of Justice is enormous. For further analysis and argument see eg, R Dehousse, *The European Court of Justice* (1998); A Arnull, *The European Union and its Court of Justice* (2nd edn 2006); A Slaughter, A Stone Sweet and J Weiler (eds), *The European Courts and National Courts: Doctrine and Jurisprudence* (1998); K Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* (2001).)

The Court of Auditors

The Court of Auditors was established in 1975 and was given increased powers and the status of an institution of the Community at Maastricht. It has the task of examining and reporting on all revenue and expenditure accounts of the Community and determining whether the financial management of the funds has been sound. The members of the Court of Auditors are to act with complete

independence in the general interest of the Community (Arts 247–8 EC). The Court draws up an annual report which is sent to the other institutions of the Community and is published. Audit is an important component of accountability in the European Union, in which the Court of Auditors has a significant role to play (for a critical appraisal, see C Harlow, *Accountability in the European Union* (2002), ch 5).

The Economic and Social Committee

The Economic and Social Committee is an advisory body established by the EC Treaty to assist the Commission and the Council. It consists of representatives, appointed by the Council in accordance with proposals submitted by the Member States, of 'the various economic and social components of organized civil society'; its members are chosen as representing producers, workers and a variety of other interest groups including the professions, farmers, dealers and consumers. The Council and the Commission are obliged by a number of Treaty provisions to consult the Committee on proposed action and in practice do so in many other cases. The Committee may also give opinions on its own initiative. Views as to the success and importance of the Committee are mixed.

The Committee of the Regions

This advisory body consists of representatives of regional and local bodies who are either elected or are politically accountable to an elected assembly, and are appointed by the Council on the basis of proposals from the Member States. The Committee must be consulted by the Council or by the Commission when the Treaty so provides or otherwise when they consider it appropriate to do so, and it may give opinions on its own initiative (see Arts 263–5 EC). The Committee of the Regions is widely regarded as having been a largely unsuccessful body. There are several policy areas in respect of which no consultation is required, yet which may be said to have an important regional dimension. A number of the more powerful non-state regions in the European Union prefer to deal with the institutions directly rather than through the Committee.

Other bodies

Two other bodies may briefly be noted: the European Central Bank, which has the exclusive power to authorise the issue of Euros (Art 106 EC) and the European Ombudsman, created in 1995, which investigates complaints of maladministration in the activities of the European Union's institutions (Art 195 EC).

(ii) Law-making in the European Union

The Treaties specify a number of different types of European law. For the Community pillar the most important provision is Article 249 EC. This provides as follows:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Regulations and Directives are the legislative instruments of the Community. Decisions may be addressed to particular individuals and corporations as well as to Member States. They have rather the character of administrative action than of general legislation, although Decisions may give rise to legal obligations and are sometimes quasi-legislative in effect. Recommendations and Opinions fall into the category of 'soft law': they do not have legislative force but may influence the working of the Community and the shaping of policy.

A Regulation, being 'directly applicable', has automatic effect as law in all the Member States without any intervention by the national authorities. As such, it is the most powerful form of law available to the European Union (apart from Treaty provisions themselves). Regulations avoid the possibility that the law might be distorted or delayed in being re-enacted by agencies of the Member States, and are especially apt when what is wanted is a prompt, precise and uniform application of rules throughout the European Union. Any necessary implementing action by a Member State must not qualify the scope or effectiveness of the Regulation. The European Union has the power to adopt Regulations only where the Treaty expressly so provides. If the European Union has the power in a certain field only to adopt Directives, it may not adopt Regulations instead.

Directives are binding 'as to the result to be achieved': the Member States are obliged to implement them but use their own legislative or administrative techniques in doing so. Unlike Regulations, then, Directives can come into force only when implemented (or 'transposed' into national law) by the Member States. In other words, they are not 'directly applicable'. In the British context, such transposition will not always require primary legislation: sometimes secondary legislation (such as an Order in Council) will be sufficient. This will depend on the subject matter. Directives are an appropriate legislative instrument when a precisely uniform implementation is not necessary or would be difficult to realise because of differing legal, administrative or economic structures in the Member States. They are particularly suitable for achieving a 'harmonisation' or 'approximation' of national laws, when that is required, for example, for the operation of the internal market (see Art 94 EC).

A Directive usually leaves to the Member States a margin of discretion in carrying out its objectives. Discretion in implementation means a less consistent application of Community policies, and Community institutions may prefer to enact Regulations (when free to choose between these and Directives) and have sometimes formulated Directives in very precise terms which left little freedom of action to the Member States. Such a Directive may not differ much in effect from a Regulation, even though national measures of implementation are called for. Recent years have seen a reaction against such over-prescriptive legislation. Directives normally set time limits for their implementation. Often these are not met by Member States. As we shall see below, the European Court of Justice is frequently seized of actions brought against Member States for failing to implement Directives or for implementing them incorrectly.

As for the second pillar, as may be expected, there is very little formal law-making. Rather, the TEU talks of the European Council 'deciding on common strategies', 'adopting joint actions' and 'adopting common positions' (see Arts 12–16 TEU). In the third pillar there is no equivalent of Regulations, but there is an equivalent of Directives, albeit that they are called Framework Decisions. Article 34 TEU provides that the Council may 'adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.' (For law- and policy-making in the second and third pillars, see H Wallace, W Wallace and M Pollack (eds), *Policy-making in the European Union* (5th edn 2005), chs 17, 18.)

The European Union possesses no general law-making power. Rather, its legislation must be based on a specific grant of law-making power (known as a 'legal base' or as a 'competence') in the Treaties. Each legal base will specify the type(s) of legislation that may be made under it (ie, whether Regulation or only Directives may be adopted) and the law-making procedure that must be followed. A typical example is Article 94 EC. This provides as follows:

> The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Thus, under this provision the Council may adopt Directives (but not Regulations), but only where it does so unanimously (rather than by qualified majority voting). It must consult the European Parliament, but the European Parliament is not given any formal power to amend the Council's legislation, and so forth.

Law-making procedures in the European Union are notoriously complex. Chalmers *et al* report that 'it is possible to identify twenty-two different legislative procedures in the EU' (p 144). The vast majority of measures, however, are

enacted through one of three different means: (a) where the Council legislates without consulting the European Parliament, (b) consultation procedure, or (c) co-decision procedure. Each of these will now be outlined. The first of these procedures tends now to be used only in fields which are politically sensitive for the Member States, such as emergency measures in immigration law, or where the legislation is performing an implementing role.

Consultation procedure, now of reduced application but still used in a number of important areas (such as agriculture), consists of three main stages: the Commission submits a proposal to the Council; the Council consults the European Parliament (and, in some cases, also the Economic and Social Committee or the Committee of the Regions); the Council adopts the measure, either unanimously or through QMV.

Co-decision procedure is, as was noted above, the only legislative procedure in which the European Parliament is conceived as being an equal partner with the Council. This procedure was added at Maastricht (see now Art 251 EC). The fields in which co-decision is used were extended by the Treaties of Amsterdam and Nice and it is now the most commonly used procedure, applicable to most of the cases in which Council decisions are taken by qualified majority. In co-decision the Commission submits its proposal for legislation to both the Council and the European Parliament. The Council, having obtained the opinion of the Parliament on the proposal, may adopt the proposed act by qualified majority if the Parliament's opinion does not include any amendments, or if the Council approves all the amendments proposed. Otherwise the Council adopts a reasoned 'common position', which is communicated to the Parliament. This initiates the so-called 'second reading' of the proposed measure. If within three months the Parliament approves the common position or has taken no decision, the act is deemed to have been adopted in accordance with the common position. If the Parliament rejects the common position by an absolute majority of its members, the act is not adopted. If, on the other hand, the Parliament proposes amendments to the common position (again by an absolute majority of its members), the Commission gives its opinion on these before they are considered by the Council. If the Council approves all the amendments by a qualified majority (but unanimity is required for amendments not supported by the Commission) the act is deemed to have been adopted as amended. If the Council does not approve the amendments a meeting of the Conciliation Committee is convened. The Conciliation Committee, on which the Council and the Parliament are equally represented, attempts, with the aid of the Commission, to reach agreement on a joint text (by a qualified majority of the Council's representatives and a majority of the representatives of the Parliament). If the Committee fails in this (which rarely happens), the proposed act is not adopted. In a 'third reading', a joint text approved by the Committee may be adopted by the Parliament (by an absolute majority of the votes cast) and the Council (by a qualified majority), but if either of the two institutions fails to approve it within six weeks, it is deemed

not to have been adopted. This is a procedure, then, in which the Parliament is engaged with the Council in a joint legislative process and has, in effect, a veto on the adoption of proposed measures.

(c) Principles of European law: supremacy, direct and indirect effect and state liability

While the institutional structure and law-making powers of the European Union are undoubtedly important, in our account of the European Union we have yet to see just why the United Kingdom's membership of it has had such a significant impact on the British constitution. This is because the heart of the matter concerns not the institutions themselves, but certain principles of EU law that have been developed by the European Court of Justice (ECJ) in its case law. It is to these principles that we now turn. This section outlines what the principles are; the next section discusses how the United Kingdom Parliament and the domestic courts have sought to grapple with and accommodate them. There are three main issues to consider – supremacy, direct and indirect effect and state liability.

(i) Supremacy

In this context supremacy concerns the relationship between EU law and national law. Suppose that a provision of EU law provides that *x* should be the law, whereas a provision of British, German or Polish law provides that *y* should be the law. In the event that *x* and *y* are mutually incompatible, which should prevail? Surprisingly, perhaps, the Treaties themselves are silent on this question. The Court of Justice first declared what it considered the right answer to be in 1964, in one of its most significant constitutional decisions to date.

Case 6/64 *Costa v ENEL* [1964] ECR 585 (ECJ)

European Court of Justice: . . . By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot

therefore be inconsistent with that legal system. The executive force of community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . .

[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

The doctrine of supremacy, regarded as 'absolutely fundamental for the maintenance and survival of the Communities' legal order' (C Timmermans in R Jansen *et al* (eds), *European Ambitions of the National Judiciary* (1997), p 35), has been many times reaffirmed by the Court of Justice, with no mitigation of its rigour. National legal provisions of whatever order (even if part of the constitution of a Member State) must yield precedence to Community law and, to the extent of any conflict with it, must be treated as inapplicable (see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125). This is so even if the national law is of more recent date than the Community rule with which it conflicts. The *Simmenthal* case was another landmark in the evolution of this doctrine.

Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 (ECJ)

The Simmenthal company had been charged a fee for a public health inspection of beef which it had imported into Italy from France. The company reclaimed the fee in an Italian magistrate's court on the ground that its imposition was contrary to provisions of Community law on the free movement of goods. This contention was upheld by the European Court of Justice on a reference made to it by the Italian court. The Italian authorities then raised a new argument: the Italian law providing for the fee had been enacted *after* the relevant Community provisions, and although under Italian law an enactment could be held invalid if it conflicted with prior Treaty obligations, only the Italian Constitutional Court had jurisdiction to give such a ruling; in the meantime other courts must give effect to the enactment. The Italian magistrate then made a second reference to the European Court, for a ruling on this question. In the course of its judgment the Court of Justice restated the principle of the supremacy of Community law as follows (emphasis added).

European Court of Justice: . . . [R]ules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.

These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.

This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.

Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures *not only by their entry into force render automatically inapplicable any conflicting provision of current national law but* – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – *also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.*

Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community . . .

It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, *whether prior or subsequent to the Community rule.*

Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

. . .[A] national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

The challenge posed by the principle of supremacy, as articulated by the Court of Justice in *Costa* and *Simmenthal*, is clear. In the UK context the challenge is how the principle may be reconciled with the British constitutional doctrine of the sovereignty of Parliament. This doctrine, discussed in chapter 2, provides of course that the United Kingdom Parliament may make or unmake any law whatever, and that no court may override or set aside an Act of Parliament. The Court of Justice, however, ruled in *Simmenthal* that it would

be *invalid* for Member States to adopt measures that are incompatible with Community provisions. This, then, is the first challenge posed by the United Kingdom's membership of the European Union: does its once cherished notion of the sovereignty of Parliament survive? Parliament's and the courts' responses to this challenge are discussed in the next section of this chapter.

(It should not be thought that the United Kingdom is the only Member State of the European Union to have experienced significant constitutional difficulties in accepting or accommodating the ECJ's controversial case law on supremacy. For similar difficulties experienced by a number of other Member States, see Chalmers *et al* (2006), pp 196–209.)

(ii) Direct and indirect effect

While it may be the clash between the principle of supremacy and the sovereignty of Parliament that has caught most of the headlines, it is in the doctrine of direct effect that the true radicalism of Community law lies. If a provision of Community law has direct effect, this means that it may be invoked and relied upon by a litigant in proceedings before a national court and that the national court must give due effect to it. Thus, making Community law directly effective is a means by which it may be enforced by national courts. Like supremacy, direct effect is not expressly provided for in the Treaties, but is the creation of the case law of the Court of Justice. Here it is *Van Gend en Loos*, arguably the most important case in the Court's history, that is central.

Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1

The question for the Court of Justice was whether as a matter of Community law an importer (Van Gend en Loos) could plead before a Dutch court that certain provisions of Community law had been infringed, and more specifically whether the importer could as a matter of Community law claim the protection of rights conferred upon it by Community law, rights which the national court was under a duty to protect. The relevant provision of Community law was Article 12 EEC (now Article 25 EC), which provides that 'customs duties on imports and exports and charges having equivalent effect shall be prohibited between the Member States'.

European Court of Justice: . . . To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to

governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under [Article 234 EC, the preliminary reference procedure], the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that [the Treaty], which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'foundations of the Community'. It is applied and explained by [Article 25].

The wording of [Article 25] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of [Article 25] does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation . . .

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, [Article 25] must be interpreted as producing direct effects and creating individual rights which national courts must protect.

In the view of the Court of Justice, then, Community law is not simply a supranational body of law but is to enter the legal orders of the Member States and be enforced by the national courts as well as by the Court of Justice itself. The English Court of Appeal judge, Lord Denning, was quick to see the radicalism of this as he gave typically vivid expression of the impact of direct effect

in the course of his judgment in *Bulmer v Bollinger* [1974] Ch 401, 418–19, a case decided soon after the United Kingdom's accession to the Communities:

> [W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute. . . . Any rights or obligations created by the Treaty are to be given legal effect in England [*sic*] without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligations, and we must give effect to them.

It is to be noted that, according to *Van Gend en Loos*, not all provisions of Community law are directly effective. On the contrary, only those provisions which are clear, unconditional and negative may have direct effect. These conditions have been substantially liberalised in subsequent case law, however. The requirement that the provision be negative was dropped in Case 2/74 *Reyners v Belgium* [1974] ECR 631 and the requirement that the provision must be unconditional and not in need of national implementing legislation was dropped in Case 43/75 *Defrenne v Sabena* [1976] ECR 455. Most controversial has been the (partial) extension of the doctrine of direct effect to Directives. In Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, the Court of Justice ruled as follows:

> It would be incompatible with the binding effect attributed to a Directive by Article [249 EC] to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by Directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article [234 EC], which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals.

The reasoning employed here is neither particularly full nor convincing, and the judgment in *Van Duyn* was greeted with such hostility that the Court of Justice had to rethink its justification for extending direct effect to Directives. This it did in Case 148/78 *Ratti* [1979] ECR 1629, where the Court constructed an 'estoppel' argument as the basis for allowing Directives, in certain circumstances, to have direct effect. The argument runs as follows: Directives impose a duty on Member States to adopt the appropriate implementing measures by

a certain date; it would be wrong for Member States to be able to rely on and gain advantage through their failure to carry out this obligation; they are thus 'estopped' or prevented from denying the direct effect of Directives once the time limit for their implementation into national law has expired.

This reasoning has had an extremely important consequence: namely that Directives may have direct effect and may be relied on by litigants in proceedings in national courts *where those proceedings are brought against a public authority of a Member State*, but not otherwise. It is the *Member State* that is estopped from gaining an advantage by failing to implement a Directive, not anyone else. Thus, an important difference has emerged between the direct effect of Directives and the direct effect of Treaty provisions and Regulations. Whereas the latter may be directly effective notwithstanding the identity of the party against whom legal proceedings are brought in the national court, Directives may be relied upon only where the party proceeded against is a public authority. This is called 'vertical' direct effect. Treaty provisions and Regulations may be both vertically and horizontally directly effective, but Directives may be only vertically directly effective. Thus, in Case 152/84 *Marshall v Southampton and SW Hampshire Area Health Authority* [1986] ECR 723 Marshall sought to rely on and enforce a provision of the Equal Treatment Directive (76/207/EEC) against her employer. She was successful on the basis that her employer (the health authority) was a public authority. But had her employer been a private sector employer, she would have been unsuccessful. This distinction has been repeatedly and roundly criticised, but it remains the law (see Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325; see further Chalmers *et al* (2006), pp 371–9).

Ever since *Marshall* the Court of Justice has tried to find a number of other ways of giving greater effect to Directives in the legal orders of the Member States, without overruling its decisions that Directives are incapable of having full (horizontal) direct effect. Several of these alternative means have had profound constitutional consequences. Here we shall consider three: the extension of the notion of the state, the doctrine of indirect effect and the development of state liability. If Directives can have direct effect against the state, or against public authorities, it clearly becomes critical to know what is and what is not a public authority. The Court of Justice showed that, for the purposes of Community law, 'public authority' could have a very broad meaning. In Case C-188/89 *Foster v British Gas* [1990] ECR I-3313, for example, the Court ruled that the pre-privatised British Gas could be regarded as a public authority. Rather than attempting to construct a pan-European definition, the Court ruled that this was a matter best left for national courts to determine. Subsequently, in *Doughty v Rolls Royce* [1992] 1 CMLR 1045 the Court of Appeal ruled that Rolls Royce was not a public authority for these purposes despite being (at that time) wholly owned by the Crown; in *Griffin v South West Water Services* [1995] IRLR 15 it was held that a Directive could be enforced against a privatised utility operating under conditions imposed by the state; and in *NUT v St Mary's Church of England Junior*

School [1997] 3 CMLR 630 it was held that a Church of England aided school could be regarded as an emanation of the state and that, as such, the terms of a Directive could be enforced against it.

More important, perhaps, is the doctrine of indirect effect, otherwise known as the 'duty of consistent interpretation'. This doctrine amounts to a duty, imposed by the Court of Justice on national courts, in certain circumstances to interpret national law in a particular way. In Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 the Court of Justice ruled, using Article 10 EC as a key part of its reasoning (see above, p 283), that:

> in applying national law and in particular the provisions of national law specifically introduced in order to implement [a] Directive, national courts are required to interpret their national law in the light of the wording and purpose of the Directive.

Von Colson concerned the interpretation of a piece of German law that had been passed in order to give effect to a Directive. To start with it appeared that the duty of consistent interpretation applied only in the context of interpreting national law whose purpose was the implementation of a Directive, but in Case C-106/89 *Marleasing v La Comercial Internacionale de Alimentacion* [1990] ECR I-4135 the Court of Justice broadened the reach of the duty, ruling that:

> in applying national law, *whether the provisions in question were adopted before or after the Directive*, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the Directive in order to achieve the result pursued by the latter (emphasis added).

As we shall see in more detail in the next section of this chapter, courts in the United Kingdom have had to grapple with this duty on a number of occasions. Like the (rather similar) duty of consistent interpretation now imposed by section 3 of the Human Rights Act 1998, the operation of this duty has caused the courts to reconsider the ways in which Parliament's legislation should be interpreted and applied, leading to results that Parliament would not perhaps have intended, and leading also to a number of commentators raising further questions about the future of parliamentary sovereignty (see above, pp 62–6, and see further below, pp 335–9).

(iii) State liability

The third and arguably most radical way in which the Court of Justice has sought to give greater effect to Directives is through the doctrine of state liability. According to this doctrine Member States will in certain circumstances be liable in damages to individuals who suffer loss as a result of the Member State's failure properly to implement a Directive into national law. The leading authority on state liability in the context of Directives remains the *Francovich* case.

Joined Cases C-6 and 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357 (ECJ)

European Court of Justice: . . . It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions [citing *Van Gend en Loos* and *Costa v ENEL*].

Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals [citing *Simmenthal*].

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

A further basis for the obligation of Member States to make good such loss and damage is to be found in Article [10 EC], under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law . . .

It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article [249 EC] to take all the measures necessary to achieve the result prescribed by a Directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

> The first of those conditions is that the result prescribed by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.
>
> Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.
>
> Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law . . .
>
> Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

Since the *Francovich* decision the principle of state liability has been broadened. Originally a means of giving greater domestic legal effects to Directives, in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur v Germany* and *R v Secretary of State for Transport, ex p Factortame Ltd (No 3)* [1996] ECR I-1029 the Court of Justice ruled that Member States could be held liable in damages for a variety of breaches of EU law, including, significantly for our purposes, breaches attributable to national legislation:

> the Court held in *Francovich* that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.
>
> It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach . . .
>
> The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.

Member States would be liable where the following three conditions were met:

> In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

State liability, while it is a doctrine of EU law, is principally for the national courts of the Member States to enforce. The Court of Justice had the following to say about the sorts of factors that national courts could take into account:

> The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.
>
> On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

The doctrine of state liability was further extended in Case C-224/01 *Köbler v Austria* [2003] ECR I-10239, where the Court of Justice controversially ruled that decisions of national courts that fail to give sufficient weight to matters of EU law could, in principle, incur state liability (for comment, see Scott and Barber (2004) 120 *LQR* 403).

Courts in the United Kingdom have applied the doctrine of state liability in a number of cases, including Case C-392/93 *R v HM Treasury, ex p British Telecommunications plc* [1996] ECR I-1631 (where the breach of EU law was held not be sufficiently serious to merit state liability) and *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524 (where the opposite conclusion was reached).

(See further Harlow, '*Francovich* and the problem of the disobedient State' (1996) 2 *ELJ* 199 and Craig, 'Once more unto the breach: the Community, the State and damages liability' (1997) 113 *LQR* 67.)

(d) EU law in the United Kingdom

(i) Impact of EU membership on government and Parliament

When ministers of the Crown exercised the royal prerogative in concluding the Treaty of Accession of the United Kingdom to the European Communities in 1972, this act produced no effects in the law of the United Kingdom. British courts act upon a dualist theory of the relation between international law and municipal (national) law, in holding that treaties can bring about changes in the law of the United Kingdom only through the intervention of Parliament (see *Attorney General for Canada v Attorney General for Ontario* [1937] AC 326, 347). It was therefore necessary for Parliament to enact a statute which would make the changes in the law required by United Kingdom membership of the European Communities. Not only would existing Community law have to be incorporated

as a whole but provision would also have to be made for future Community legislation to take effect in the United Kingdom in accordance with the Treaties.

Both these commitments were implemented by the European Communities Act 1972 – an enactment effecting a radical transformation of the legal system of the United Kingdom. Indeed, Laws LJ suggested in *Thoburn v Sunderland City Council* [2003] QB 151 that 'It may be there has never been a statute having such profound effects on so many dimensions of our daily lives'. The European Communities Bill introduced in Parliament in 1972 was given a second reading in the House of Commons by a majority of eight votes after the Prime Minister (Edward Heath) had announced that the vote would be regarded as one of confidence in the Government. Although strongly contested, the bill was passed by both Houses without a single amendment. So Parliament exercised its sovereignty, and the European Communities Act 1972 came into force on 1 January 1973.

Changes and additions to the EC Treaty made by the Single European Act, the Maastricht Treaty and the Treaties of Amsterdam and Nice were given the effect of law in the United Kingdom respectively by the European Communities (Amendment) Acts of 1986, 1993, 1998 and 2002.

Few institutional changes have been made in the United Kingdom in consequence of accession to the Communities. It has been remarked that 'The new challenges posed by EC/EU membership have simply been absorbed into the existing institutions, and into the characteristic methods, procedures and culture of Whitehall' (Bulmer and Burch, 'Organising for Europe' (1998) 76 *Pub Adm* 601, 613). No new government department has been created to handle European Union affairs, for these affect the work of most departments – principally the Foreign and Commonwealth Office, the Treasury, and the departments concerned with agriculture, trade and industry, employment, the environment and transport. Some thousands of officials in these departments – the greatest number in the Department of Environment, Food and Rural Affairs – are wholly or mainly engaged in work related to the European Community. 'We are an entirely European Ministry', a Minister of Agriculture remarked (before the amalgamation of agricultural and environmental affairs), 'running European policy in Britain' (*First Report, Environment Committee*, HC 55 of 1991–92, Evidence, Q 112).

In the Foreign and Commonwealth Office, which has the main responsibility for policy on the European Union, a Minister of State has charge, under the Secretary of State, of EU matters. In most other departments responsibility for European matters is divided between several ministers. A Ministerial Committee on European Policy, under the chairmanship of the Secretary of State for Foreign and Commonwealth Affairs, has as its terms of reference: 'To determine the United Kingdom's policies on European Union issues, and to oversee the United Kingdom's relations with other Member States and principal partners of the European Union'. There is also a Ministerial Committee on European Union Strategy, chaired by the Prime Minister. The European

Secretariat in the Cabinet Office provides the machinery for coordinating the work of government departments relating to the European Union, and gives advice on European matters to the Prime Minister. (See further Daintith and Page, *The Executive in the Constitution* (1999), pp 316–19; Bulmer and Burch, 'The Europeanisation of UK government' (2005) 83 *Pub Adm* 861.)

Parliament has undertaken a scrutinising role in respect of EU legislation, setting up for this purpose a new committee of each House. The House of Commons European Scrutiny Committee, according to its terms of reference, 'assesses the legal and/or political importance of each EU document, decides which EU documents are debated, monitors the activities of UK Ministers in the Council, and keeps legal, procedural and institutional developments in the EU under review'. As the Committee states on its homepage (accessible via www.parliament.uk):

> The committee's primary role is to assess the political and legal importance of each EU document (about 1,100 per year) and to determine which are debated. The committee receives an explanatory memorandum on each document from the relevant minister. All documents deemed politically or legally important are discussed in the committee's weekly reports. Debates recommended by the committee take place either in a European Standing Committee or (more rarely) on the Floor of the House. Under [a House of Commons] resolution, ministers should not agree to proposals which the committee has not cleared or which are waiting for debate. The committee also monitors business in the Council . . . and sometimes conducts general inquiries into legal, procedural or institutional developments in the EU.

The House of Lords European Union Select Committee has the following terms of reference: 'to consider European Union documents and other matters relating to the EU'. This may sound bland, but the House of Lords committee is both busy and exceptionally valuable. It produces a large number of high quality reports on a broad variety of matters pertaining to the European Union. To take a typical year as an example, in 2005–06 it produced reports on current developments in European foreign policy, the criminal law competences of the EU, the Commission's policy on 'sustainable, competitive and secure energy', the Services Directive, developments in European defence policy, the EU's budget, relations between the EU and Africa, nuclear safety, consumer credit, illegal migrants, effective regulation, the 'European Arrest Warrant', the EU's strategy for jobs and growth and the proposed European Institute for Gender Equality, as well as numerous other matters.

Since 1972 the process of integration of the United Kingdom into the Communities has continued, the 'incoming tide' of Community law flowing strongly up our rivers (as Lord Denning conceived of it in *Bulmer v Bollinger*, above). A Department of Trade and Industry *Review of the Implementation and Enforcement of EC Law in the UK* (1993) estimated that 'over a third of existing UK legislation arises from an obligation to implement EC law'. This estimate

seems to have been too high (see Page, 'The impact of European legislation on British public policy-making' (1998) 76 *Pub Adm* 803). Nevertheless that impact has been considerable in some fields: a former Secretary of State for the Environment, John Gummer, remarked that 'something like 80 per cent of our environmental legislation is now decided collectively in Brussels' (see *Third Report, Environment Committee*, HC 163-I of 1995–96, para 42).

(ii) European Communities Act 1972

The provisions of the European Communities Act 1972 to be discussed below are set out here for reference:

> 2. (1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.
>
> (2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision –
>
> (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;
>
> and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.
>
> In this subsection 'designated Minister or department' means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council. . . .
>
> (4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act, Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

> 3. (1) For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto).

We have seen that the European Communities Act had to provide for the application in the United Kingdom of Community law – both the law already existing and that which would issue in the future from the Community institutions. Some specific alterations of UK law were immediately necessary and these were made by sections 4–12 of the Act; for example, section 9(1) modified the doctrine of ultra vires in company law to conform to a Community Directive of 1968. For the rest, the existing Community law to be given effect in the United Kingdom was incorporated *en bloc* by section 2(1) of the Act.

The rights and remedies etc to which section 2(1) refers are those that are required by Community law to be given legal effect 'without further enactment' – that is, are to be directly enforceable in the courts of the Member States. The subsection means that all directly applicable and directly effective Community law is to be recognised and enforced in the United Kingdom; by this provision the Act adopted at a stroke almost the entire existing corpus of Community Regulations together with the directly effective provisions of Directives, Decisions and the Treaties. As a result some 1,500 Community instruments came into force in the United Kingdom on 1 January 1973.

It will be noticed that the law made applicable by section 2(1) keeps its separate identity as Community law: it is not made a part of English (or Scottish) law but is to be enforced together with that law in the courts of the United Kingdom. British courts regularly act upon section 2(1) of the European Communities Act in giving effect to Community law. Once it is established – it may be by reference to the case law of the Court of Justice, in accordance with section 3(1) – that the Community provision in question is of the kind that produces direct effects, it is enforced accordingly. In *Bulmer v Bollinger* [1974] Ch 401, 419, Lord Denning, having referred to section 2(1), said:

> The statute is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in England [*sic*] without more ado.

What, however, was to be done about *future* Community legislation that was to be given direct effect in the United Kingdom? A Government White Paper of 1967 had drawn attention to the 'constitutional innovation' which would be necessary for 'the acceptance in advance as part of the law of the United Kingdom of provisions to be made in the future by instruments issued by the Community institutions – a situation for which there is no precedent in this

country' (*Legal and Constitutional Implications of United Kingdom Membership of the European Communities*, Cmnd 3301, para 22). The situation was the more unprecedented in that future Community legislation was not only to be accepted in advance, but was to be given that supremacy over domestic law which is a keystone of the Community's legal order.

The way was not taken of attempting to make an express transfer of legislative power from Parliament to the Community institutions. Rather, the subtle mechanism of section 2(1) was made to serve a dual purpose. For the subsection gives effect in the United Kingdom to what it terms 'enforceable Community rights' as 'from time to time' arising under the Treaties, and so covers prospective Community law as well as the law in existence when the Act came into force.

Neither was it thought right (or politic?) to make an express declaration in the Act of the primacy or supremacy of Community law over the laws of the United Kingdom. The words designed to achieve this are to be found oddly sandwiched in the middle of section 2(4), and read as follows:

> any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section.

The enormous effect of this provision is not immediately apparent on its face, but among 'the foregoing provisions' are those in subsection (1) giving the force of law in the United Kingdom to the 'enforceable Community rights' there defined. It is therefore intended that any enactment (including any Act of Parliament) is to be construed and have effect *subject to* Community law having force in the United Kingdom.

The same principle is impressed upon the judges by some bracketed words in section 3(1): it is there provided that any question of the validity, meaning or effect of Community law is to be decided by our courts 'in accordance with the principles laid down by and any relevant decision of the European Court'. That Court of Justice has, as we have seen, consistently upheld the precedence of Community law over national law.

The provisions we have considered are apt to ensure that Community law, of whatever date, that has legal force in the United Kingdom will override any inconsistent provisions in United Kingdom legislation enacted before 1 January 1973, when the European Communities Act came into force. This follows from the simple rule that the later Act (the European Communities Act) must prevail over any earlier enactment.

A more difficult problem arises if an Act of Parliament passed *after* 1 January 1973 should conflict with a provision of Community law (of whatever date). Here the simple rule mentioned above would give precedence to the Act of Parliament as the latest expression of Parliament's will, but the Community law doctrine of supremacy and the apparent intention of section 2(4) of the European Communities Act require the Community law to prevail. This conflict raises the question of the continuing sovereignty of Parliament. We shall see in the following section how the British courts have responded to it.

Community legislation (in particular Directives) will often call for implementing action by the national authorities. In the United Kingdom this is sometimes done, especially in important matters, by Act of Parliament: an example is the Data Protection Act 1998, passed to implement the Data Protection Directive (95/46/EC). More often subordinate legislation is the chosen method of implementation: section 2(2) of the European Communities Act authorises the making of Orders in Council or departmental regulations for this purpose. The power given is a wide one, for it is amplified by section 2(4) to include 'any such provision (of any such extent) as might be made by Act of Parliament', subject only to certain limitations in Schedule 2 to the Act. (These relate to taxation, retrospective legislation, sub-delegated legislation and the creation of new criminal offences.) It follows that Orders in Council or regulations made under section 2(2) can repeal or amend Acts of Parliament. This was done, for instance, when the Equal Pay (Amendment) Regulations 1983, S1 1983/1794, made by the Secretary of State for Employment under the authority of section 2(2), amended the Equal Pay Act 1970 so as to carry out the terms of the Equal Pay Directive (75/117/EEC) in accordance with the judgment of the Court of Justice in Case 61/81 *Commission v United Kingdom* (see above, p 288–90).

(iii) Impact of EU membership on questions of public law

Naturally, the United Kingdom's membership of the European Union has had a profound effect on the areas of substantive law over which the European Union has competence. Thus, British trade law, competition law, environmental protection law, labour law and discrimination law, to name just a few such areas, have been utterly transformed by virtue of our membership of the European Union. But the United Kingdom's membership of the European Union has also had a considerable impact on various matters of British constitutional law. In the remaining pages of this chapter, the European Union's impact on four areas of constitutional law will be examined. We start with the most famous: the challenge EU membership poses for the doctrine of the sovereignty of Parliament. We then consider the European Union's impact on statutory interpretation (particularly in light of the doctrine of indirect effect, or the duty of consistent interpretation) and, more briefly, the impact on judicial review and on the law of remedies.

Supremacy and sovereignty

It did not take long for English judges to acknowledge the supremacy of Community law. For example, Lord Hailsham said in *The Siskina* [1979] AC 210, 262:

> It is the duty of the courts here and in other Member States to give effect to Community law as they interpret it in preference to the municipal law of their own country over which *ex hypothesi* Community law prevails.

Community law is applied by British courts so as to override contrary provisions in laws made before the European Communities Act came into force on 1 January 1973. This was unhesitatingly acknowledged, for example, in *R v Henn* [1981] AC 850, *R v Goldstein* [1983] 1 All ER 434 and *WH Smith Do-It-All v Peterborough City Council* [1991] 1 QB 304. This aspect of the supremacy of Community law is consistent with the normal operation of United Kingdom statutes and is uncontroversial.

When a statute enacted after 1 January 1973 is in question, the court will strive to interpret the statute in such a way as to reconcile it with any relevant Community law in force in the United Kingdom. Such an approach is demanded by section 2(4) of the European Communities Act, by which enactments must be 'construed and have effect' subject to the application in the United Kingdom of directly effective Community law. We shall see that, by the use of novel and creative modes of interpretation, the courts have been able to resolve apparent inconsistencies between post-1972 United Kingdom statutes and Community instruments. In taking this course a court may claim to give due recognition both to the intentions of Parliament and to the obligation to accord priority to Community law. If such an interpretation of the statute proves impossible, however, the court has nevertheless to find the way of assuring to Community law its full force and effect.

In the following case the question arose of the relation between the Equal Pay Act 1970 – (as re-enacted with amendments by the Sex Discrimination Act 1975 *after* the European Communities Act had come into force) and Community law.

Macarthys Ltd v Smith [1979] 3 All ER 325 (CA)

Macarthys Ltd had employed Mr McCullough as their stockroom manager. Some time after he left, Mrs Smith was employed in the same position, with similar duties, at lower pay. An industrial tribunal held that she was entitled to be paid at the same rate as Mr McCullough, and the Employment Appeal Tribunal, with Phillips J presiding, affirmed that decision. Macarthys Ltd appealed.

Lord Denning MR: . . . The employers say that this case is not within the Equal Pay Act 1970. In order to be covered by that Act, the employers say that the woman and the man must be employed by the same employer on like work *at the same time*: whereas here Mrs Smith was employed on like work *in succession* to Mr McCullough and not at the same time as he.

To solve this problem I propose to turn first to the principle of equal pay contained in the EEC Treaty, for that takes priority even over our own statute.

The EEC Treaty

Article 119 of the EEC Treaty [as it then was: see now Article 141 EC] says:

> 'Each Member State shall . . . ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.'

That principle is part of our English law. It is directly applicable in England. So much so that, even if we had not passed any legislation on the point, our courts would have been bound to give effect to art 119. If a woman had complained to an industrial tribunal or to the High Court and proved that she was not receiving equal pay with a man for equal work, both the industrial tribunal and the court would have been bound to give her redress. . . .

In point of fact, however, the United Kingdom has passed legislation with the intention of giving effect to the principle of equal pay. It has done it by the Sex Discrimination Act 1975 and in particular by s 8 of that Act amending s 1 of the Equal Pay Act 1970. No doubt the Parliament of the United Kingdom thinks that it has fulfilled its obligations under the Treaty. But the European Commission take a different view. They think that our statutes do not go far enough.

What then is the position? Suppose that England passes legislation which contravenes the principle contained in the Treaty, or which is inconsistent with it, or fails properly to implement it. There is no doubt that the European Commission can report the United Kingdom to the European Court of Justice; and that court can require the United Kingdom to take the necessary measures to implement art 119. . . .

It is unnecessary, however, for these courts to wait until all that procedure has been gone through. Under s 2(1) and (4) of the European Communities Act 1972 the principles laid down in the Treaty are 'without further enactment' to be given legal effect in the United Kingdom; and have priority over 'any enactment passed or to be passed' by our Parliament. So we are entitled and I think bound to look at art 119 of the EEC Treaty because it is directly applicable here; and also any directive which is directly applicable here: see *Van Duyn v Home Office*. We should, I think, look to see what those provisions require about equal pay for men and women. Then we should look at our own legislation on the point, giving it, of course, full faith and credit, assuming that it does fully comply with the obligations under the Treaty. In construing our statute, we are entitled to look to the Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of s 2(1) and (4) of the European Communities Act 1972.

I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it *and says so in express terms* [emphasis added] then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation . . . Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty. In the present case I assume that the United Kingdom intended to fulfil its obligations under art 119. Has it done so?

Article 119

Article 119 is framed in European fashion. It enunciates a broad general principle and leaves the judges to work out the details. In contrast the Equal Pay Act is framed in English fashion. It states no general principle but lays down detailed specific rules for the courts to apply

(which, so some hold, the courts must interpret according to the actual language used) without resort to considerations of policy or principle.

Now consider art 119 in the context of our present problem. Take the simple case envisaged by Phillips J. A man who is a skilled technician working single-handed for a firm receives £1.50 an hour for his work. He leaves the employment. On the very next day he is replaced by a woman who is equally capable and who does exactly the same work as the man but, because she is a woman, she is only paid £1.25 an hour. That would be a clear case of discrimination on the ground of sex. It would, I think, be an infringement of the principle in art 119 which says 'that men and women should receive equal pay for equal work'. All the more so when you take into account the explanatory sentence in art 119 itself which says:

> 'Equal pay without discrimination based on sex means . . . that pay for work at time rates shall be the same for the same job'.

If you go further and consider the Council directive of 10th February 1975, it becomes plain beyond question:

> 'The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on ground of sex with regard to all aspects and conditions of remuneration'.

. . . In my opinion therefore art 119 is reasonably clear on the point; it applies not only to cases where the woman is employed on like work *at the same time* with a man in the same employment, but also when she is employed on like work in succession to a man, that is, in such close succession that it is just and reasonable to make a comparison between them. So much for art 119.

The Equal Pay Act 1970

Now I turn to our Act to see if that principle has been carried forward into our legislation. The relevant part of this Act was passed not in 1970 but in 1975 by s 8 of the Sex Discrimination Act 1975.

Section 1(2)(a)(i) of the Equal Pay Act 1970 introduces an 'equality clause' so as to put a woman on an equality with a man 'where the woman is employed on like work with a man in the same employment'. The question is whether the words 'at the same time' are to be read into that subsection so that it is confined to cases where the woman and the man are employed *at the same time* in the same employment.

After considering this and related provisions Lord Denning concluded that section 1(2)(a)(i) of the Equal Pay Act should *not* be read as if it included the words 'at the same time', but should be interpreted so as to apply to cases where a woman was employed on like work *in succession* to a man. He continued:

> So I would hold, in agreement with Phillips J, that both under the Treaty and under the statutes a woman should receive equal pay for equal work, not only when she is employed *at the same time* as the man, but also when she is employed at the same job *in succession* to him, that is, in such close succession that it is just and reasonable to make a comparison between them.

If I am wrong

Now my colleagues take a different view. They are of opinion that s 1(2)(a)(i) of the Equal Pay Act should be given its natural and ordinary meaning, and that is, they think, that it is confined to cases where the woman is employed *at the same time* as a man.

So on our statute, taken alone, they would allow the appeal and reject Mrs Smith's claim. My colleagues realise, however, that in this interpretation there may be a conflict between our statute and the EEC Treaty. As I understand their judgments, they would hold that if art 119 was clearly in favour of Mrs Smith it should be given priority over our own statute and Mrs Smith should succeed. But they feel that art 119 is not clear, and, being not clear, it is necessary to refer it to the European Court at Luxembourg for determination under art 177 of the Treaty [now Article 234 EC].

Conclusion

For myself I would be in favour of dismissing the appeal, because I agree with the decision of the Employment Appeal Tribunal. I have no doubt about the true interpretation of art 119.

But, as my colleagues think that art 119 is not clear on the point, I agree that reference should be made to the European Court at Luxembourg to resolve the uncertainty in that article.

Pending the decision of the European court, all further proceedings in the case will be stayed.

Lawton LJ: . . . In my judgment the grammatical construction of s 1(2) [of the Equal Pay Act] is consistent only with a comparison between a woman and a man in the same employment at the same time. The words, by the tenses used, look to the present and the future but not to the past. They are inconsistent with a comparison between a woman and a man, no longer in the same employment, who was doing her job before she got it. . . .

As the meaning of the words used in s 1(2) and (4) is clear, and no ambiguity, whether patent or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words. It is not permissible to read into the statute words which are not there or to look outside the Act, as counsel for Mrs Smith invited us to do and Phillips J did, to read the words used in a sense other than that of their ordinary meaning. . . .

What led Phillips J to construe s 1(2) and (4) of the Act so as to allow such a comparison were the provisions of art 119 of the EEC Treaty to which Lord Denning MR has referred for its full terms. In this court counsel on both sides have submitted that the meaning of this article is clear; but they have differed as to what that meaning is. Counsel for Mrs Smith has submitted that under art 119 a woman should receive the same pay as a man she follows in a job, unless there are factors, other than sex discrimination, which justify the difference. If this be right, art 119 says something different from what I adjudge to be the plain, unambiguous meaning of s 1(2) and (4) of the Act. When an Act and an article of the EEC Treaty are in conflict, which should this court follow? Counsel for Mrs Smith says the article, because s 2 of the European Communities Act 1972 so provides, as does European Community law.

. . . Counsel for the employers' submission as to the meaning of art 119 did not . . . convince me that when construed in accordance with the canons of construction as used in

> our court for finding out the meaning of statutes and deeds, its ambit was confined to men and women doing like or broadly similar work side by side at the same time. The part of the article which begins with the words 'Equal pay without discrimination based on sex' takes in para (a) 'the same work' and in para (b) 'the same job' as the bases of comparison. A woman may do 'the same work' or 'the same job' after a man as well as alongside a man. In my opinion there is some doubt whether art 119 applies to the facts of this case.
>
> We cannot, as counsel for the employers submitted, ignore art 119 and apply what I consider to be the plain meaning of the Act. The problem of the implementation of art 119 is not one for the EEC Commission to take up with the government of the United Kingdom and Northern Ireland, as counsel for the employers submitted it was. Article 119 gives rise to individual rights which our courts must protect. . . .
>
> Being in doubt as to the ambit of art 119 and being under an obligation arising both from the decisions of the European Court of Justice . . . and s 2 of the European Communities Act 1972 to apply that article in our courts, it seems to me that this is a situation to which art 177 of the EEC Treaty [now Article 234 EC] applies. I consider that a decision is necessary as to the construction of art 119 and I would request the European Court of Justice to give a ruling on it.

Cumming-Bruce LJ agreed with the reasoning and conclusion of Lawton LJ.

The case duly came before the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty (as it then was; now Article 234 EC). The European Court ruled that the principle of equal pay enshrined in Article 119 of the Treaty was not confined to situations in which men and women were employed contemporaneously by the same employer: see Case 129/79 *Macarthys Ltd v Smith* [1980] ECR 1275. In the light of this answer the employers conceded defeat when the case returned to the Court of Appeal: *Macarthys Ltd v Smith* [1981] QB 180. Lord Denning took the opportunity of saying (at 200):

> The majority of this court felt that article 119 was uncertain. So this court referred the problem to the European Court at Luxembourg. We have now been provided with the decision of that court. It is important now to declare – and it must be made plain – that the provisions of article 119 of the EEC Treaty take priority over anything in our English statute on equal pay which is inconsistent with article 119. That priority is given by our own law. It is given by the European Communities Act 1972 itself. Community law is now part of our law: and, whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.

Macarthys Ltd v Smith was not a case in which an English statutory provision was deprived of its effect by an overriding Community law: rather the Community law extended to employees a right to equal pay in circumstances which fell outside the scope of the English statute. Nevertheless, as the Court of Appeal recognised, there was an inconsistency between the English statute and Community law, and the court held unequivocally that the Community law had

'priority'. TRS Allan, drawing attention to Lord Denning's proposition that Parliament could override provisions of the EC Treaty if it stated 'in express terms' its intention to do so, comments as follows ('Parliamentary sovereignty: Lord Denning's dexterous revolution' (1983) 3 *OJLS* 22, 25):

> The attempt to entrench section 2(1) of the European Communities Act by means of section 2(4) has to some extent succeeded: the effect of the decision seems to be to impose a requirement of form (express wording) on future legislation designed to override Community law. In short, Parliament in 1972 accomplished the impossible and (to a degree) bound its successors.

The *Factortame* saga

As Allan's comment suggests, questions of sovereignty pervaded the judgment in *Macarthys Ltd v Smith* even if that case did not confront them squarely. That confrontation came a decade later, with the *Factortame* series of cases, to which we now turn.

The background is as follows. The Council of Ministers had fixed national quotas of allowable catches of fish by the fishing fleets of the Member States. The United Kingdom Parliament enacted the Merchant Shipping Act 1988, Part II of which specified requirements for the registration of fishing vessels as British (whose catches would then count as part of the British quota). The Act stipulated that only British-owned vessels managed and controlled from within the United Kingdom could be registered as British fishing vessels. In substance, a vessel would be 'British-owned' only if the owners (or shareholders of corporate owners) were British citizens and were resident and domiciled in the United Kingdom. Regulations made by the Secretary of State under the Act brought this scheme into operation and as a result ninety-five fishing vessels, previously registered as British under an Act of 1894 but managed and controlled from Spain or owned by Spanish nationals or companies, would not qualify for registration under the 1988 Act. The owners of these vessels sought judicial review, seeking a declaration that the 1988 legislation should not apply to them, on the ground that it denied their rights under directly enforceable provisions of Community law.

The Divisional Court decided to obtain a preliminary ruling from the European Court of Justice under (what is now) Article 234 EC on the questions of Community law arising in the case. Since there would be a delay of two years before the ruling of the Court of Justice was given, and the owners of the fishing vessels would suffer severe hardship if obliged to refrain from fishing during that time, the Divisional Court granted them interim relief, ordering that Part II of the 1988 Act and the Regulations should be 'disapplied' and that the Secretary of State should be restrained from enforcing the legislation pending final judgment in the case.

In *R v Secretary of State for Transport, ex p Factortame Ltd* the Court of Appeal ([1989] 2 CMLR 353) and then the House of Lords ([1990] 2 AC 85) held that the Divisional Court had had no power, as a matter of *English* law,

to make an interim order in such terms. This was for two reasons. In the words of Lord Bridge, the first was that:

> An order granting the applicants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law . . . not to be the law until some uncertain future date . . . [T]he effect of [such] interim relief would be to [confer] upon [the applicants] rights directly contrary to Parliament's sovereign will.

The second reason was more technical. It was that, as the law then stood, there was simply no such thing in English law as an interim injunction against the Crown, and this was precisely the remedy which the Divisional Court had granted (the respondent in the case, the Secretary of State for Transport, being an officer of the Crown). There was, at the time, no such thing as an interim injunction against the Crown because section 21(2) of the Crown Proceedings Act 1947 provides that 'The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown'. (The interpretation of this provision was subsequently changed in *M v Home Office* [1994] 1 AC 377 to exclude judicial review proceedings from its scope, judicial review proceedings being public law proceedings rather than civil proceedings. See above, pp 89–93.)

Having decided that there was no such remedy in English law, the House of Lords then went on to consider whether an appropriate interim remedy might be available to the applicants *as a matter of Community law*. After all, it was their rights in Community law which the applicants argued had been violated. Might Community law not be expected to say something about how those rights could be judicially protected? Their Lordships decided that Community law on the matter was unsettled and accordingly sent a second reference to the Court of Justice under Article 234 EC.

In the meantime another actor had entered the stage. The European Commission brought an action in the Court of Justice for a declaration under (what is now) Article 226 EC that in imposing the nationality requirements in Part II of the Merchant Shipping Act 1988, the United Kingdom had failed in its obligations under the EC Treaty. In Case 246/89R *Commission v United Kingdom* [1989] ECR 3125 the Court of Justice made an interim order that, pending the delivery of its judgment in the action for a declaration, the United Kingdom was to suspend the application of the nationality requirements as regards the nationals of other Member States. The United Kingdom Government complied with this ruling: see the Merchant Shipping Act 1988 (Amendment) Order 1989, S1 1989/2006. In the debate in the House of Commons on a motion to approve the Order, MPs expressed their concern about the implications for parliamentary sovereignty, one of them seeing the Order as 'an historic surrender of some constitutional importance' (Mr Jonathan Aitken). The Solicitor General said in reply: 'This case involves no erosion of sovereignty over and above that which we accepted in 1972–73'.

When the question of interim relief referred to it by the House of Lords came before the Court of Justice, the ECJ held that a national court was obliged to set aside provisions of domestic law which might prevent, even temporarily, Community rights from having full force and effect (see Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] ECR I-2433). Accordingly:

> a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

The House of Lords, when the case returned to it, obliged now to disregard obstacles to interim relief under English law, granted an injunction against the Secretary of State, requiring him to suspend the application of the requirements of British residence and domicile in the Merchant Shipping Act to nationals of other Member States: *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603. (The nationality requirements had already been suspended by Order in Council: see above.) In this profoundly important decision, the House of Lords acknowledged that its obligation to comply with a principle of Community law as affirmed by the European Court of Justice required it to deny effect to the terms of an Act of Parliament. In the result the Merchant Shipping Act 1988 yielded to the superior force of an earlier statute, the European Communities Act 1972. As Craig sees it (in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999), p 332) the House of Lords was seeking by its ruling in *Factortame (No 2)* 'to bring constitutional doctrine up to date with political reality'. In the course of his opinion in *Factortame (No 2)* Lord Bridge made the following observations:

> **Lord Bridge of Harwich:** My Lords, when this appeal first came before the House last year . . . your Lordships held that, as a matter of English law, the courts had no jurisdiction to grant interim relief in terms which would involve either overturning an English statute in advance of any decision by the European Court of Justice that the statute infringed Community law or granting an injunction against the Crown. It then became necessary to seek a preliminary ruling from the European Court of Justice as to whether Community law itself invested us with such jurisdiction . . .
>
> . . . [We later] received the judgment of the European Court of Justice (Case C 213/89), replying to the questions we had posed and affirming that we had jurisdiction, in the circumstances postulated, to grant interim relief for the protection of directly enforceable rights under Community law and that no limitation on our jurisdiction imposed by any rule of national law could stand as the sole obstacle to preclude the grant of such relief. In the light of this judgment we . . .unanimously decided that relief should be granted . . .
>
> Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of Member States to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that

this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based on a misconception. If the supremacy within the European Community of Community law over the national law of Member States was not always inherent in the E.E.C. Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council Directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

We shall come back to consider Lord Bridge's comments in detail in a moment. First, let us finish the saga. In the next chapter of the *Factortame* annals, the Court of Justice gave its ruling on the original reference from the Divisional Court, holding that nationality, residence and domicile requirements such as were stipulated by the Merchant Shipping Act 1988 were contrary to Community law (in particular Article 43 EC on freedom of establishment): Case C-221/89 *R v Secretary of State for Transport, ex p Factortame (No 3)* [1992] QB 680. The Divisional Court thereupon granted a declaration to that effect, and the Government duly took the necessary steps to bring domestic law into conformity with the judgment: see the Merchant Shipping (Registration, etc) Act 1993, section 3 and the Merchant Shipping (Registration of Ships) Regulations 1993, S1 1993/3138. The sequel to the ECJ's ruling that the UK legislation was in breach of Community law was a claim for damages against the United Kingdom Government brought by the Spanish trawler owners who had, during the course of the *Factortame* litigation, been deprived of their right to fish in British waters. It was held by the House of Lords, after yet another reference to the Court of Justice, that the claimants were entitled to damages: see *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)* [2000] 1 AC 524.

It was clear after *Factortame (No 2)* that British courts would no longer necessarily be inhibited from suspending the application of a statute when such action was required to give effective interim protection to Community rights. Moreover, the *Factortame* litigation indicated that a ruling by the Court of Justice that provisions in a United Kingdom statute were incompatible with Community law would, where possible, be acted upon by British courts in granting declaratory relief to a party adversely affected by the application of those provisions. This was reinforced by the decision of the House of Lords in

R v Secretary of State for Employment, ex p Equal Opportunities Commission [1995] 1 AC 1. In this case the Equal Opportunities Commission (EOC) objected to provisions of the Employment Protection (Consolidation) Act 1978 on the ground that they were contrary to Community law. No decision had been taken by the Secretary of State such as might have been open to review, but the EOC mounted a challenge, in proceedings for judicial review, directed to the statutory provisions themselves. The House of Lords granted declarations that the provisions in question were incompatible with (what is now) Article 141 EC and with the Equal Pay and Equal Treatment Directives. In response to this ruling the Act was amended by delegated legislation so as to remove the incompatibility (see on this case Harlow and Szyszczak (1995) 32 *CML Rev* 641).

What are we to make of the *Factortame* story and, in particular, of the decision of the House of Lords in *Factortame (No 2)*? Academic opinion is sharply divided on how the decision should be interpreted and, especially, on what it means for the sovereignty of Parliament. There are perhaps two main camps, which may be dubbed the 'revolution view' and the 'evolution view'. In the former (perhaps we should say, leading the former) is the late Sir William Wade, who with his customary clarity and robustness, argued as follows ('Sovereignty: revolution or evolution?' (1996) 112 *LQR* 568):

> When in the second *Factortame* case the House of Lords granted an injunction to forbid a minister from obeying an Act of Parliament, and the novel term 'disapplied' had to be invented to describe the fate of the Act, it was natural to suppose that something drastic had happened to the traditional doctrine of Parliamentary sovereignty. The established rule about conflicting Acts of Parliament, namely that the later Act must prevail, was evidently violated, since the later Act in this case was the Merchant Shipping Act 1988, yet it was disapplied under the European Communities Act 1972. The Act of 1972 had provided for the subordination of English law to European Community law by section 2(4), enacting that European Community law was to prevail over Acts of Parliament 'passed or to be passed'. When that Act was nevertheless held to prevail it seemed to be fair comment to characterise this, at least in a technical sense, as a constitutional revolution. The Parliament of 1972 had succeeded in binding the Parliament of 1988 and restricting its sovereignty, something that was supposed to be constitutionally impossible. It is obvious that sovereignty belongs to the Parliament of the day and that, if it could be fettered by earlier legislation, the Parliament of the day would cease to be sovereign.

For Wade, a constitutional revolution had occurred because the House of Lords had recognised that the result of the European Communities Act 1972 was that future Parliaments were, unless and until they expressly repealed it, bound by its terms. Parliament remained sovereign in the sense that it retained the power expressly to repeal the 1972 Act (thereby withdrawing the United Kingdom from the European Union), but for as long as the United Kingdom continued to be a member of the European Union on the terms set out in the 1972 Act, the United Kingdom Parliament remained tied to the terms of that statute.

An alternative, more evolutionary, set of views has been suggested by a variety of other commentators, including Sir John Laws and TRS Allan. Sir John Laws has argued as follows ('Law and democracy' [1995] *PL* 72, 89):

> The effect is that section 2(4) of the European Communities Act falls to be treated as establishing a rule of construction for later statutes, so that any such statute has to be read (whatever its words) as compatible with rights accorded by European Law. Sir William Wade regards this development as 'revolutionary', because in his view it represents an exception to the rule that Parliament cannot bind its successors. But I do not think that is right. It is elementary that Parliament possesses the power to repeal the European Communities Act in whole or in part (I leave aside the political realities); and the most that can be said, in my view, is that the House of Lords' acknowledgement of the force of European law means that the rule of construction implanted by section 2(4) cannot be abrogated by an implied repeal. Express words would be required. That, however, is hardly revolutionary: there are a number of areas where a particular statutory construction is only likely to be accepted by the courts if it is vouchsafed by express provision [as where a statute is said to exact taxes, impose criminal liability or to have retroactive effect]. Although *Factortame* and *EOC* undoubtedly demonstrate what may be described as a devolution of legislative power to Europe, it is no true devolution of sovereignty. In legal (though certainly not political) terms, the organs of European legislation may in truth be described, for so long as the Act of 1972 remains on the statute book, as Parliament's delegates; the law of Europe is not a higher-order law, because the limits which for the time being it sets to the power of Parliament are at the grace of Parliament itself.

Allan's challenge to Wade is slightly different. He attacks the jurisprudential basis of Wade's account of sovereignty (outlined in chapter 2, above, pp 54–6). For Wade, the sovereignty of Parliament is ultimately a judicially recognised 'political fact'. And when the judges recognise that the political facts have changed, the meaning of sovereignty changes accordingly. So, for Wade, what the House of Lords recognised in *Factortame (No 2)* was that the political fact of sovereignty had changed – Parliament since 1972 legislates not in the splendid isolation of a supreme being but in a geo-political environment in which the United Kingdom is a loyal and largely obedient member of the European Union. Allan disputes this analysis on the basis that sovereignty should be seen, not as judicial recognition of political fact, but as a rule of the common law based on reason just like any other rule of the common law. For him, what occurred in *Factortame (No 2)*, 'far from any dramatic, let alone unauthorised, change', was that 'the House of Lords merely determined what the existing constitutional order required in novel circumstances' ('Parliamentary sovereignty: law, politics, and revolution' (1997) 113 *LQR* 443, 445). As he recognises and, indeed, welcomes, the consequences of Allan's analysis are potentially great (pp 448–9): 'If it is possible to recognise limits on the power of Parliament to enact legislation which conflicts with European Community law, even if only to the extent of requiring express wording, it is equally possible to countenance other limits on parliamentary sovereignty which reflect the demands of constitutional

principle. Since the requirement of judicial obedience to statutes constitutes a principle of common law . . . its nature and scope are matters of reason, governed by our understanding of the constitution as a whole.' Here we are back to the common law radicalism that we saw posing such a potent challenge to the sovereignty of Parliament in chapter 2 (see above, pp 66–74).

(For a full and balanced analysis of the issues, see Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 *YEL* 221; for further commentary see Wade (1991) 107 *LQR* 1, Oliver (1991) 54 *MLR* 442 and Gravells [1991] *PL* 180.)

These matters were revisited and taken further in *Thoburn v Sunderland City Council* [2003] QB 151. This is a first instance decision only and has not been expressly approved by the Court of Appeal or by the House of Lords, although it is a decision made by a leading public law judge, Sir John Laws (Laws LJ). The case arose out of the prosecution of a number of traders (known popularly as the 'metric martyrs') for continuing to trade in imperial measures (pounds and ounces) after EU laws had been brought into effect in Britain that required trade to be conducted in metric measures only (ie, in grams and kilograms). The traders argued that the Weights and Measures Act 1985 which, until it was amended by Orders in Council in 1994 to bring it into line with European requirements, had allowed trading in either imperial or metric measures, had impliedly repealed the government's statutory power (in section 2(2) of the European Communities Act 1972) to make the 1994 Orders in Council. The argument was unsuccessful, principally on the ground that there was no inconsistency between the 1972 and 1985 Acts (and, without such inconsistency, there could be no question of implied repeal). What is of more interest, however, is Laws LJ's reasoning, albeit that (rather like their Lordships' comments on sovereignty in *Jackson v Attorney General* in chapter 2), it is almost all *obiter*.

Laws LJ: . . . Being sovereign, [the United Kingdom Parliament] cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle.

The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of parliamentary sovereignty are ultimately confided. The courts may say – have said – that there are certain circumstances in which the legislature may only enact what it

desires to enact if it does so by express, or at any rate specific, provision. The courts have in effect so held in the field of European law itself . . .

It seems to me that there is no doubt but that in *Factortame* the House of Lords effectively accepted that section 2(4) [of the European Communities Act 1972] could not be impliedly repealed, albeit the point was not argued . . .

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental [citing *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 and *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, among other authorities: see chapter 2]. And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were 'ordinary' statutes and 'constitutional' statutes . . .The European Communities Act 1972 [along with Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts, the Human Rights Act and the devolution legislation] is, by force of the common law, a constitutional statute.

Ordinary statutes may be impliedly repealed. Constitutional statutes may not.

Laws LJ's distinction between ordinary and constitutional statutes is novel, and has not (yet?) been adopted elsewhere (although compare *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, considered in chapter 2). But it will be seen that, in this judgment, his Lordship develops aspects of both his own and of TRS Allan's 'evolutionary' accounts of what happened in 1972 and of what the constitutional implications are of the House of Lords' decisions in *Factortame*.

It seems that, on any of Wade's, Laws' or Allan's views, we must recognise the assertion of a judicial power to redefine the extent and limits of parliamentary sovereignty. In the context of Community law that power was furnished to the courts by Parliament itself, in the European Communities Act 1972, and the resulting limitation of sovereignty can be seen as proceeding from a collaboration of Parliament and the courts. (Compare the comments of Lord Hope in *Jackson*: above, p 74.)

Could Parliament reclaim the fullness of its sovereignty? Parliament retains its ultimate sovereignty as long as it has the power to terminate the application of Community law in the United Kingdom (and its overriding force) by repealing or amending the European Communities Act 1972. Since the United Kingdom's membership of the European Union is now relatively uncontentious no such action by Parliament is in prospect, but it is hardly open to doubt that the Queen's courts would give effect to an Act of Parliament which was passed in the process of effecting a withdrawal from the Union. Meanwhile it is conceivable, although unlikely, that Parliament might legislate deliberately in contradiction of a rule of Community law, perhaps even with the *expressly stated* purpose of negating the effect of the rule in the United Kingdom. (Cf Lord Denning MR in *Macarthys Ltd v Smith*, above.) A bill to this effect was introduced in Parliament in 2005 (the Food Supplements (European Communities Act 1972 Disapplication) Bill, sponsored by a group of

well-known 'Eurosceptic' MPs). The bill had no chance of being enacted. Its provisions, however, make interesting reading. The bill's long title stated that the bill was 'to provide that a specified Community instrument relating to food supplements shall not have effect in the United Kingdom notwithstanding the provisions of the European Communities Act 1972'. To this end, clause 1 of the bill provided that 'Notwithstanding the provisions of the European Communities Act 1972 (a) Directive 2002/46/EC . . . on the approximation of the laws of the Member States relating to food supplements, and (b) any judgment of the European Court of Justice relating to the [Directive], shall not have effect in the United Kingdom'.

If an Act were to be passed in terms such as these the courts could not refuse to apply it without asserting a power which our constitution has not hitherto accorded to them and to which no English court has yet laid claim. Should the issue arise, however, the response of the British courts cannot be predicted with certainty. One thing is certain, however: the Commission would bring infringement proceedings before the Court of Justice against the United Kingdom (under Article 226 EC) and, if the United Kingdom ignored the Court's judgment, the country would be heavily fined under the penalty payment procedure of Article 228 EC. What would happen if the United Kingdom – a net contributor to the EU's budget – refused to pay such a penalty payment, insisting on its national sovereignty, is a question which (remarkably, perhaps) has not yet arisen in the history of the European Union and which, in any event, cannot be answered by reference to law alone. Any solution would have to come from the altogether more unpredictable worlds of diplomacy, politics and international relations.

For the present, Parliament in practice refrains from any deliberate exercise of its legislative power that would contradict or forestall the application of Community law. If this should happen inadvertently, corrective action would be taken – if not by the courts in the process of interpretation or in giving primacy to Community law, then by amending legislation. To this extent, and in the area occupied by Community law, parliamentary sovereignty may be said to be in abeyance.

In *Stoke-on-Trent City Council v B & Q plc* [1991] Ch 48, 56, Hoffmann J said:

> The [EC] Treaty is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the European Economic Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which it regulated. The entry into the Community was in itself a high act of social and economic policy, by which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership.

Statutory interpretation

We saw above (p 312) that in *Von Colson* and again in *Marleasing* the European Court of Justice introduced and developed a duty on the courts of Member

States to interpret national law consistently with EU law. As we saw, to start with this duty was expressed in the specific context of the interpretation of national law that was itself designed to implement provisions of EU law into the relevant national legal system. Only in *Marleasing*, it will be recalled, was this duty extended more generally. A series of three House of Lords cases, all decided after *Von Colson* but before *Marleasing*, illustrate the impact of this obligation on British practices of statutory interpretation.

These cases do not, strictly speaking, concern sovereignty, although matters of statutory interpretation may sometimes have an indirect impact on sovereignty (as we saw, for example, with regard to section 3 of the Human Rights Act 1998, above, pp 62–6). There is a difference – in theory if not always in practice – between judicial interpretation of Parliament's legislation and judicial invalidation of legislation. In any case, not all of these three cases concern the interpretation of statute – of primary legislation. One of them concerns the interpretation of secondary legislation, where no question of parliamentary sovereignty can arise.

The first case is *Duke v GEC Reliance* [1988] AC 618. This case concerned the interpretation of certain provisions of primary legislation (the Sex Discrimination Act 1975) that had *not* been passed for the purpose of giving domestic effect to EU law. One purpose of that legislation was to preserve different retirement ages for men and women. In 1986 the European Court of Justice ruled (in *Marshall*, above, p 311) that such discrimination was, as a matter of Community law, unlawful as being in breach of the Equal Treatment Directive (Directive 76/207/EC). In *Duke*, the House of Lords was invited to follow that approach and to construe and give effect to the 1975 Act accordingly. This their Lordships refused to do, holding that *Von Colson* was 'no authority for the proposition that a court of a Member State must distort the meaning of a domestic statute so as to conform to Community law which is not directly applicable' (Lord Templeman). (Directives, of course, are not directly applicable: Article 249 EC.) Neither could section 2(4) of the European Communities Act 1972 be relied upon to achieve this purpose: Lord Templeman stated that section 2(4) 'does not in my opinion enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community Directive which has no direct effect between individuals' (a reference to the fact that, as we saw above, Directives may have vertical, but not horizontal, direct effect. In *Duke*, the dispute was between two private parties.)

The second case is *Pickstone v Freemans* [1989] AC 66, which saw the House of Lords adopt an altogether different approach to interpretation. The case does not overrule *Duke v GEC Reliance*, but it clearly distinguishes it. The Equal Pay Act 1970, as amended, provides for equality of benefits for a female employee if her work is (in terms of the demands made on her) of equal value to that of a man in the same employment. The amendment so providing was made to the Equal Pay Act 1970 by the Equal Pay (Amendment) Regulations 1983,

S1 1983/1794 in order to give effect to Article 119 of the EC Treaty (as it then was, see now Article 141 EC) as elaborated by the Equal Pay Directive (Directive 75/117/EC).

Mrs Pickstone was employed by Freemans as a 'warehouse operative' and was paid less than a man in the same employment who was employed as a 'checker warehouse operative'. She contended that her work was of equal value with that of the man and that she was therefore entitled to equal pay. The employers replied that one of the warehouse operatives was a man, doing the same work as Mrs Pickstone and receiving the same pay. They argued that the amended Equal Pay Act excluded a woman's entitlement to equal pay on the basis of work of equal value to that of a man if she was paid as much as another man who was employed on like work with her.

A literal construction of the relevant section of the Equal Pay Act supported the argument of the employers but would thus allow a new form of discrimination against women which would be inconsistent with Community law: the Equal Pay (Amendment) Regulations 1983 would have failed, through defective drafting, in their purpose of bringing the Act into accord with the Treaty and the Equal Pay Directive. To avoid this result the House of Lords departed from the 'well-established' rule of construction that the intention of Parliament 'has . . . to be ascertained from the words which it has used and those words are to be construed according to their plain and ordinary meaning' (Lord Oliver of Aylmerton). It was necessary to adopt instead a 'purposive' construction.

Lord Oliver of Aylmerton: . . . [A] construction which permits the section to operate as a proper fulfilment of the United Kingdom's obligation under the Treaty involves not so much doing violence to the language of the section as filling a gap by an implication which arises, not from the words used, but from the manifest purpose of the Act and the mischief it was intended to remedy. The question is whether that can be justified by the necessity – indeed the obligation – to apply a purposive construction which will implement the United Kingdom's obligations under the Treaty . . .

. . . The fact that a statute is passed to give effect to an international treaty does not, of itself, enable the treaty to be referred to in order to construe the words used other than in their plain and unambiguous sense . . .I think, however, that it has also to be recognised that a statute which is passed in order to give effect to the United Kingdom's obligations under the EEC Treaty falls into a special category and it does so because, unlike other treaty obligations, those obligations have, in effect, been incorporated into English law by the European Communities Act 1972 . . .

In the instant case, the strict and literal construction of the section does indeed involve the conclusion that the Regulations, although purporting to give full effect to the United Kingdom's obligations under article 119, were in fact in breach of those obligations. The question . . . is whether they are reasonably capable of bearing a meaning which does in fact comply with the obligations imposed by the Treaty . . .

> . . . I am satisfied that the words of [the section], whilst on the face of them unequivocal, are reasonably capable of bearing a meaning which will not put the United Kingdom in breach of its Treaty obligations. This conclusion is justified, in my judgment, by the manifest purpose of the legislation, by its history, and by the compulsive provision of section 2(4) of the [European Communities Act 1972].

Lord Templeman, in agreeing with Lord Oliver, expressly relied on *Von Colson*. He stated that, in that case, the Court of Justice 'advised that in dealing with national legislation designed to give effect to a Directive, "it is for the national court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of Community law, in so far as it is given discretion to do so under national law"'. Lord Templeman then went on to state that:

> In *Duke v GEC Reliance* this House declined to distort the construction of an Act of Parliament which was not drafted to give effect to a Directive and which was not capable of complying with the Directive as subsequently construed by the European Court of Justice. In the present case I can see no difficulty in construing the Regulations of 1983 in a way which gives effect to the declared intention of the Government of the United Kingdom responsible for drafting the Regulations and is consistent with the objects of the EEC Treaty, the provisions of the Equal Pay Directive and the rulings of the European Court of Justice.

Thus, their Lordships were in agreement that the words of the Act inserted by the Equal Pay (Amendment) Regulations 1983 must be modified – by implication of additional words – to the extent necessary to ensure compliance with Community law, so giving effect to the intention of the Government in introducing the Regulations and of Parliament in approving them.

Such a purposive approach to statutory interpretation was again taken by the House of Lords in *Litster v Forth Dry Dock and Engineering* [1990] 1 AC 546, where their Lordships recognised, indeed emphasised, that what they were doing was a requirement of Community law, rather than something they were doing purely voluntarily. As Lord Keith put it, 'it is the duty of the court to give [the relevant legislation, here the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794] a construction which accords with the decisions of the European Court upon the corresponding provisions of the Directive to which the [national legislation] was intended by Parliament to give effect. The precedent established by *Pickstone v Freemans* indicates that this is to be done by implying the words necessary to achieve that result.'

As was noted above, all of these decisions were handed down before *Marleasing*. While *Marleasing* extended the scope of the duty of consistent interpretation (so that it applies not only in the context of interpreting national legislation that has been passed in order to give EU law domestic effect), even

after *Marleasing* the duty is not an absolute one. It applies only where an interpretation consistent with EU law is 'possible'. *Marleasing* does not require a court to give a meaning to UK legislation which it is incapable of bearing: as the House of Lords ruled in *Webb v EMO Air Cargo* [1993] 1 WLR 49 the statute 'must be open to an interpretation consistent with the Directive whether or not it is also open to an interpretation inconsistent with it', and a conformable interpretation is to be adopted only 'if that can be done without distorting the meaning of the domestic legislation' (Lord Keith).

In *Webb v EMO Air Cargo* the appellant, Mrs Webb, had been engaged by the company to take the place of another employee who had been given maternity leave. Soon after starting work Mrs Webb reported that she had herself become pregnant and she was dismissed. She claimed that her dismissal was contrary to the Sex Discrimination Act 1975. The House of Lords concluded that if the Act was considered in isolation the appellant must fail: she would not have suffered discrimination according to its terms. The question then arose whether Mrs Webb's dismissal was contrary to the Equal Treatment Directive (Directive 76/207/EC, which could not have direct effect in the circumstances of the case and had been adopted after the 1975 Act). The House of Lords made a reference to the Court of Justice for its ruling on the correct interpretation of the Directive, to enable the House to decide whether it was possible to construe the 1975 Act so as to accord with that interpretation. In Case C-32/93 *Webb v EMO Air Cargo* [1994] ECR I-3567 the Court of Justice ruled that Directive 76/207 precluded the dismissal of an employee in the position of Mrs Webb. When the matter returned to it in *Webb v EMO Air Cargo (No 2)* [1995] 1 WLR 1454 the House of Lords did find it possible, without doing violence to the language of the Act, to interpret it so as to conform to the Directive.

(See generally Craig, 'Directives: direct effect, indirect effect and the construction of national legislation' (1997) 22 *EL Rev* 519.)

Judicial review

The third and fourth consequences for British public law of the United Kingdom's membership of the European Union can be relatively quickly dealt with. EU law has had an important impact on judicial review. As we shall see in detail in chapter 10, judicial review is the legal procedure by which the actions and decisions of government and other public authorities may be challenged in court. Applicants may seek (or, in Scotland, petition for) judicial review where they consider that a public authority has acted or is proposing to act illegally, irrationally or procedurally unfairly (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374). Each of these grounds of review – illegality, irrationality and procedural unfairness – have detailed and developed meanings in domestic law, as we shall see in chapter 10. EU law has made two substantive changes to the way in which the grounds of judicial review are applied.

First, it has supplemented the notion of irrationality with a doctrine of proportionality. It may be that, in this respect, it is the law of the ECHR rather than EU law that will have the greater impact on domestic proceedings, proportionality being a principle of considerable importance in European human rights law (on which, see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, considered in chapter 10). There are some cases, however, in which proportionality as a general principle of EU law has begun to feature, perhaps the most notable example being *R v Chief Constable of Sussex, ex p International Trader's Ferry* [1999] 2 AC 418. This case concerned the legality of the decision of the Chief Constable of Sussex police force, taken principally for resource reasons, to limit the number of days on which his force was able to police ports from which live animals were being exported to France. Without a significant police presence, animal rights protesters would force the ports to close. The House of Lords ruled that the Chief Constable's decision was neither irrational in domestic law nor disproportionate in EU law, the point of EU law arising because the ferry operators considered that their inability to continue with the exports infringed their right to freedom of movement of goods under Article 28 EC. (For a further example, see *Gough v Chief Constable of Derbyshire* [2002] QB 1213.)

Secondly, EU law has significantly influenced the protection that the courts will give under domestic law to 'legitimate expectations'. If you legitimately expect that the government will treat you in a certain way (because, for example, the government has told you that it will treat you in a certain way and you have relied on that assurance), English law would traditionally have protected your expectation by affording you a right to be heard before your expectation could be frustrated (see eg, *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906). This amounts to a procedural protection of legitimate expectations: what you get is a right to be heard; what you do not get is the right necessarily to have your expectation fulfilled. Under EU law, however, legitimate expectations may be protected substantively: what you may get is not merely a right to be heard, but the right to have your expectation satisfied. Accordingly, albeit only in limited cases, English law too has started (not only in the context of EU law) to afford substantive protection to legitimate expectations (see eg, *R v Minister for Agriculture, Fisheries and Food, ex p Hamble* [1995] 2 All ER 714 and *R v North and East Devon Area Health Authority, ex p Coughlan* [2001] QB 213).

Remedies

The final area to be considered is the law of remedies. We saw above that the Court of Justice has developed a doctrine of state liability according to which, in certain circumstances, Member States will be liable in damages for 'sufficiently serious' breaches of EU law. Under domestic public law, damages were only rarely available. Whereas damages are a central remedy in domestic private law, they have not been so in public law. In public law the principal

remedies are injunctions, by which public officers may be ordered to act or to refrain from acting in certain ways, and declarations, by which, as its name implies, the court may declare what the legal position is (see generally C Lewis, *Judicial Remedies in Public Law* (3rd edn 2004); note that the law of remedies is different in Scots law: see S Blair, *Scots Administrative Law: Cases and Materials* (1999), ch 11). It may be that, under the combined influence of the EU doctrine of state liability and European human rights law (see the Human Rights Act 1998, section 8), this is beginning to change, as damages become more important in public law (see Amos, 'Extending the liability of the state in damages' (2001) 21 *LS* 1).

Part II
Government

6

Crown and government

Contents

In this chapter and the next we focus on government. For the most part we consider British government, although reference is made from time to time to government in the devolved administrations. This chapter mainly concerns the institutions, personnel and structure of British government. In it, we consider the constitutional positions of the Crown, the monarchy, the Prime Minister, Cabinet and other ministers, and civil servants. In the next chapter we move on to examine the various powers of British government, paying particular attention to the government's various rule- and law-making powers.

1 The Crown

We saw in chapter 1 that constitutional thought and doctrine in the United Kingdom have largely dispensed with the concept of the state. Instead of the state we have the Crown, which serves as a central, organising principle of government. The Crown 'personifies the executive government of the country'

(Diplock LJ in *BBC v Johns* [1965] Ch 32, 79): it is associated with the idea of executive authority rather than with that of the common interest. The major public powers are vested in the Crown or, more commonly, in ministers who, in strict theory, are servants of the Crown.

Town Investments Ltd v Department of the Environment [1978] AC 359 (HL)

The Secretary of State for the Environment, a minister of the Crown, had acquired a leasehold interest in certain premises for use as office accommodation by civil servants employed not in his own but in other government departments. The question arose whether the premises were 'occupied' by their tenant under a 'business tenancy' and were therefore subject to a rent freeze imposed on such tenancies by statutory instrument. If the minister was the tenant, could he be said to be in occupation of the premises? The House of Lords held that it was the Crown, not the minister, that became the tenant of the premises, and further that the Crown was in occupation for the purposes of a business (the activity or business of government) carried on by it. The premises were therefore occupied under a 'business tenancy'.

Lord Diplock: . . . [I]t is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments. These relationships have in the course of centuries been transformed with the continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarchy of today; but the vocabulary used by lawyers in the field of public law has not kept pace with this evolution and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century. To use as a metaphor the symbol of royalty, 'the Crown', was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of 'the Crown' as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. We very sensibly speak today of legislation being made by Act of Parliament – though the preamble to every statute still maintains the fiction that the maker was Her Majesty and that the participation of the members of the two Houses of Parliament had been restricted to advice and acquiescence. Where, as in the instant case, we are concerned with the legal nature of the exercise of executive powers of government, I believe that some of the more Athanasian-like features of the

debate in your Lordships' House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' – a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries [junior ministers] under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law.

The executive acts of government with which the instant case is concerned are the acceptance of grants from lessors who are private subjects of the Queen of leasehold interests in premises for use as government offices and the occupation of the premises by civil servants employed in the work of various government departments. The leases were executed under his official designation by the minister of the Crown in charge of the government department to which, for administrative and accounting purposes, there is entrusted the responsibility for acquiring and managing accommodation for civil servants employed in other government departments as well as that of which the minister himself is the official head. In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown.

Lord Diplock's analysis is open to criticism in so far as it holds that executive acts done by ministers are necessarily to be considered as acts done by the Crown. (See Sir William Wade in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (1999), pp 23–6 and compare the analysis by Martin Loughlin in chapter 3 of the same work.) Ministers are commonly themselves invested by statute with powers or duties and are then legally answerable for any excess or improper exercise of such powers or failure of duty and cannot shelter behind immunities of the Crown. This principle was authoritatively confirmed in *M v Home Office* [1994] 1 AC 377 (above, p 89).

Notwithstanding its continuing formal centrality, the constitutional concept of the Crown has suffered a substantial decay. The original or inherent powers of the Crown embraced in the royal prerogative, although still significant (see below) have been greatly reduced in extent by the intervention of statute. Individual ministers (or 'the Secretary of State': see below, p 367), rather than the Crown itself, are normally the recipients of statutory powers. From the viewpoint of political science, if not of law, the concept of the Crown distorts reality in representing the different elements of the executive as a unified whole, concealing their interrelationships – for example, the conflicts and accommodations that take place between the Prime Minister and other ministers, the Treasury and the spending departments, ministers and civil servants, departments and their associated public bodies, irregular or special advisers

and established civil servants, and so on. As Rodney Barker observed (in R Borthwick and J Spence (eds), *British Politics in Perspective* (1984), p 5):

> Constitutional theory is concerned to determine coherent principles, and as such the notion of the crown has a limited use since it cannot be employed over a wide range of constitutional behaviour without losing precisely that coherence, and referring to powers which are separate, conflicting or independent of one another.

Lord Simon of Glaisdale's characterisation of the Crown, in *Town Investments* (above), as a corporation aggregate – a corporation composed of many persons – headed by the Queen, seems to capture the complex and fragmented nature of central executive power in the United Kingdom, but Lord Diplock's designation of the Crown, in the same case, as a corporation sole is generally followed. As a corporation the Crown has an inherent legal capacity, for instance, to enter into contracts. All ministers are in law 'servants of the Crown' (or of the Queen); civil servants work under the direction of ministers but are themselves also servants of the Crown, not of the departmental minister. (See *Bainbridge v Postmaster-General* [1906] 1 KB 178.) In *Robertson v Minister of Pensions* [1949] 1 KB 227 the appellant was assured by an official of the War Office that a disability from which he suffered had been accepted as attributable to military service, so entitling him to certain disablement benefits. Later the Minister of Pensions decided that the appellant's disability was not attributable to war service. The court (Denning J) held that the assurance given by the War Office was legally binding, and since the War Office was the agent of the Crown, it was binding on the Crown and therefore bound the Minister of Pensions, who was also only a servant or agent of the Crown. (Cf *R v W* [1998] STC 550.)

In the larger realm of the Commonwealth, however, the Crown is divisible and the Queen's government is a separate legal entity in each of the territories still owing allegiance to the Crown: see *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Indian Association of Alberta* [1982] QB 892; *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57; [2006] 1 AC 529.

See generally M Sunkin and S Payne (eds), *The Nature of the Crown* (1999); N Johnson, *Reshaping the British Constitution* (2004), ch 4; McLean, 'The Crown in contract and administrative law' (2004) 24 *OJLS* 129.

(a) Privileges and immunities of the Crown

In a vivid aphorism, Walter Bagehot remarked of the England of Queen Victoria that 'A Republic has insinuated itself beneath the folds of a Monarchy' (*The English Constitution* (Fontana edn 1963), p 94). Modern governments, having assumed the attributes of the Crown, are invested with most of those common law powers, privileges and immunities that formerly constituted the 'royal' prerogative, but of which relatively few are now exercised or enjoyed by the Queen

in her own person. Some of these are necessary governmental powers which, if they did not belong to the government as part of the prerogative, would have to be provided by statute: indeed statute might be a better ground for the definition and regulation of such powers. (On the powers of government see chapter 7.) The prerogative also includes, however, certain privileges and immunities which, as the legacy of a former royal pre-eminence, may lack justification in a modern democratic state.

The Crown may be able to avoid liability under a statute that is not expressed as being applicable to it, by virtue of a principle commonly, although misleadingly, described as 'Crown immunity'. In effect the principle functions as a rule of construction or a presumption (one that is rebuttable) that the Crown is not bound by statute. It is preserved by section 40(2)(f) of the Crown Proceedings Act 1947, which provides that nothing in the Act shall 'affect any rules of evidence or any presumption relating to the extent to which the Crown is bound by any Act of Parliament'.

Madras Electric Supply Corpn Ltd v Boarland [1955] AC 667 (HL)

In this case the liability of the appellant company to income tax was in issue, the company having transferred its business to the Crown in the course of the year of assessment. It was not disputed that the Crown itself was immune from the taxing provisions of the relevant statute, but some of their Lordships found it necessary, in dealing with the contentions of the parties, to consider the basis of the Crown's immunity.

Lord Macdermott: . . . Whatever ideas may once have prevailed on the subject, it is, in my opinion, today impossible to uphold the view that the Crown can find in the prerogative an immunity from tax if the statute in question, according to its true construction, includes the Crown amongst those made liable to the tax it imposes. The appropriate rule, as I understand it, is that in an Act of Parliament general words shall not bind the Crown to its prejudice unless by express provision or necessary implication.

Lord Reid: . . . I do not think that it has ever been suggested, at least since 1688, that, if an Act in its terms and on its true construction applies to the Crown, its operation can be prevented by the royal prerogative. It is true that there does not appear to be in the authorities any statement which precisely negatives this argument, but that is not surprising. As the point has never been raised it has not been necessary to formulate the answer to it.

Chitty states the rule as follows: 'But Acts of Parliament which would divest or abridge the King of his prerogatives, his interests or his remedies, in the slightest degree, do not in general extend to, or bind the King, unless there be express words to that effect.' (*Prerogatives of the Crown*, [1820], p 383.) I draw attention to the words 'extend to, or bind the King'. It is not a matter of the King preventing the operation of an Act which extends to the Crown, but of the scope of provisions which prejudice the Crown being so limited that they never extend to the Crown.

Dicta of Lord Keith of Avonholm in this case found the basis of the rule in a prerogative power of the Crown to override statutory words that were capable of applying to it, but this is no longer a tenable view of the matter.

In *Province of Bombay v Municipal Corporation of the City of Bombay* (below), a stringent test was applied in deciding whether a statute was effective to bind the Crown. The Privy Council held that the Crown would be bound only if made subject to the Act by express words or *necessary implication*, and placed a strict interpretation upon the latter alternative.

Province of Bombay v Municipal Corpn of the City of Bombay [1947] AC 58 (PC)

The City of Bombay Municipal Act 1888 gave power to the Bombay Municipality to carry water-mains 'into, through or under any land whatsoever within the city'. The municipality wished to lay a water-main in certain Crown land within the city, but its right to do so was contested by the Crown. The High Court of Bombay was satisfied that the Act could not operate with reasonable efficiency unless it applied to Crown land, and accordingly held that it must be taken to bind the Crown by necessary implication. This decision was reversed by the Privy Council. The judgment of the Board was delivered by Lord du Parcq.

Lord du Parcq: . . . The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, 'Roy n'est lie par ascun statute si il ne soit expressement nosme'. But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, 'by necessary implication'. If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions. . . . [T]heir Lordships are of opinion that to interpret the principle in the sense put on it by the High Court would be to whittle it down, and they cannot find any authority which gives support to such an interpretation.

It was contended on behalf of the [municipality] that whenever a statute is enacted 'for the public good' the Crown, though not expressly named, must be held to be bound by its provisions and that, as the Act in question was manifestly intended to secure the public welfare, it must bind the Crown. . . . The proposition which the [municipality] thus sought to maintain is supported by early authority . . . but in their Lordships' opinion it cannot now be regarded as sound except in a strictly limited sense. Every statute must be supposed to be 'for the public good', at least in intention, and even when, as in the present case, it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment. . . . Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown

> is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words.

It was argued in *Lord Advocate v Dumbarton District Council* [1990] 2 AC 580 that the rule of construction that the Crown is not bound by statute, unless named expressly or by necessary implication, applied only if the statute was one which would, if binding on the Crown, prejudice or restrict its property, rights or interests. This argument was accepted by the First Division of the Court of Session (1988 SLT 546) but was controversially rejected by the House of Lords, which declined to place any gloss on 'the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect' (per Lord Keith). (See further Tomkins, 'The Crown in Scots Law', in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006) and compare the more flexible formulation of the rule by the High Court of Australia in *Bropho v State of Western Australia* (1990) 171 CLR 1: see Kneebone [1991] *PL* 361 and Berry (1993) 14 *Stat LR* 204.)

The Crown's (qualified) immunity from statute has enabled Crown bodies to escape the operation of social welfare and other legislation enacted in the public interest. Indeed some statutes make express provision for the Crown's immunity, in whole or in part; for example, section 13 of the Rent Act 1977 provides that tenants of the Crown shall not, in general, qualify as protected tenants under the Act, and section 191 of the Employment Rights Act 1996 excludes persons in Crown employment from the Act's provisions on redundancy payments.

Various means have been adopted for securing conformity by Crown bodies and activities with general standards and requirements imposed by statute. While the Crown long enjoyed immunity from statutory planning controls (an immunity continued by the Town and Country Planning Act 1990) and accordingly was not required to obtain planning permission for the development of Crown land, a non-statutory administrative procedure, involving consultation with the local planning authority, provided equivalent safeguards. Provision for removal of the Crown's immunity was made by the Planning and Compusory Purchase Act 2004, subject to a number of exceptions and qualifications, for instance in relation to enforcement action and urgent Crown building developments 'of national importance'. The Crown is not bound by the statutes providing for leasehold enfranchisement, but the Government has given undertakings that the Crown as landlord will, in general, agree to the enfranchisement or extension of residential long leases under the same qualifications and terms applicable to other landlords. (See HL Deb vol 629, cols 195–7 WA, 11 December 2001.)

Part I of the Health and Safety at Work etc Act 1974, which deals with the health, safety and welfare of employees and the protection of public health and safety, is declared to be binding on the Crown, but with important exceptions relating to enforcement procedures (s 48). In 1978 the Health and Safety Commission initiated a non-statutory procedure of Crown enforcement notices, issued in lieu of the statutory improvement and prohibition notices served on private sector employers. In the event of failure to comply with the notice an approach is made by the Health and Safety Executive to higher authorities in the Crown body concerned. The Government is committed to introducing legislation which will remove Crown immunity from statutory health and safety enforcement (HC Deb vol 418, col 386 W, 24 February 2004; HC Deb vol 429, col 354 WH, 20 January 2005; see also the Government's comments on its Draft Corporate Manslaughter Bill, Cm 6755/2006 and the Corporate Manslaughter and Corporate Homicide Bill 2006).

The tendency of recent legislation has been to remove or restrict Crown immunity from statutory duties. For instance, the National Health Service and Community Care Act 1990, section 60, removed Crown immunities (eg, respecting food hygiene, health and safety and fire prevention legislation) from National Health Service bodies. Section 159 of the Environmental Protection Act 1990 exemplifies an approach to Crown immunity that is characteristic of recent statutes:

> 159. *Application to Crown.*
>
> (1) Subject to the provisions of this section, the provisions of this Act and of regulations and orders made under it shall bind the Crown.
>
> (2) No contravention by the Crown of any provision of this Act or of any regulations or order made under it shall make the Crown criminally liable; but the High Court or, in Scotland, the Court of Session may, on the application of any public or local authority charged with enforcing that provision, declare unlawful any act or omission of the Crown which constitutes such a contravention.
>
> (3) Notwithstanding anything in subsection (2) above, the provisions of this Act and of regulations and orders made under it shall apply to persons in the public service of the Crown as they apply to other persons.
>
> (4) If the Secretary of State certifies that it appears to him, as respects any Crown premises and any powers of entry exercisable in relation to them specified in the certificate that it is requisite or expedient that, in the interests of national security, the powers should not be exercisable in relation to the premises, those powers shall not be exercisable in relation to those premises; and in this subsection 'Crown premises' means premises held or used by or on behalf of the Crown.
>
> (5) Nothing in this section shall be taken as in any way affecting Her Majesty in her private capacity.

The Government confirmed that any declaration of non-compliance in terms of section 159(2) 'would be followed by immediate corrective action' (*The*

Citizen's Charter, Cm 1599/1991, p 46). Equivalent provision as regards the Crown is made by the Food Safety Act 1990, section 54 and the Environment Act 1995, section 115. (See also the Competition Act 1998, section 73.)

The Government's policy, it has been affirmed, is to ensure that government departments and other Crown bodies 'are not shielded from obligations placed upon others' (HC Deb vol 223, col 490, 21 April 1993). 'Crown immunity is being removed as legislative opportunities arise . . . Continuing immunities should not be used to shelter inadequate standards in areas where the Crown is not at present bound by existing requirements. Crown bodies are expected to comply as though these requirements applied to them' (HL Deb vol 606, col 98 WA, 4 November 1999).

The Crown benefited in the past from a far-reaching privilege relating to the production of evidence in court, to which the name 'Crown privilege' was aptly applied. This doctrine, rooted in the royal prerogative, enabled a minister of the Crown to disallow the production of any document in a court of law by invoking the public interest. The courts were obliged, although with increasing reluctance, to submit to the minister's decision. The *coup de grâce* to this absolute ministerial discretion was administered in *Conway v Rimmer* [1968] AC 910, in which the House of Lords upheld the power of the courts to review and, in an appropriate case, to set aside the objection of the executive to disclosure. In *Rogers v Home Secretary* [1973] AC 388, 'Crown privilege' was reinterpreted as a rule of 'public interest immunity', which gives a qualified protection to documents bearing on important state interests: it is for the court to balance any such interest against the public interest in the due administration of justice. In coming to its decision the court must ensure that a party's right to a fair trial (Article 6 of the European Convention on Human Rights) is not infringed by the exclusion of evidence. (See as to this *R v H* [2004] UKHL 3, [2004] 2 AC 134.) The government's use (some would say abuse) of public interest immunity has on occasion caused deep legal and political controversy, as when ministers sought in the early 1990s to rely on the doctrine to withhold material evidence from the criminal trials of directors of companies that had been engaged in covert trading (including, it was alleged, arms trading) with Saddam Hussein's Iraq. The defendants argued that such trade as their companies had undertaken was done with the full knowledge, indeed with the positive encouragement, of the United Kingdom's secret intelligence service (MI6). It was this controversy which led to the establishment of the Scott inquiry (see A Tomkins, *The Constitution after Scott* (1998), ch 5 and see further below, pp 572, 586–7).

The Crown still enjoys certain privileges and immunities in legal proceedings to which it is a party – in particular, the remedies of injunction and specific performance are not available in civil proceedings against the Crown: Crown Proceedings Act 1947, section 21. A declaration can be granted in lieu of these remedies and, as Lord Bridge observed in *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85, 150, 'A declaration of right made in proceedings against the Crown is invariably respected'. Judicial interpretation of section 21

has caused particular problems in Scots law, on which see *Davidson v Scottish Ministers* 2002 SC 205 (Court of Session) and 2006 SLT 110 (House of Lords) and *Beggs v Scottish Ministers* 2005 SC 342 (Court of Session, at the time of writing on appeal to the House of Lords) (see Tomkins in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006)).

Some public bodies are set up to perform managerial or administrative functions on behalf of the Crown and so may benefit from privileges or immunities of the Crown – in particular, they may share in Crown immunity from statutory liability. A statute constituting a new public body will often say expressly whether or not it is to be regarded as acting on behalf of the Crown. For instance, the Health Protection Agency Act 2004, Schedule 1, para 5(1), provides that the Agency 'is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown'; whereas the Water Act 2003, section 34(1) provides that the functions of the Water Services Regulation Authority established by the Act are performed 'on behalf of the Crown'. If the statute is not explicit on this point, the question has to be resolved on a consideration of the functions of the public body and the degree of its independence: see *Tamlin v Hannaford* [1950] 1 KB 18. Even if a public body acts as the agent of the Crown, it is not necessarily to be identified with the Crown for all purposes. In *British Medical Association v Greater Glasgow Health Board* [1989] AC 1211 the House of Lords held that the Health Board, although set up to perform functions on behalf of the Crown, was not within the protection of section 21 of the Crown Proceedings Act 1947 (see above).

A former immunity of the Crown from liability in tort for injury or death caused to members of the armed forces, as provided in section 10 of the Crown Proceedings Act 1947, was abolished by the Crown Proceedings (Armed Forces) Act 1987, but not retrospectively. In *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 AC 1163 the House of Lords held that the surviving immunity under section 10 was not incompatible with Convention rights (Article 6(1) of the Convention, given effect by the Human Rights Act 1998).

See generally Tomkins, 'Crown privileges', in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999).

2 Monarchy and the prerogative

In a constitutional monarchy like ours the Sovereign is the head of state and symbolically represents the nation, but he or she is not the head of government. As Vernon Bogdanor succinctly observes (below, at p 65), in a constitutional monarchy we find 'a set of conventions which limit the discretion of the sovereign so that his or her public acts are in reality those of ministers'.

Vernon Bogdanor, *The Monarchy and the Constitution* (1997), pp 61–2, 63

The functions of a head of state, where that office is separated from that of the head of government, are generally of three main kinds. First, there are constitutional functions, primarily of a formal and residual kind, such as appointing a prime minister and dissolving the legislature. Secondly, the head of state carries out a wide variety of public engagements and ceremonial duties. Thirdly, and perhaps most important, there is the symbolic or representative function, by means of which the head of state represents and symbolizes not just the state but the nation. It is this role of interpreting the nation to itself that is the crucial one; the ceremonial activities – once dismissed by President de Gaulle as opening exhibitions of chrysanthemums – are means through which the head of state can be seen as fulfilling his or her representative functions. That is why the long withdrawal from public duties of Queen Victoria after the death of the Prince Consort in 1861 proved so damaging to the monarchy. To be an effective symbol, a head of state and particularly a sovereign has to be seen. There is a theatrical element to effective representation, and, unless this is recognized, a head of state will lack the authority which comes from public support. Then, in the long run, he or she will find it impossible, lacking that authority, to perform his or her constitutional functions effectively.

In his book *The English Constitution*, first published in 1867, Walter Bagehot drew a famous distinction between the 'efficient' and the 'dignified' elements of the constitution. The 'efficient' elements were those with the power to make and carry out policy, such as the cabinet. The 'dignified' elements, by contrast, such as the monarchy, enjoyed little effective power. This did not mean, however, that they were unimportant or superfluous. On the contrary, they were of fundamental significance in symbolizing and reinforcing national unity. They helped to reconcile the ruled to the rulers. It was the 'dignified' elements in the constitution which created the aura of authority that helped to render government legitimate.

It is easier for a head of state to fulfil this 'dignified' function if the 'efficient' functions are located elsewhere, for any exercise of the efficient functions is almost bound to be controversial. Thus, when he or she exercises the 'efficient' functions, the head of state will cease to be able to represent all of the people; he or she will be representing only the particular cross-section who agree with his or her activities. That is a fundamental problem with countries where the positions of head of state and head of government are combined.

Bogdanor remarks that a head of state in a republic, even if not the same person as the head of government, is likely to be a figure with a political history:

[T]he fact that the head of state has a political history must always make it more difficult to fulfil the symbolic and representative role successfully. In a monarchy, by contrast, the head of state has no political history. Provided that the sovereign carries out the constitutional functions in an impartial way, he or she is in a better position to represent the nation as a whole and to be a representative whom everybody can accept.

A republican riposte might be that a hereditary monarch, albeit without a political history, embodies a regal history and patrician associations which may also

be a disability in representing the nation as a whole. (See Tom Nairn, *The Enchanted Glass: Britain and its Monarchy* (rev edn 1994).)

In the modern constitution the Queen still possesses certain residual rights and powers. As a source of influence on government she has, as Bagehot remarked (above, at p 111), 'three rights – the right to be consulted, the right to encourage, the right to warn'. Occasions for the exercise of these rights still exist, for instance in the Prime Minister's weekly audience with the Queen, but to what extent they are asserted it is difficult to know, especially as regards the living monarch. Peter Hennessy is persuaded of 'the continuing political influence of the monarchy as practised by George VI and Elizabeth II' (*The Hidden Wiring* (1995), p 49 and see pp 63–70). Likewise, one of the present Queen's biographers, Ben Pimlott, chronicles the Queen's personal involvement in the selection of the Prime Minister as recently as 1957 and 1963, judging her action in the latter year, 'in effect to collude with' outgoing Prime Minister Harold Macmillan's scheme for 'blocking' the front-runner RA Butler from replacing him, as 'the biggest political misjudgement of her reign' (Ben Pimlott, *The Queen: Elizabeth II and the Monarchy* (2nd edn 2002), p 335). That said, however, there can be little doubt that royal influence on government has declined substantially since the reign of Queen Victoria. (See F Hardie, *The Political Influence of the British Monarchy 1868–1952* (1970); Lord Simon, 'The influence and power of the Monarch in the United Kingdom' (1982) 63 *The Parliamentarian* 61; R Brazier, *Constitutional Texts* (1990), pp 127–8, 417–35; Bogdanor, above, pp 69–74.)

We have already seen that most of the surviving powers, privileges and immunities which were once aspects of the *royal* prerogative have been appropriated by the government. Even when it is the Queen who acts, she is normally obliged by convention to do so in accordance with the advice of her ministers. There remain, however, a few prerogative powers – aptly named 'reserve powers' by Geoffrey Marshall [2002] *PL* 4 – which may still be exercised by the Queen in her own judgement in exceptional circumstances.

(a) Appointment of the Prime Minister

Legally, the Queen has the power to appoint whomsoever she wishes to be her Prime Minister. Indeed, if she so desired, she has the legal power to appoint no one at all to the office. There is no *legal* requirement that there be at all times a Prime Minister. While this remains the legal position, in reality the Queen's choice of Prime Minister is governed by the convention, grounded in political necessity, that she must appoint the man or woman who can form a government which will have the confidence of the House of Commons. Normally this convention clearly indicates the party leader who, having majority support in the House, has an indisputable claim to be appointed as Prime Minister.

Formerly if a Prime Minister died or personally resigned (other ministers remaining in office), the Sovereign might have had to use her own judgement in making an appointment, but now the main parties all have procedures for

electing a successor in such an event. When Mr Harold Wilson announced his resignation as Prime Minister in March 1976 he did so in terms that it would take effect when the Parliamentary Labour Party had elected a new leader. Mr Callaghan having been elected, Mr Wilson formally tendered his resignation to the Queen and informed her of the result of the election, probably adding his opinion that Mr Callaghan was assured of majority support in Parliament (see H Wilson, *The Governance of Britain* (1976), pp 21–2). Again in 1990 Mrs Thatcher, having decided to withdraw after the first round of the Conservative leadership election, waited to resign as Prime Minister until Mr John Major had been elected as leader. In such cases there is no room for the exercise of discretion by the Queen.

In the event of a sudden death or resignation of the Prime Minister, the governing party would doubtless expedite its election procedures. If there were still to be substantial delay before a successor could be chosen, the Cabinet could be expected to bring forward a minister who would assume temporary leadership of the government, the Queen being invited to confirm his or her authority to act. Otherwise the Queen might call on the Deputy Prime Minister, or if there were none, the minister ranking highest in precedence, to take this responsibility. (See further R Brazier, *Constitutional Practice* (3rd edn 1999), ch 2.)

If in a general election the main opposition party wins an overall majority of seats, the Government will resign and the Queen will call on the leader of the Opposition to form a new government. But if no party gains an overall majority it may not be immediately clear whether the existing Prime Minister, or the leader of the Opposition, or some other party leader, will have sufficient support in the House of Commons to govern effectively. This indeed was the position after the general election of February 1974.

Rodney Brazier, 'The constitution in the new politics' [1978] *PL* 117, 117–20

What may be said with confidence about the February 1974 General Election is that the Conservative Government lost it. Its 323 seats out of 630 at the dissolution were reduced to 296 out of the newly-enlarged House of 635, and the Ulster Unionists no longer took the Conservative whip. Labour gained the largest number of seats, 301, but no overall majority. Such a result had not occurred since 1929. What, if anything, is constitutionally prescribed in such an event?

It was expected on the Friday after polling that Mr Heath would resign: after all, Labour had a clear majority of five seats over the Conservatives. And the Labour Shadow Cabinet had issued a statement announcing that the Labour Party was prepared to form a minority government, without coalition or inter-party pacts. But Mr Heath saw the Queen merely to inform her of the political situation, and then tried to form a coalition with the 14 Liberal MPs, or, failing that, at least to reach agreement on a parliamentary and administrative programme. The negotiations failed, and on Monday, March 4, 1974, Mr Heath resigned and Mr Wilson kissed hands on appointment as Prime Minister.

Those who must work the constitution at the centre must decide what a Prime Minister should do if he loses a General Election in circumstances in which no opposition party has captured a majority of Commons seats. A Parliament so composed is very unusual in modern times, for every General Election since 1931 had produced a majority government. The precedents are unhelpful. In the December 1923 Election Baldwin's majority was destroyed, the Conservatives holding 258 seats but Labour achieving 191 and the combined Liberals 159 – Labour thus becoming the second largest parliamentary party for the first time in its history. The new Parliament did not assemble until January 1924. Baldwin reluctantly accepted George V's advice not to resign in the interim but to meet the new House of Commons, where he was duly beaten on an amendment to the address in reply to the King's Speech. MacDonald then became Prime Minister on Baldwin's resignation, to hold office at Liberal sufferance. After the 1929 General Election Labour formed the largest grouping in the House (with 288 seats) followed by the Conservatives (260), the Liberals holding only 59 seats but again having the balance of power. This time Baldwin resigned forthwith, to allow MacDonald to form his second minority Government. It is of no help to recall that ever since that resignation a Prime Minister who has lost his majority in the House at the polls has, with the exception of Mr Heath, resigned immediately, because in every case with that exception there has been a Leader of the Opposition with a parliamentary majority waiting in the wings. And as in 1923–24 and in 1929 the sitting Prime Minister made no attempt to construct a workable Commons majority, these precedents are of even less use in considering the constitutionality of Mr Heath's delayed resignation or that of any future Prime Minister who might be placed in his predicament. If it is accepted that many constitutional conventions mean what the current set of politicians say they mean, then with both Mr Heath and Mr Wilson being of the view that it was right for the former to try to form a fresh government from the new House [see H Wilson, *The Governance of Britain* (1976), pp 25–6], we are propelled to the view that if a House of Commons is elected in which no single party has an overall majority it falls first to the Prime Minister to see if he can construct an administration enjoying the confidence of that House, and that if he cannot do so within a reasonable time, he should offer to resign. . . . [I]t seems that the Queen acted in a wholly appropriate manner after the February Election. Given a Labour minority government in waiting, it was surely correct for her to stay out of the political arena and to allow the parties to resolve the difficulties of the electorate's making. Had she on the day after polling insisted on Mr Heath's immediate resignation, when a Conservative-Liberal coalition was on the cards, then that would have been an entirely unjustifiable use of the prerogative which would have caused the Queen to become, in Asquith's phrase, 'the football of contending factions'.

'Hung' Parliaments, with no party enjoying an overall majority, will doubtless recur at Westminster, and would be likely to do so frequently if a system of proportional representation should be introduced for elections to the House of Commons. A general election might produce a result allowing of either a single-party minority government or a government formed from any of various combinations of parties under one or other of a number of party leaders. In these circumstances the existing conventions and precedents might fail to give an unequivocal indication of the way in which the prerogative should be exercised.

A fictional twenty-first century general election

Suppose that a Labour Prime Minister has called a general election, the Sovereign granting a dissolution of Parliament, and the result of the election – held, it might be, under a system of proportional representation – is the following distribution of seats in the House of Commons:

Conservatives	260
Labour	240
Liberal Democrats	120
Others	26

Suppose further that the Labour Prime Minister tenders her resignation to the Sovereign, after making it known to him or her that the Liberal Democrats have agreed to join in a coalition government led by the deputy leader of the Labour Party (awaiting confirmation as the new party leader).

The Conservative leader (and former Leader of the Opposition) declares that he is prepared to form a minority government.

The precedents (especially those of 1923, 1929 and February 1974) suggest that the Sovereign should send for the Conservative leader, as leader of the largest party in the House of Commons, to form a minority government. This might be the most prudent course for the Sovereign to follow in such circumstances for, as Vernon Bogdanor observes (*The Monarchy and the Constitution* (1997), p 153):

> Were he or she to act on the basis of precedent . . . the sovereign would not require a government in a hung parliament to command majority support. Were he or she to depart from precedent, the sovereign would be open to criticism from the major parties of acting partially towards the Liberal Democrats, since he or she would not be allowing a Prime Minister to form a minority government without negotiating its terms with them. On the other hand, the Liberal Democrats can reasonably claim that the working of the system is biased against them.

It has been objected, however, that the precedents are unreliable, since they represented 'political accommodations arrived at as the result both of the political realities of the day and of the personal relationships between the party Leaders' (R Brazier, *Constitutional Practice* (3rd edn 1999), p 31). Also, a minority Conservative government taking office in the circumstances supposed would very likely be unstable, so that the Queen might be asked for a further dissolution of Parliament within a short time. On the other hand a coalition Labour-Liberal Democrat government would have the support of a substantial majority in the House and might seem to offer the prospect of stable government.

The view seems to be gaining ground that, in the event of a hung Parliament, the leader of the largest single party should have no overriding claim to be appointed as Prime Minister if it were clearly demonstrated to the Sovereign that a 'copper-bottomed coalition agreement' had been reached between other parties, and that their chosen leader was assured of majority support in the Commons (see in particular Brazier, above, ch 3). In any event the conventions

of a two-party system would be of limited use in guiding the Sovereign's choice of a Prime Minister if multi-party politics and hung Parliaments should become normal at Westminster. New conventions would be needed to guide the actions of party leaders and the Sovereign, but the politicians show no disposition to reach agreement on conventions for dealing with contingencies which do not seem imminent or inevitable. If these do occur we shall be unprepared for them, and there will very likely be 'an extremely messy intervening period in which different conceptions of political reality jostle for acceptance' (Bogdanor, above, at p 165). Bogdanor doubts that a code of conduct for the Sovereign could be laid down in advance (cf P Hennessy, *The Hidden Wiring* (1996), pp 61–3), concluding rather that new conventions 'would gradually come into play' in a multi-party system. Hennessy adds (p 177):

> The best safeguard for constitutional monarchy . . . lies not in any specific set of constitutional rules or conventions, but rather in a willingness on the part of both politicians and people to preserve the role of the monarchy by avoiding actions which would have the effect of compromising its neutrality.

As long as the choice of a Prime Minister may still call for the exercise of political judgement, is the decision best left with the Sovereign and his or her personal advisers, or should it be given instead to the Speaker of the House of Commons, or a panel of eminent citizens, or a 'special adviser' approved by all parties, or a ballot of MPs? The Institute for Public Policy Research, in its draft *Constitution of the United Kingdom* (1991), proposed that the Head of State should 'appoint as the Prime Minister the person elected to that office by the House of Commons'. A like solution is urged by the Fabian Society in its report on *The Future of the Monarchy* (2003), p 56. In devolved Scotland, where the election system has so far produced hung Parliaments and coalition governments, the First Minister is chosen by the Scottish Parliament, to be formally appointed by the Sovereign: Scotland Act 1998, section 46. Once the Government of Wales Act 2006 comes into force a similar provision will operate in Wales: see section 47 of the 2006 Act.

(b) Dismissal of ministers

The Queen has a prerogative power to dismiss 'her' ministers, singly or collectively but, again, the legal power is overlaid by convention. In practice the fate of individual ministers is in the hands of the Prime Minister. Although constrained by political factors he or she has by convention the power to require the resignation of any minister. (In the last resort the Prime Minister could advise the Queen to exercise her power of dismissal.)

In *Adegbenro v Akintola* [1963] AC 614 the Privy Council had to decide a question about the power vested by the Constitution of Western Nigeria in the Governor of the Region to dismiss the regional Premier if he had lost the

confidence of the elected House. Arguments addressed to the court had sought to draw analogies from the Queen's prerogative of dismissal in the United Kingdom. Lord Radcliffe said (at 631):

> British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of constitutional doctrine bearing upon a Prime Minister's loss of support in the House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal, an exercise of which is not treated as being within the scope of practical politics.

Having regard to the facts that governments are sustained in office by a democratically elected House of Commons, and that no Prime Minister has been dismissed by the Sovereign since 1783, when George III dismissed the Fox-North coalition government (or perhaps since 1834, when the circumstances of Melbourne's departure were equivocal), it must now be unconstitutional for the Sovereign to dismiss the Prime Minister and his or her colleagues in all but the most exceptional circumstances. George V contemplated dismissing the Asquith Government in 1914 with a view to a general election being called by a new Prime Minister, in order to forestall the passage of a Home Rule Bill and avert an apparent threat of civil war in Ulster. In the event the crisis was resolved without royal recourse to this extreme remedy. The power of dismissal is said still to survive for use if a government should act to destroy the democratic or parliamentary bases of the constitution. But unless the Queen's judgement of the necessity to dismiss her ministers on these grounds should be generally supported by public opinion, the monarchy itself would be placed in jeopardy.

What consequences might follow if a government, defeated on a vote of confidence in the House of Commons, refused to resign or request a dissolution of Parliament? Would this be an occasion for the exercise of the prerogative of dismissal? For Geoffrey Marshall this is a plain case: 'Ministers who clearly ignored a loss of confidence by the House of Commons and defied the conventional rule might properly be dismissed' (G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1986), p 27).

When in 1975 the Governor-General of Australia, Sir John Kerr, acting in the name of the Queen but on his own initiative, dismissed the Prime Minister of Australia, Mr Whitlam, and all the ministers of the Labour Government with the object of resolving a political and constitutional impasse, his action provoked much controversy and reactions of an intense and bitter kind. The crisis had resulted from the refusal of the Upper House of the Australian Parliament, where the Opposition had a majority, to pass Appropriation Bills providing necessary supply (authorisation of expenditure) for the government. This

unprecedented action of the Senate was designed to bring down the government, which attempted to extricate itself from a critical situation by devising unorthodox expedients for raising money. In this crisis the Governor-General acted by dismissing Mr Whitlam and his Government and appointing as Prime Minister the Leader of the Opposition, Mr Fraser, who had first assured the Governor-General that the Appropriation Bills would be passed and that he would as Prime Minister advise a dissolution of both Houses of Parliament in order that the deadlock might be resolved by the verdict of the people. The subsequent election was convincingly won by the opposition Liberal and Country Parties, and a coalition government was formed under Mr Fraser.

Sir John Kerr's drastic action has been defended in that it brought about the immediate passage of the obstructed supply bills and placed the resolution of the conflict in the hands of the electorate. But the Governor-General was criticised for acting precipitately when a political solution was still possible.

These events took place in a political and constitutional context different from that in which the Sovereign has to operate in the United Kingdom and they do not provide us with a directly applicable precedent (even if any clear principle can be deduced from them). They demonstrate, however, that dismissal of a government may still be an available measure of last resort, but also that it is likely to generate vehement public controversy.

See further Howard and Saunders in G Evans (ed), *Labor and the Constitution 1972–1975* (1997); Sir John Kerr, *Matters for Judgment* (1978), especially chs 16–22; Low, 'Wearing the Crown: new reflections on the dismissal 1975' (1984) 19 *Politics* 18; D Low (ed), *Constitutional Heads and Political Crises* (1988), ch 6.

(c) Dissolution of Parliament

The prerogative power of dissolving Parliament belongs to the Sovereign, but its exercise depends in ordinary circumstances on the judgement of the Prime Minister. Until the First World War the decision to request the Sovereign to dissolve Parliament was taken by the Cabinet collectively, but the power to request a dissolution was appropriated by the Prime Minister early in the twentieth century, it seems through a misunderstanding of the precedents: see Lord Blake, *The Office of Prime Minister* (1975), p 59 and G Marshall, above, at pp 48–53. Marshall argues that the justification for the present practice is weak, but it seems nevertheless now to be established as a constitutional convention that the responsibility rests with the Prime Minister alone. In any event it is usual for the Prime Minister to consult senior colleagues before asking for a dissolution.

May the Sovereign in any circumstances refuse a dissolution requested by the Prime Minister? The question was canvassed after the general election of February 1974, when Labour took office with four more seats in the House of Commons than the Conservatives but no overall majority. The new Government faced the threat of immediate defeat in the House in a division on the Address in reply to the Queen's Speech, which would have obliged the Prime Minister either

to resign, with his Government, or seek a dissolution of Parliament. The Prime Minister, Mr Wilson, publicly declared his intention to request a dissolution in such an event. As it happened the expected challenge to the Government did not materialise and the Queen was not asked to dissolve Parliament until some months later. It has, however, been asserted that if a dissolution had been requested in March 1974 or soon after, the Queen would have been justified in refusing.

Sir Peter Rawlinson, 'Dissolution in the United Kingdom' (1977) 58 *The Parliamentarian* 1, 2

> When Mr Harold Wilson in March 1974 formed a minority government in succession to Mr Edward Heath, following the failure of the latter to find allies from the minor parties, the Crown could have rejected advice (if proffered, which it was not) to dissolve the Parliament elected in February 1974 within days or weeks of the succession of Mr Heath by Mr Wilson. For it was the duty of the new minority Wilson Administration to face Parliament and to discover whether the new Administration was viable. There was always the possibility of another attempt at coalition between the Conservatives and Liberals and other parties as an alternative to the Wilson Government. As Lord Balfour has said . . . 'No constitution can stand a diet of dissolutions', and advice to dissolve very shortly after March 1974, when supply was being effected and major Bills presented by the new Wilson Government were being accepted by the House of Commons, could and should have been rejected by the Sovereign certainly until at least six months of minority government had been experienced. Advice to dissolve prior to a period of trial would have been advice wrongly proffered and, therefore, wrong to have been accepted. The Sovereign on her personal responsibility could have taken into account the time since the previous election and the incidence that government was not being impossibly thwarted.

On the other hand the Queen's personal advisers are fully aware of the necessity to shield the monarchy from the winds of political controversy, which would certainly have been unleashed if the Queen had refused a dissolution in these circumstances. Contemporary reports suggest – though the matter cannot be stated with certainty – that soundings at the Palace by politicians revealed that there would be no question of refusal if the Prime Minister were to request a dissolution. (See *The Times*, 6 May 1974, p 14; Watt (1974) 45 *Political Quarterly* 346, 349. See too Anthony Howard, *The Times*, 27 February 2001, p 7.) Refusal would doubtless have been followed by Mr Wilson's resignation. The obvious person to succeed him, Mr Heath, had already failed to gain Liberal support for a government headed by himself.

Governors-General of Commonwealth countries of which the Sovereign remained the head of state have on rare occasions refused prime-ministerial requests for dissolutions, notably in Canada in 1926 and in South Africa in 1939. In each case the Governor-General's action was controversial. The refusal by the Governor-General of Canada, Lord Byng, of a request for dissolution from the

Liberal Prime Minister, Mr Mackenzie King, precipitated the latter's resignation and the appointment as Prime Minister of the Leader of the Conservative opposition, Mr Meighen. The new government proved unviable and after its defeat within a few days in the Canadian House of Commons, Lord Byng was obliged to grant Mr Meighen a dissolution. In the ensuing general election the Liberals were returned to office. Lord Byng was strongly criticised for granting to Mr Meighen the dissolution he had a week before refused to Mr Mackenzie King.

The South African episode had a different outcome. General Smuts, who took office after the resignation of General Hertzog upon refusal of the latter's request for a dissolution, was able to carry on as Prime Minister for a number of years with a small but secure majority in the elected House.

The Commonwealth cases provide no clear precedent for the exercise of the Sovereign's prerogative in the United Kingdom, having regard to the appointive office and limited tenure of a Governor-General, whose actions do not involve the Sovereign in person (see G Marshall and G Moodie, *Some Problems of the Constitution* (5th edn 1971), pp 40–1). These cases do, however, indicate that circumstances can arise in which refusal of a dissolution may be contemplated. They also underline the hazard attending such refusal and warn of matters to be taken into account by the Sovereign and his or her advisers.

It is at all events generally believed that the Sovereign is not obliged by convention to grant a request for a dissolution in all circumstances: such a request is not equated with *advice* of ministers, upon which the Sovereign is constitutionally bound to act. The circumstances in which the Sovereign would be justified in refusing such a request cannot, however, be defined with precision.

It was publicly discussed in 1950 what the King's response should be if the newly re-elected Labour Government, having an overall majority of only six in the House, should be immediately defeated on an amendment to the Address and were then to ask for a dissolution. A statement of the applicable conventions was proffered by Sir Alan Lascelles, private secretary to King George VI, in a letter to *The Times* (under the pseudonym 'Senex') on 2 May 1950. No wise Sovereign, he said, would deny a dissolution to the Prime Minister unless satisfied that:

> (1) the existing Parliament was still vital, viable, and capable of doing its job; (2) a General Election would be detrimental to the national economy; (3) he could rely on finding another Prime Minister who could carry on his Government, for a reasonable period, with a working majority in the House of Commons.

The second condition might be better expressed in terms of detriment to the national interest, although it may be thought that assessment of the national interest is rather a matter for the Prime Minister, constrained by the counsels or warnings of colleagues and accountable to the electorate. (Professor Hennessy remarks that the second condition has in any event been 'dropped from the canon' – ie from the Cabinet Office's internal guidance notes on the question: *The Economist*, 24 December 1994, p 32). Satisfaction of the first and third

conditions is not easily determined – indeed StJ Bates finds the first condition to be 'virtually meaningless' (in W Finnie, C Himsworth and N Walker (eds), *Edinburgh Essays in Public Law* (1991), p 26). The third condition was plainly *not* satisfied when Lord Byng refused a dissolution to Mackenzie King in Canada in 1926 (above).

The issue is most likely to arise in the event of a hung Parliament. Refusal of a dissolution even in such circumstances would not normally be politic or justified – and would never be so if no alternative government was available – but would seem the appropriate response if the Prime Minister of a government which had lost an election should immediately seek a second dissolution in the hope of reversing the result. It might also be appropriate if a Prime Minister who was discredited in his party and repudiated by ministerial colleagues, hoped by a dissolution to forestall his replacement and restore his personal authority. 'In general', as Vernon Bogdanor observes (*The Monarchy and the Constitution* (1995), p 162), 'the sovereign has the right to refuse a dissolution only where the grant of a dissolution would be an affront to, rather than an expression of, democratic rights'. This safeguard against abuse of the constitution depends on the political judgement of the Sovereign, and again the question arises whether it is best left there: should a request for dissolution have to be supported by a resolution of the Commons? (See further R Blackburn, *The Meeting of Parliament* (1990); Bogdanor, above, pp 79–83, 157–62; Brazier, *Constitutional Practice*, pp 45–50; G Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (1986), pp 35–44; Harvey, 'Monarchy and democracy: a progressive agenda' (2004) 75 *Political Quarterly* 34.)

It is sometimes urged that the House of Commons should be elected for a fixed term, so that the power of dissolution should not ordinarily be available during the five-year (or a shorter) term (the Scottish Parliament and the National Assembly for Wales are each elected to four-year fixed terms and the Scotland Act 1998 (s 3) and Government of Wales Act 2006 (s 5) contain provisions dealing with 'extraordinary general elections', provisions which obviate any need for reliance on prerogative powers). Such a rule, it might seem, would prevent an appeal to the people in circumstances of political dissension or deadlock when that sovereign remedy was most needed. An attempted cure for this difficulty was included in a ten-minute rule bill introduced by Mr Tony Banks MP in 1987 (but not enacted), which provided that a dissolution might be granted within a fixed five-year term only if the government should lose a formal vote of confidence. Mr Tony Benn's abortive Crown Prerogatives (Parliamentary Control) Bill of 1999 provided that the prerogative should not be exercised to dissolve Parliament within the five-year term unless the assent of the House of Commons had first been obtained. (See further Barendt [1995] *PL* 599, 618; the IPPR *Constitution of the United Kingdom* (1991), Article 60; the sceptical comments of Bogdanor, above, at pp 175–7; and R Hazell and C Willan, *Fixed Term Parliaments* (2006).)

On the prerogative powers to give or refuse assent to bills and to create peers, see Bogdanor, above, at pp 113–22, 129–33; Marshall, above, at pp 21–5;

Blackburn, 'The royal assent to legislation and a monarch's fundamental human rights' [2003] *PL* 205; Twomey, 'The refusal or deferral of royal assent' [2006] *PL* 580.

A sceptical view of the 'personal prerogatives' of the Sovereign is taken by Robert Blackburn, who argues that the Sovereign exercises her legal powers exclusively in accordance with established conventions and procedures, leaving no room for personal discretion ('Monarchy and the personal prerogatives' [2004] *PL* 546; see also the response by Brazier at [2005] *PL* 45). For a more expansive interpretation of the continuing constitutional authority of the monarch, see Tomkins, *Public Law* (2003), pp 62–72. Nevil Johnson concludes a survey of the Queen's residual powers in saying that 'there is no prerogative power that can in the normal conditions of political life be exercised independently by the monarch' (*Reshaping the British Constitution* (2004), p 60). This is surely right, although it is always to be remembered that politics does not invariably keep to its 'normal conditions'. In abnormal or emergency conditions, it is clear that the monarch retains an array of extraordinary *legal* powers. Whether the exercise of such powers would ever again be considered *constitutional* is impossible to say unless and until it happens. Such is the nature of conventions. What we can say, perhaps, is that, as the examples of Scotland and Wales suggest, statutory provisions could relatively easily be crafted that would do away with any lingering doubts. Why have they not been? In whose interests is it that the present circumstances continue to persist?

3 Central government

(a) Ministers

The executive powers of government are, in general, exercised by or on behalf of ministers of the Crown, who in the theory of the constitution are themselves servants of the Crown. It has been argued (by Rodney Brazier, *Ministers of the Crown* (1997), pp 23–31) that the term 'ministers of the Crown' is properly restricted to those senior ministers who have sole charge of a government department, and in whom the legal powers of government are vested. Usage is not consistent, however, and 'ministers of the Crown' sometimes refers to all ministers of whatever rank (eg, in the Ministers of the Crown Act 1975). Ministers are chosen by the Prime Minister and are then appointed by the Queen. As they hold office 'at the pleasure of the Crown' they can be lawfully dismissed by the Queen, but in this she must act in accordance with convention, as we have already seen.

Town Investments Ltd v Department of the Environment [1978] AC 359 (HL)

Lord Simon of Glaisdale: . . . Once central government was firmly established in England, power – what in modern political science would be known as executive, judicial and legislative power – was concentrated in the King. No line was drawn at first between the

private and the public business of the King. But, as the latter grew, administrative convenience called for some devolution. Offices were hived off from the King's household. There was the Chancery presided over by the Chancellor. Then there was the Privy Seal office under a Keeper of the Privy Seal, and the Exchequer with a Treasurer and a Chancellor of its own. And so on. All these officials holding offices of ancient origin had their action 'confined within rigid limits, expressed by the commissions by which they were appointed and the procedure which their acts must follow'. The motive force behind their departments –

> 'was the King's command. They all existed to give effect to his will. The officials who presided over them were appointed and dismissible by him. Each was charged with the fulfilment of the royal pleasure within his own appropriate sphere.'

However, for centuries thereafter the King's secretary remained within the royal household. Unlike the officials holding offices of ancient origin, the King's secretary was therefore 'free to enter every new branch of royal administration as it developed'. So it was that with the increase in the powers of the Crown in the 16th century the Secretary rose to the first rank among the King's servants. But under the Restoration the Secretaries (for their office was now duplicated) too became heads of departments of state, charged like the holders of the ancient offices with executing the royal will. (For the foregoing historical development, see DL Keir, *The Constitutional History of Modern Britain 1485–1937* . . . , whence also came the quotations.)

With the development of modern government fresh departments were formed to be headed by ministers or by Secretaries of State. Just as all were originally appointed to carry out departmentally the royal will, so today all ministers are appointed to exercise the powers of the Crown, together with such other powers as have been statutorily conferred upon them directly.

In theory there is still only one office of Secretary of State, but several may be invested with the title and powers of the office. By the Interpretation Act 1978, section 5 and Schedule 1, 'Secretary of State' means 'one of Her Majesty's Principal Secretaries of State'. Powers and functions entrusted to 'the Secretary of State' can accordingly be exercised by *any* of the Principal Secretaries of State, of whom there were fifteen in 2006, each heading a government department and with a seat in the Cabinet. Some ministers have traditional titles reflecting their historical functions as servants of the Crown: they include the Lord Chancellor, the Chancellor of the Exchequer, the Lord Privy Seal, the Lord President of the Council, the Chancellor of the Duchy of Lancaster and the Paymaster General. The last four do not run major government departments and their responsibilities vary in different administrations. For example, the Chancellor of the Duchy of Lancaster in the Heath Government (1970–74) had responsibility for the conduct of negotiations for British entry into the European Communities. Since 1998 the Chancellor of the Duchy has been the Minister for the Cabinet Office, with responsibilities for the coordination and presentation of government policy and reform of the

civil service. The Lord President of the Council, besides being the head of the Privy Council Office, at present acts as Leader of the House of Lords, and the Lord Privy Seal is the Leader of the House of Commons. In some administrations there is a Minister Without Portfolio to whom various responsibilities may be assigned. Since 2001 a Minister Without Portfolio has held office as Party Chairman with a seat in the Cabinet.

The office of Secretary of State for Constitutional Affairs is at present combined with that of Lord Chancellor: besides his responsibilities, as Secretary of State, for constitutional reform, freedom of information and human rights, this minister exercises the remaining responsibilities of the Lord Chancellor for the justice system (including judicial appointments (chapter 2 above) and legal aid).

The Attorney General and the Solicitor General, as Law Officers of the Crown for England and Wales, the Advocate General for Scotland and the Advocate General for Northern Ireland are (non-Cabinet) ministers who act as the government's chief legal advisers and have important responsibilities in relation to the law and its enforcement. The Attorney General, a minister with 'a bewildering range of roles' (T Daintith and A Page, *The Executive in the Constitution* (1999), p 232), has certain discretionary powers to authorise, institute or stop criminal proceedings and has ultimate responsibility for the Crown Prosecution Service. (See R Brazier, *Constitutional Practice* (3rd edn 1999), pp 109–11, 134–5; Daintith and Page, above, at pp 231–6 and ch 9.) In acting as the government's principal legal adviser he is required to act independently, in the sense that his legal advice is meant to be impartial. However, in 'providing such advice he is acting on behalf of and as a member of the Government and is bound by the principle of collective responsibility' (*Attorney-General's Review of the Year 2001–02*, para 19). The Attorney General also has a unique role as 'guardian of the public interest' and in that capacity he or she brings (or may allow a private individual to bring in his or her name) civil proceedings for the enforcement of public rights. When acting in this capacity, the Attorney General is said to act 'in a wholly independent and quasi-judicial capacity and not as a member of the Government' (*Attorney-General's Review of the Year 2001–02*, para 19; on the Attorney General's role as guardian of the public interest see further *Attorney General v Blake* [1998] Ch 439). While entitled to consult ministerial colleagues before taking action of these kinds in cases raising political issues, the Attorney General is required by convention to exercise an independent judgement uninfluenced by considerations of party advantage.

Is the simultaneous wearing of these various 'government' and 'independent' hats desirable? In September 1984 allegations were made that the prosecution of a civil servant, Mr Ponting, under section 2 of the Official Secrets Act 1911 had been undertaken on the insistence of the Secretary of State for Defence, supported by the Prime Minister. Mrs Thatcher denied the allegation in a letter to Dr David Owen MP, saying that the decision to prosecute had

been taken by the Law Officers without consulting any of their ministerial colleagues, and adding:

> you must know that the Attorney-General acts in a totally independent and non-political capacity in making decisions on prosecutions. It would be improper for me or my colleagues to interfere in any way with his discretion in the exercise of that function and I confirm that we did not do so in Mr Ponting's case. [*The Times*, 17 September 1984.]

The Prime Minister's statement was corroborated by the Attorney General himself in Parliament: HC Deb vol 73, col 180, 12 February 1985.

When the Attorney General brought proceedings for an injunction in the '*Crossman Diaries*' case (see chapter 2) he acted on his own judgement (albeit after consulting ministerial colleagues) in his capacity as guardian of the public interest (see J Edwards, *The Attorney-General, Politics and the Public Interest* (1984), pp 337–42). When, a decade later, another Attorney General brought proceedings in Australia for injunctions to prevent the publication of Mr Peter Wright's book, *Spycatcher*, he acted on a different conception of his role. Questioned in the House of Commons about his part in decisions not to bring criminal or civil proceedings in respect of the publication of certain other books about espionage and the security services, the Attorney General (Sir Michael Havers) replied:

> When I am wearing my hat as Attorney-General and prosecutor, nobody can influence me and I would not accept any attempt to influence me from anybody. When the Government are acting as Government in civil proceedings I happen, by tradition, to be the nominal plaintiff and that is what has happened here.

Later, with reference to the decision to take proceedings in Australia against *Spycatcher*, he said:

> [T]his was a Government decision and, of course, like my fellow Ministers, I accept collective responsibility.

Pressed to confirm that it was 'the Attorney-General's duty to determine the public interest before commencing the injunctive process to ban a book, and not the duty of Ministers collectively', the Attorney General made an evasive reply. (See HC Deb vol 106, cols 623–4, 1 December 1986.) In contempt proceedings connected with the *Spycatcher* litigation the Attorney General was said to be acting 'in a quite different capacity independently of the government of the day . . . as "guardian of the public interest in the due administration of justice" ' (Sir John Donaldson MR in *Attorney General v Newspaper Publishing plc* [1988] Ch 333, 362). The *Ministerial Code* (2005), para 6.27, reaffirms the distinction between civil proceedings 'in which the Law Officers are involved in a representative capacity on behalf of the Government, and action undertaken

by them in the general interest, for example, to enforce the law on behalf of the general community'.

Is it realistic to expect the Law Officers to keep their political and public-interest responsibilities in separate mental compartments? As a Lord of Appeal, Lord Steyn, has remarked extra-judicially, the Attorney General is 'a political figure responsive to public pressure': see (1996) 146 *NLJ* 1770. Should the office of Attorney General be removed from the political arena, as an independent office outside government? How might such an independent officer be held accountable for his or her actions? (Cf Edwards, above, pp 62–7 and Brazier, 'Government and the law: ministerial responsibility for legal affairs' [1989] *PL* 64, and see generally Edwards, above, chs 11 and 12; N Walker in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999), ch 6.)

Next in rank below full or senior ministers (most of whom head departments and sit in the Cabinet) are ministers of state, who are attached to departments headed by Cabinet ministers. Ministers of state are often appointed to take charge (under the departmental minister) of a particular section of a department and are designated accordingly – for example, the Minister for Europe in the Foreign and Commonwealth Office. Others have tasks allotted to them by the departmental minister at his or her discretion. Departments also include junior ministers known as Parliamentary Secretaries (or Parliamentary Under-Secretaries of State if the senior minister is a Secretary of State), some of whom, too, may be appointed to named offices. In the Department of Trade and Industry in 2006 there were, besides the Secretary of State, three Ministers of State and two Parliamentary Under-Secretaries of State. Statutory powers are not conferred on subordinate ministers, who act as delegates of the Secretary of State or other senior minister who heads the department, in whom powers are legally vested and who remains responsible to Parliament for their exercise. Ministers may be assisted, in their parliamentary and political work, by Members of Parliament appointed by them (with the approval of the Prime Minister) as parliamentary private secretaries, who are unpaid and do not themselves rank as ministers.

Government Whips have posts with titles which do not indicate their functions of backbench liaison and party discipline: the Chief Whip in the House of Commons has the title of Parliamentary Secretary to the Treasury and the Deputy Chief Whip that of Treasurer of Her Majesty's Household.

A minister must, by convention, be a member of one or other House of Parliament (although exceptions have sometimes been made for Law Officers). By statute there can be no more than ninety-five holders of ministerial office in the House of Commons at any time (House of Commons Disqualification Act 1975, s 2(1)) – a rule designed to prevent executive dominance of the House. (The Ministerial and Other Salaries Act 1975 limits the number of ministerial salaries that can be paid: see Rodney Brazier, *Ministers of the Crown* (1997), pp 36–8.) The number of MPs involved in government (including whips and

parliamentary private secretaries) has generally been somewhere between 130 and 145 in recent years. The principle of collective responsibility (see below) usually assures the government of the support at least of this substantial body of parliamentarians for its policies and bills.

Since the financial responsibilities of Parliament are exercised by the House of Commons alone, the Chancellor of the Exchequer, the Chief Secretary to the Treasury (who also usually has a seat in the Cabinet) and the Financial Secretary are invariably members of the lower House. The two leading parties have differed in their readiness to entrust major departmental responsibilities to peers. In the 1964–70 and 1974–79 Labour Governments the only heads of principal departments who were peers were the Lord Chancellor and (briefly in 1965–66) the Colonial Secretary. A peer, Lord Carrington, held successively the portfolios of Defence, Energy and Foreign and Commonwealth Affairs in the 1970–74 and 1979–83 Conservative administrations. Lord Young of Graffham was a member of Mrs Thatcher's Cabinet from 1984–89, successively as Minister Without Portfolio, Secretary of State for Employment and Secretary of State for Trade and Industry. Since 1989 the Lord Chancellor and the Leader of the House of Lords have usually been the only peers in Conservative and Labour Cabinets. (A peer briefly held office as Secretary of State for Overseas Development in 2003.)

Ministers generally have a quite short tenure of office. In the eight years from 1983 to 1991, as Richard Rose notes, seven different ministers were in charge of the Department of Trade and Industry (*Too Much Reshuffling of the Cabinet Pack*? (1991), p 3). The Department of Transport was headed successively by eleven different ministers in the Conservative administrations of 1979–97. In the period 1997–2006 six Secretaries of State have headed the Department of Social Security/Department of Work and Pensions. Rose discovered that in the period 1964–91 the average length of time for which a Cabinet minister headed a department was two-and-a-half years (above, Table 1), while Rodney Brazier remarks that in the course of Mrs Thatcher's premiership 'fifty-seven people entered and left the Cabinet' (above, p 288). Few ministers bring to their departments an appropriate specialised knowledge and few remain long enough to acquire it.

It is impossible for a departmental minister to be kept informed in detail about the immense and multifarious activity of a modern government department, or to take the management of the department's business into his or her own hands. Overloaded ministers rely greatly on their permanent secretaries and other senior officials in the running of their departments, but a managerially minded minister may take a close interest in the department's organisational structure and decision-making processes. Ministers in the Thatcher administration were encouraged to adopt a managerial role, but it is questionable whether ministers in general have the aptitude, experience or inclination for departmental management. Christopher Foster and Francis Plowden

observe (*The State Under Stress* (1996), p 177) that if efficiency and the control of public expenditure are to be achieved:

> then the civil service is a more hopeful instrument of such changes than politicians can ever be. They are in a better position to retain and restore old notions of good administration and civil service management, at the same time as learning to manage contracts and agencies as efficiently as the best private-sector management, because they have a long-term interest in government.
>
> But the price of achieving such levels of efficiency is that the role of the minister must be limited.

Ministers, these authors say (p 246), must have 'more time to focus on those things . . . for which they are most needed – leadership, policy-making and persuasion'. The lightening of ministers' workloads was one objective of the devolution of operational management to executive agencies within the departments, a reform initiated in 1988 and now an established feature of departmental organisation (see below, pp 409–11).

In developing policies and reviewing the work of the department a minister has the help of subordinate ministers, parliamentary private secretaries, senior officials and it may be one or more special policy advisers brought in from outside government (see below, pp 426–7). The ministers in a large department may meet regularly and act 'as a sort of departmental board of directors' (WH Greenleaf, *The British Political Tradition*, vol III, part 2 (1987), p 665). Existing arrangements could be developed so as to provide ministers with political and specialist support of the kind that is made available to ministers in France through a system of ministerial *cabinets*. The Treasury and Civil Service Committee of the House of Commons proposed an experiment on these lines in 1986, suggesting that the minister's private office should be expanded into a Policy Unit (*Seventh Report*, HC 92-I of 1985–86, paras 5.28–5.30). A minister's policy unit would be composed of several special policy advisers together with a number of career civil servants and the minister's parliamentary private secretary. Its role would be to strengthen the minister, 'increasing his influence and control over the department, putting him in a better position to participate in the collective decision-making of cabinet'. There was further support for an innovation of this kind from a Working Group of the Royal Institute of Public Administration (*Top Jobs in Whitehall* (1987)) and from the Re-Skilling Government Group (*Re-Skilling Government* (1986), (1987)). The Treasury and Civil Service Committee returned to the matter in 1994 and, while noting doubts as to the validity of the French *cabinet* model in the British context, urged that the Government should give further consideration to the strengthening of support for ministers. Ferdinand Mount (*The British Constitution Now* (1993), p 154) found these proposals 'a little over-elaborate' and suggested a more limited reform, which builds on existing practice, allowing ministers to bring in four to six advisers from outside, together with two or three outside

experts on temporary secondment to assist with technical aspects of new policies. (See too the sceptical comment by Simon James, *British Cabinet Government* (2nd edn 1999), pp 241–2.)

Collective ministerial responsibility for the whole of government policy entitles each Cabinet minister to claim a share in general policy-making, including policies on important issues emerging from other departments. But ministers immersed in the 'urgent minutiae' of departmental life (Barbara Castle, *The Castle Diaries, 1974–76* (1980), p 523) seldom have time to inform themselves adequately about extra-departmental matters. When these arise in Cabinet or Cabinet committee, departmental ministers may simply remain passive, or else take positions urged on them previously by ministerial colleagues, or follow briefs prepared by their own civil servants. Some ministers are more assertive and try to take a full part in government policy-making. Whether they are able to do so will depend upon their standing with their colleagues and the Prime Minister, their membership of the inner Cabinet, if there is one, and of relevant Cabinet committees, and their ability to limit their involvement in departmental administration, as by delegating responsibility to subordinate ministers. (Ministerial Policy Units might also help in this respect: see above.) The Chancellor of the Exchequer is in a special position as, being responsible for public expenditure, he or she is bound to take a close interest in policies and spending decisions of other ministers. It is a convention that no departmental expenditure can properly be incurred without the approval of the Treasury, and the Chancellor, as a former holder of the office has remarked, 'has his finger in pretty well every pie in government' (Nigel Lawson, *The View from No 11* (1993 edn), p 273).

By convention some kinds of decision are taken on the personal responsibility of the minister concerned, without engaging the collective responsibility of ministerial colleagues. This applies, for instance, to decisions of the Home Secretary in extradition cases. (See HL Deb vol 606, col 185 WA, 11 November 1999.)

In principle all Secretaries of State and other Cabinet ministers are equal in status, although there is an informal ranking of them by the Prime Minister. Sometimes a minister is designated as First Secretary of State, and the Prime Minister may nominate a Deputy Prime Minister (eg, Whitelaw, 1979–88; Howe, 1989–90; Heseltine, 1995–97). Mr John Prescott was given the title of Deputy Prime Minister in 1997 and, from 2001, held office as Deputy Prime Minister and First Secretary of State. A Deputy Prime Minister may act on behalf of the Prime Minister during his or her illness or absence, but has no entitlement to be appointed Prime Minister if that office becomes vacant. (See Brazier [1988] *PL* 176; P Hennessy, *The Hidden Wiring* (1996), pp 14–19.)

(i) Conduct of ministers

A rule-book, formerly called *Questions of Procedure for Ministers* and updated from time to time under successive Prime Ministers, was from the middle of the

twentieth century issued to ministers on their appointment. It set out guidelines on a variety of questions of Cabinet procedure and ministerial conduct and was described, with a dash of hyperbole, as 'the nearest thing we have to a written constitution for British Cabinet government' (Peter Hennessy, *Cabinet* (1986), p 7). This document was formerly withheld from the public and classified as confidential. The 1992 edition was released into the public domain; the heavens did not fall. Anxieties about the standards of conduct of ministers and other public servants led to the setting up in 1994 of the Nolan Committee on Standards in Public Life. (See Peter Hennessy's racy account of the Nolan inquiry: *The Hidden Wiring* (1996), ch 8.) In its *First Report* (Cm 2850-I/1995) the Committee recommended the revision and strengthening of *Questions of Procedure for Ministers*. The amended document is now entitled the *Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers*. The Code is issued on the authority of the Prime Minister. It does not have the force of law but ministers are expected to work within its letter and spirit and 'to behave according to the highest standards of constitutional and personal conduct in the performance of their duties' (*Ministerial Code* (2005), Foreword and para 1.1). The Code is to be read (para 1.5):

> against the background of the overarching duty on Ministers to comply with the law, including international law and treaty obligations, to uphold the administration of justice and to protect the integrity of public life.

Ministers are expected to observe the seven 'Principles of Public Life' set out in the First Report of the Nolan Committee, p 14 and in Annex A to the Code, under the headings: selflessness; integrity; objectivity; accountability; openness; honesty; leadership. More specifically, the Code sets out nine principles of conduct which ministers are directed to observe:

Ministerial Code (2005), para 1.5

a. Ministers must uphold the principle of collective responsibility;
b. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies [see below, pp 409–11];
c. it is of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity. Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister;
d. Ministers should be as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000 [see below, p 560];
e. Ministers should similarly require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in

providing accurate, truthful and full information in accordance with the duties and responsibilities of civil servants as set out in the Civil Service Code [see below, p 419];

f. Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;
g. Ministers should avoid accepting any gift or hospitality which might, or might reasonably appear to, compromise their judgement or place them under an improper obligation;
h. Ministers in the House of Commons must keep separate their roles as Minister and constituency Member;
i. Ministers must not use government resources for Party political purposes. They must uphold the political impartiality of the Civil Service and not ask civil servants to act in any way which would conflict with the Civil Service Code.

The Code declares that it is 'not a rule-book' but provides 'guidance' to ministers, and that (para 1.3):

> Ministers are personally responsible for deciding how to act and conduct themselves in the light of the Code and for justifying their actions and conduct in Parliament.

Then it is added:

> Ministers only remain in office for so long as they retain the confidence of the Prime Minister. He is the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards.

The Code is a prime-ministerial document in the sense that successive Prime Ministers make alterations to it on their own authority, although in practice after some consultation with ministerial colleagues and senior officials. The Code has a hybrid nature, setting out prime-ministerial instructions and practical guidance which may be varied from time to time, but also reaffirming principles of good government and conventions of a binding character (relating for instance to ministerial accountability to Parliament). It exemplifies, as Peter Hennessy has remarked ('Introduction' to Amy Baker, *Prime Ministers and the Rule Book* (2000)):

> the 'coral-reef' nature of much of British constitutional practice – how a cluster of guidelines can grow and harden, first into expectations, then into conventions and ultimately into a code if not quite into a fully-fledged constitutional artefact.

That the Ministerial Code should be 'the Prime Minister's property' has been deplored as a 'constitutional anomaly' with disturbing implications for the accountability of Prime Minister and ministers alike: 'There is an urgent need to find a proper guardian for the code' (Blick, Byrne and Weir, 'Democratic audit' (2005) 58 *Parliamentary Affairs* 408, 415). The House of Commons Select

Committee on Public Administration forcefully argued in 2006 that, while the Prime Minister must remain the ultimate judge, an 'independent investigatory capacity' should be created 'which does not undermine the Prime Minister's right to decide whether a minister has breached the Ministerial Code and what the consequences must be'. Such an investigatory machinery, in the Committee's view, must be 'manifestly independent of the Executive', should not involve the creation of yet another regulatory office but should be undertaken by an official connected to the House of Commons (see the Committee's *Seventh Report: The Ministerial Code – The Case for Independent Investigation* (HC 1457 of 2005–06), paras 21–25).

(See further Amy Baker, above; S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999), pp 306–14.)

(ii) Ministerial solidarity

The convention of collective ministerial responsibility obliges ministers to support and defend the policies and decisions of the government to which they belong; the conventional rule is reaffirmed in the *Ministerial Code* (2005), para 6.16: 'Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government'. Then in para 6.17 it is said:

> Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached.

The classic or strict version of the principle requires a minister to resign from office if he or she feels bound to express public dissent from government policies.

The principle of collective solidarity began as a political expedient for countering the authority of the King and managing Parliament; it was fortified by the development of party cohesion in the nineteenth century. Lord Salisbury gave his emphatic endorsement to the principle in 1878.

House of Lords, 8 April 1878 (Parl Deb 3rd series vol 239, cols 833–4)

> **Lord Salisbury:** Now, my Lords, am I not defending a great Constitutional principle, when I say that, for all that passes in a Cabinet, each Member of it who does not resign is absolutely and irretrievably responsible, and that he has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by one of his Colleagues. Consider the inconvenience which will arise if such a great Constitutional law is not respected. . . . It is, I maintain, only on the principle that absolute responsibility is undertaken by every Member of a Cabinet who, after a decision is arrived at, remains a Member of it, that the joint responsibility of Ministers to Parliament can be upheld, and one of the most essential conditions of Parliamentary responsibility established.

The principle is in the interest of the government, which is able to present a united front against the Opposition. In this respect it seems to be essentially a feature of the party political system, and we find that a similar convention is observed by the Opposition, whose frontbench spokesmen are expected to uphold Opposition party policies. But it can also be claimed that the convention has a wider 'constitutional' function, in that it makes for coherent and accountable government and the loyalty of ministers to policies which have been approved by the electorate. It is the collective responsibility of ministers that 'welds the separate functions of Government into a single Administration' (Peter Hennessy, *The Hidden Wiring* (1996), p 102, quoting from an internal government document).

The obligation of ministerial solidarity is most convincingly justified in principle if governmental decisions are reached collectively. A Home Office minister (Mr Mike O'Brien) expressed this in saying (Standing Committee B on the Freedom of Information Bill, 27 January 2000, cols 323–4) that collective responsibility:

> is the bedrock of the Government, of whichever party. It is a safeguard under our constitution that any Minister who makes a decision or speaks on behalf of a Department or the Government as a whole requires the collective consent of other Ministers to make that statement, propound the policy or deliver that decision. . . . That protection, which is for the citizen as well, must be ensured.

Ministers who have contributed to a decision are properly required to support and defend it. In a modern government it is, however, impossible for all ministers to take part in all decisions: most questions must necessarily be decided in Cabinet or a ministerial committee of the Cabinet or within government departments or by inter-departmental discussion. These decisions must be accepted as having been taken on behalf of the government as a whole. Nevertheless, a principle of collective decision-making is embedded in our governmental system. All major departments are represented in the Cabinet by the departmental minister, and ministers whose responsibilities are affected will generally be members of the relevant ministerial committee. The flexibility of the conventional arrangements does, however, allow for a less collegiate style of decision-making through informal networks, unacknowledged ad hoc groups and bilateral exchanges between an interventionist Prime Minister and departmental ministers. In these circumstances, ministerial solidarity may serve merely to strengthen the position of the Prime Minister or a cabal of senior ministers. A government that practises collective decision-making to the greatest extent that is feasible has the strongest claim upon individual ministers to give their loyal support to the decisions reached.

Questions of ministerial solidarity were severely tested in the Westland affair of 1985–86. Political arguments about rescue plans for the Westland helicopter company culminated in 1986 in the resignation of two senior ministers, in

circumstances which raise questions about the conventions of ministerial responsibility. For the present we shall consider the significance of these events in the context of governmental decision-making and the collective responsibility (solidarity) of ministers. (Individual ministerial responsibility is considered in chapter 9.)

The question at issue was whether Westland plc, a principal supplier of helicopters to the Ministry of Defence, should resolve its financial difficulties through an association with the American company, Sikorsky, or instead with a consortium of European companies, the British Government participating, in either event, in the reconstruction 'package'. The Government's policy was that the choice between Sikorsky and the European consortium was a matter for the Westland Board, the Government itself adopting a neutral position. Mr Michael Heseltine, the Secretary of State for Defence, came to favour the 'European' solution, and took an active part in fostering a proposal from the European consortium and in publicly urging that the national interest favoured its acceptance. In this, as a parliamentary select committee afterwards observed, he was 'pursuing a policy which was diametrically opposed to the Government's stated policy' (*Fourth Report, Defence Committee*, HC 519 of 1985–86, para 105). The Prime Minister might have requested his resignation on this ground, but did not do so.

Mr Heseltine did, however, resign in January 1986, after a meeting of the Cabinet at which it was decided that ministers' statements on the subject of Westland should first be submitted to the Cabinet Office for clearance as being consistent with the Government's policy. Mr Heseltine was unable to accept this ruling, and afterwards declared that he had resigned because there had been a 'breakdown of constitutional government' in that the Prime Minister had frustrated collective consideration of the Westland issue, refusing to allow it to be discussed in Cabinet and cancelling a ministerial meeting which had been arranged to deal with the matter. (The Government's account of these events differed from Mr Heseltine's.) Peter Hennessy remarks on this affair that 'Each side claimed the other was breaking the rules. Both sides were right' (K Minogue and M Biddiss (eds), *Thatcherism: Personality and Politics* (1987), p 66).

(See also P Hennessy, *Cabinet* (1986), pp 106–11; Marshall, 'Cabinet government and the Westland affair' [1986] *PL* 184; Oliver and Austin, 'Political and constitutional aspects of the Westland affair' (1987) 40 *Parliamentary Affairs* 20.)

Dissension within government was again dramatically displayed in October 1989, when Mr Nigel Lawson, the Chancellor of the Exchequer, resigned from the office he had held for six years and from the government. Mr Lawson believed that his position had been undermined by differences on questions of economic policy between himself and the Prime Minister, Mrs Thatcher, who was disposed to follow the counsel of her economic adviser, Sir Alan Walters, whose opinions (publicly expressed) on some important matters of policy were

in opposition to those of the Chancellor. In his resignation letter to the Prime Minister, Mr Lawson declared:

> The successful conduct of economic policy is possible only if there is, and is seen to be, full agreement between the Prime Minister and the Chancellor of the Exchequer.
>
> Recent events have confirmed that this essential requirement cannot be satisfied so long as Alan Walters remains your personal economic adviser.
>
> I have therefore regretfully concluded that it is in the best interests of the Government for me to resign my office without further ado.

Speaking in the House of Commons on 31 October 1989, Mr Lawson said (HC Deb vol 159, col 208):

> [F]or our system of Cabinet government to work effectively, the Prime Minister of the day must appoint Ministers whom he or she trusts and then leave them to carry out the policy. When differences of view emerge, as they are bound to do from time to time, they should be resolved privately and, whenever appropriate, collectively.

The strains and fissures in collective, Cabinet government in the latter days of Mrs Thatcher's premiership were once more to be exposed in the resignation of the Deputy Prime Minister, Sir Geoffrey Howe, in November 1990. Deploring the Prime Minister's role in the conduct of monetary policy in Europe, he observed in his resignation letter that 'Cabinet government is all about trying to persuade one another from within', adding in his resignation speech that it had become futile 'to pretend that there was a common policy when every step forward risked being subverted by some casual comment or impulsive answer' by the Prime Minister (HC Deb vol 180, col 465, 13 November 1990). These resignations contributed to the eventual resignation of Mrs Thatcher herself: see further below, p 387.

Mr Blair as Prime Minister has a commanding style of leadership and places a strong emphasis on ministerial unity. A revisionist approach to traditional, 'old Labour' policies and priorities in his first term did not cause serious disaffection at the centre of government or resignations of senior ministers. The first resignation from the new Labour Government on the ground of policy disagreement was that of Mr Malcolm Chisholm, a Parliamentary Secretary, in 1997 over the reduction of benefits for lone parents. Another junior minister, Mr Peter Kilfoyle, resigned in 2000, disapproving what he saw as the Government's disregard of traditional Labour supporters in the regions and their concerns. A more serious reaction was provoked by the military intervention in Iraq in 2003, which led to the resignations of two senior ministers, Mr Robin Cook (President of the Council and Leader of the House of Commons) and Ms Clare Short (Secretary of State for International Development). The former could not support the Government's decision to embark on military action without specific authorisation in a United

Nations Security Council resolution. (Two subordinate ministers resigned on the same principle.) Subsequently Ms Short resigned on the ground of the Government's failure to seek a United Nations mandate authorising the measures necessary for the establishment of a legitimate government in Iraq. She also expressed concerns about the style and organisation of government, in particular a concentration of power in the hands of the Prime Minister and the downgrading of collective Cabinet government. (See Clare Short's resignation statement, HC Deb vol 505, cols 36–9, 12 May 2003. In her book, *An Honourable Deception*? (2004), p 71, she remarks that 'The term collective responsibility is now being used to demand loyalty to decisions on which Cabinet members were not consulted, let alone that were [not] reached collectively'.)

Whatever its utility, the convention of collective responsibility, if strictly observed, exacts its price. By stifling open dissent it contributes to secrecy in government: questions of public importance which may be strongly contested between ministers are not aired in a way that enables public opinion to be expressed before decisions are reached – the argument goes on behind the screen of collective responsibility. Also, since the convention extends to all ministers (not only those in the Cabinet) and even, if in a weaker form, to parliamentary private secretaries to ministers, some 140 or more MPs on the government side are expected to give unqualified support to government policies, as a condition of retaining their positions. In this way the convention helps to strengthen the government's control over Parliament.

In practice, however, Prime Ministers often find it impolitic to insist on a strict observance of the obligations of ministerial solidarity. Indeed, on a few occasions the convention has been formally suspended, with a publicly announced 'agreement to differ' on some issue of importance. A famous instance of this occurred in 1932. The National Government, constituted the year before under Ramsay MacDonald to deal with a financial crisis, proposed to introduce tariffs; four Cabinet ministers, convinced free-traders, were unable to agree. In the emergency it was considered important to keep the government together, so a compromise was reached by which the dissenting ministers were allowed to speak and vote against tariffs, while remaining in the government. This arrangement has been regarded with disfavour by most writers on the constitution. Jennings described it as 'an attempt to break down the party system and to substitute government by individuals for government by political principles' (*Cabinet Government* (3rd edn 1959), p 281). In 1975 there was again an agreement to differ, on the issue of United Kingdom membership of the European Communities. The Labour Government had decided to submit the question of continued membership (on the terms renegotiated by the Government) to a referendum and to recommend the electorate to vote for remaining in the Community. Seven Cabinet ministers who dissented from the Government's recommendation were allowed to oppose it in the referendum campaign.

House of Commons, 23 January 1975 (HC Deb vol 884, col 1746)

The Prime Minister (Mr Harold Wilson): . . . When the outcome of renegotiation is known, the Government will decide upon their own recommendation to the country, whether for continued membership of the Community on the basis of the renegotiated terms, or for withdrawal, and will announce their decision to the House in due course . . .

The circumstances of this referendum are unique, and the issue to be decided is one on which strong views have long been held which cross party lines. The Cabinet has, therefore, decided that, if when the time comes there are members of the Government, including members of the Cabinet, who do not feel able to accept and support the Government's recommendation, whatever it may be, they will, once the recommendation has been announced, be free to support and speak in favour of a different conclusion in the referendum campaign.

House of Commons, 7 April 1975 (HC Deb vol 889, col 351 W)

The Prime Minister: In accordance with my statement in the House on 23rd January last, those Ministers who do not agree with the Government's recommendation in favour of continued membership of the European Community are, in the unique circumstances of the referendum, now free to advocate a different view during the referendum campaign in the country.

This freedom does not extend to parliamentary proceedings and official business. Government business in Parliament will continue to be handled by all Ministers in accordance with Government policy. Ministers responsible for European aspects of Government business who themselves differ from the Government's recommendation on membership of the European Community will state the Government's position and will not be drawn into making points against the Government recommendation. Wherever necessary Questions will be transferred to other Ministers. At meetings of the Council of Ministers of the European Community and at other Community meetings, the United Kingdom position in all fields will continue to reflect Government policy.

I have asked all Ministers to make their contributions to the public campaign in terms of issues, to avoid personalising or trivialising the argument, and not to allow themselves to appear in direct confrontation, on the same platform or programme, with another Minister who takes a different view on the Government recommendation.

This arrangement helped to keep the Government together. Was it also in the public interest?

In 1977 collective responsibility was again suspended, to allow dissenting ministers to vote against the principle of the European Assembly Elections Bill – which provided, in accordance with government policy, for direct elections to the European Parliament – at its second reading. Questioned in the House of Commons about collective responsibility the Prime Minister (Mr Callaghan) replied (HC Deb vol 933, col 552, 16 June 1977):

I certainly think that the doctrine should apply, except in cases where I announce that it does not.

This was brusquely said, and has been cited as a cynical disregard of constitutional proprieties. But we must ask with G Marshall (*Constitutional Conventions: The Rules and Forms of Political Accountability* (1986), p 8) whether it does 'represent a breach of any constitutional duty to the House of Commons if freedom to speak or vote against cabinet policy [is] willingly conceded by the Cabinet to individual Cabinet Ministers?'

Formal suspensions of the convention have been rare and controversial; a more commonplace and frequent mitigation of collective responsibility is provided by the 'unattributable ministerial leak'.

Patrick Gordon Walker, *The Cabinet* (rev edn 1972), pp 33–4, 35, 38–9

The unattributable leak involves the disclosure of . . . matters that are secret only because of the doctrine of collective responsibility – such as the subject of Cabinet discussion, Cabinet decisions, views assigned to different Ministers and the like. The leak gives information known only to members of the Cabinet; being unattributable, it does not breach the doctrine that Ministers do not attack one another in public.

An element of concealment was inherent in the very concept of collective responsibility. The doctrine that the Cabinet must appear to be united presupposed Cabinet divisions that had not been reconciled. Ministers must in the nature of things have differences but they must outwardly appear to have none. Collective responsibility must therefore to some extent be a mask worn by the Cabinet.

The self-same conditions of mass democracy that gave rise to collective responsibility produced the unattributable leak. The maintenance of secrecy imposed by the doctrine became intolerable. This for two main reasons.

First, Ministers were political creatures living in a political world. As party leaders they accepted the need for the doctrine of collective responsibility: but as political creatures they felt it sometimes necessary to let their political views be unofficially known.

Secondly, the Press began to try and tear away the mask from the face of the Cabinet: their readers became increasingly interested in being informed about 'secrets' that were felt to be of a political and not a security nature. . . . From [the 1880s] the unattributable leak became a feature of the Cabinet system. The main motives for leaks by Ministers became the desire to inform – or to mislead – their followers in the Parliamentary party about the stand they had taken in the Cabinet on a particular issue; or the attempt to mobilize party or public opinion behind a view that was being argued in Cabinet. . . .

Thus the doctrine of collective responsibility and the unattributable leak grew up side by side as an inevitable feature of the Cabinet in a mass two-party system. In every Cabinet the leak will be deplored and condemned; but it is paradoxically necessary to the preservation of the doctrine of collective responsibility. It is the mechanism by which the doctrine of collective responsibility is reconciled with political reality. The unattributable leak is itself a recognition and acceptance of the doctrine that members of a Cabinet do not disagree in public.

Brian Harrison (*The Transformation of British Politics 1860–1995* (1996), p 291) remarks that during the Thatcher Cabinets 'a competitive leaking to the press was part of the weaponry deployed by "wets" and "dries" in their battle for

control over policy'. What Harrison calls 'the art of competitive leaking' continued to be displayed in Mr Major's Government, which is said to have become 'as leaky as a sieve' (Kenneth Clarke, cited by Peter Hennessy, *The Prime Minister* (2000), p 445), and has not diminished since Labour took office in 1997.

Leaking is practised by Prime Ministers as well as by other members of the Cabinet. If a necessary palliative of collective responsibility, it makes little contribution to open government: leaked information is notoriously unreliable and at its worst the practice is a technique for misleading the public (see M Cockerell, P Hennessy and D Walker, *Sources Close to the Prime Minister* (1984), ch 7). AP Tant (' "Leaks" and the nature of British government' (1995) 66 *Political Quarterly* 197) regards leaks as a reflection of the pathology of British government, which he sees as being deficient in both responsibility and efficiency. Tant distinguishes the 'deliberate unauthorised' leak and the 'authorised but unacknowledged' leak. The former kind, while 'constitutionally irresponsible', may sometimes be in the national interest: Tant gives the example of information about the inadequacy of Britain's air defences leaked to Winston Churchill in the 1930s. Of the latter kind Tant writes:

> It is a well known and accepted part of British political life that from time to time political adversaries use 'authorised but unacknowledged' leaks to discredit or undermine each other's policies. Equally, government uses this strategy to 'fly kites' – in instances where a potentially contentious policy proposal may find its way into the public arena first via a leak. If the public reaction is particularly hostile, government is able to argue that it never had any intention of implementing this particular policy; it was merely part of the discussions surrounding possible options. If, on the other hand, there is a muted response, government knows it is relatively 'safe' to proceed with the policy. Whatever the outcome, it is clear that this tactic in fact compromises the principles of responsible government.

It happens from time to time that a minister flouts convention by disagreeing in public with government policy. This may result in his or her dismissal. When a junior naval minister made a speech in 1981 criticising the Government's proposed reduction of the surface fleet he was promptly dismissed by Mrs Thatcher, who said, 'Ministers should fight departmental battles within the Department and not outside' (HC Deb vol 5, col 151, 19 May 1981). But sometimes the breach results in nothing more than a prime-ministerial rebuke or is simply overlooked. In 1974 after a Minister of State had publicly criticised a government decision to complete the delivery of warships to a tyrannical regime in Chile, the Prime Minister (Mr Harold Wilson) was asked in the House of Commons to say what his policy was with regard to collective responsibility. He replied (HC Deb vol 873, col 1103, 14 May 1974):

> All members of the Government share a collective responsibility for the policies of Her Majesty's Government. I have recently reminded my right hon and hon Friends in the administration that, where any conflict of loyalties arises, the principle of the collective responsibility of the Government is absolute and overriding in all circumstances.

Dissenting ministers sometimes choose to resign in emphatic repudiation of government policy, and in these instances we seem to see the convention of collective responsibility dramatically confirmed. When Mr Ian Gow, a Minister of State at the Treasury, resigned in protest against the signing of the Anglo-Irish Agreement in November 1985, he said in his resignation letter: 'I cannot support this change of policy; it follows that I cannot remain in your Government'. Instances of resignation in dissent from government policy have been given above, but resignation (like dismissal) is by no means automatic in the event of serious policy disagreement or even an open breach of ministerial solidarity and is often a matter of political calculation; in this respect it appears that we are dealing with an 'optional convention' (P Madgwick in V Herman and J Alt (eds), *Cabinet Studies: A Reader* (1975), p 98).

Dissent among Cabinet ministers is nowadays often revealed to the public in one way or another, and ministerial solidarity is less strictly insisted upon than formerly. The dilution of the convention has alarmed some observers. Nevil Johnson discerned a 'retreat into constitutional anarchy' if collective responsibility could at any time be waived by the Prime Minister, and expressed the sombre belief that 'our constitution has atrophied to a point at which it expresses only one principle, namely that any rule or convention thought to be part of it may be suspended or evaded if the government of the day believes that this is required for the sake of holding together the party in power' (letter to *The Times*, 22 June 1977). But an inflexible insistence on ministerial solidarity is not manifestly for the public good, and its relaxation might contribute to more open and honest government and better informed public debate. Political controversy often takes place *within* rather than *between* the political parties – especially when there is a consensus on particular policies between the party leaderships – and collective responsibility may confine or even effectively suppress this necessary conflict.

Anthony Wedgwood Benn, 'Democracy in the age of science' (1979) 50 *Political Quarterly* 7, 18–19

[T]he constitutional convention of collective Cabinet responsibility which is thought to be central to the working of the British Constitution has considerable implications for secrecy of government. Under this doctrine the myth of Cabinet unity on all matters discussed is fostered. Cabinets are, of course, rarely united in their views. Indeed, were it so there would be no Cabinet discussion at all. . . .

Common sense and ordinary personal loyalty must require defeated minorities to accept the majority decision and to explain and defend it. But there is no reason whatsoever why this necessary and sensible principle should be extended to the necessarily false pretence that no alternative policies were considered, no real debate took place, and that everyone present was convinced of the merits of the majority view – as distinct from accepting that it was the majority view and that as such it should be supported. The narrow interpretation of collective Cabinet responsibility denies citizens essential knowledge of the processes by which their government reaches its decisions.

(b) The Prime Minister

The office of Prime Minister is the creation of convention, and the role and powers of the Prime Minister still depend mainly on convention and political circumstances. In the course of a reply to a parliamentary question about the extent of his powers, the incumbent Prime Minister (Mr Tony Blair) said on 15 October 2001:

> The Prime Minister's roles as the head of Her Majesty's Government, her principal adviser and as Chairman of the Cabinet are not . . . defined in legislation. These roles, including the exercise of powers under the royal prerogative, have evolved over many years, drawing on convention and usage, and it is not possible precisely to define them.

Relatively few powers are vested in the Prime Minister by statute – the office is barely acknowledged in legislation – but like other ministers, although with a pre-eminent authority, the Prime Minister may make use of prerogative powers which have devolved upon ministers or are exercised by the Sovereign only on ministerial advice. A number of public appointments are made directly by the Prime Minister (eg, of the Interception of Communications Commissioner, the Intelligence Services Commissioner and Surveillance Commissioners: see the Regulation of Investigatory Powers Act 2000, ss 57(1), 59(1) and the Police Act 1997, s 91(1)) and many others are made by the Sovereign on prime-ministerial advice: these latter include government ministers, the Cabinet Secretary, the Civil Service Commissioners and the Parliamentary Ombudsman. Other ministers will often be expected to consult the Prime Minister about the exercise of powers vested in them, especially if public controversy is likely to be caused.

It now appears to be a firm convention that the Prime Minister should be a member of the House of Commons. The last peer to hold the office was Lord Salisbury (from 1895 to 1902); the Earl of Home disclaimed his peerage and sought election to the House of Commons when he became Prime Minister in 1963.

Since the person appointed by the Sovereign as Prime Minister will, as we have seen, normally be the leader of one or other of the political parties, eligibility for the office of Prime Minister is in practice determined by the election procedures of the parties. Indeed the Labour Party in 1957 formally adopted the principle that a Labour Prime Minister must have been elected as leader of the party. Before the June 1983 election the Liberal and Social Democrat parties jointly nominated a Prime Minister-designate (Mr Roy Jenkins) in case the Alliance should have the strongest claim to provide the Prime Minister.

The Prime Minister customarily holds the titular position of First Lord of the Treasury, and since 1968 has held the office of Minister for the Civil Service, with another minister exercising day-to-day responsibility. Exceptionally the Prime Minister has taken control of a major department, as when Mr Harold Wilson assumed overall responsibility for the Department of Economic Affairs from

1967 to 1968 (but with a Secretary of State in direct charge of the department). In any event the Prime Minister has a general authority to intervene in any sphere of government and often takes a leading role in foreign relations, dealing directly with other heads of government. (The Prime Minister represents the United Kingdom on the European Council, which gives strategic leadership to the European Union: see chapter 5.) Mrs Thatcher as Prime Minister took a close and assertive interest in the development of economic policy.

John Mackintosh wrote in 1962 that the description of British government simply as 'Cabinet government' had become misleading, for 'the country is governed by the Prime Minister' (*The British Cabinet* (1st edn 1962), p 451; see also the 3rd edn 1977, ch 20). The description had been made famous by Sir Ivor Jennings' pioneering study, *Cabinet Government* (1936). Richard Crossman agreed with, and developed, this thesis in vivid manner in *Inside View* (1972), pp 62–7. Crossman listed the principal conventional powers wielded by a Prime Minister which enabled him to exert 'when he is successful, a dominating personal control'. In particular, the Prime Minister (1) appointed ministers and could sack any minister at any time; (2) decided the agenda of the Cabinet; (3) decided on the organisation and membership of Cabinet committees and the issues to be put to them; (4) approved appointments of senior civil servants and certain appointments made by ministers to high public office; (5) had personal control of government publicity. The powers identified by Crossman remain in the Prime Minister's hands at the present day. The list can be extended, for instance to include powers to change the structure of government departments and to bring about a dissolution of Parliament by request to the Sovereign. (See also Crossman's 'Introduction' to Walter Bagehot, *The English Constitution* (2nd edn 1964) and note Geoffrey Marshall's critical comments on Crossman's views [1991] *PL* 1.)

Another former Cabinet minister, Mr Tony Benn, emphasised the 'immense concentration of power in the hands of the Prime Minister', and the need to bring it under greater democratic control (*Arguments for Democracy* (1981), ch 2). In *The Hidden Wiring* (1996), pp 86–90, Peter Hennessy lists some fifty functions and powers of the Prime Minister, with a chilling final item:

> Symbolically enough, the last act a British Prime Minister would take is not a matter for the Cabinet but one for the PM alone. The Polaris or Trident missile would erupt from the Atlantic thanks to a prime ministerial decision made by the Premier under the Royal Prerogative in the name of the Queen.

The argument of prime-ministerial dominance seemed to be confirmed by the premiership of Mrs Thatcher, who became Prime Minister in 1979 with the determination to head a 'conviction government' firmly committed to a range of policies on which she herself held strong views. Initially she was compelled to conciliate and compromise in a Cabinet in which those who shared her political outlook were in a minority, but in 1981 she made changes in her

ministerial team so as to bring about 'a major shift in the balance of power within the Cabinet' in her favour (A King (ed), *The British Prime Minister* (2nd edn 1985), p 105). Moreover by displacing some important decision-making to informal, ad hoc groups of ministers convened by herself she diminished the role of Cabinet, and she intervened more frequently and assertively than most premiers in the business of departmental ministers and in relation to the appointment of senior civil servants. This is not to say that prime-ministerial powers increased under Mrs Thatcher, but she exerted the available powers to the full, so demonstrating the dominant authority that can be wielded by a Prime Minister who has a secure political base, a clearly envisaged set of political objectives, single-mindedly pursued, and a determination to act in a leadership role rather than foster consensus.

Michael Foley, in *The Rise of the British Presidency* (1993), a wide-ranging study of the premiership (in particular that of Mrs Thatcher), discerned profound and lasting changes in the political system which had transformed the Prime Minister's position. He concluded (p 263) that:

> it would be no exaggeration to assert that what this country has witnessed over the last generation has been the growing emergence of a British presidency.

On the other hand even Mrs Thatcher failed on occasion to get her way, as in June 1989, when she was obliged to agree to terms of entry to the Exchange Rate Mechanism of the European Monetary System, under threats of resignation from the Chancellor and the Foreign Secretary. Moreover the resignation of Mrs Thatcher in 1990 demonstrated the limits of prime-ministerial power. She survived, initially, resignations of senior Cabinet ministers provoked by her ideologically driven policies and authoritarian style of government (characterised by Hugo Young as a 'marked indifference to the normal protocols of collective responsibility': *One of Us* (1993 edn), p 196); but when her leadership came to be seen as damaging to her party's electoral prospects, the support of her ministerial colleagues ebbed away and a party coup brought about her downfall. (See Alderman and Carter, 'A very Tory coup: the ousting of Mrs Thatcher' (1991) 41 *Parliamentary Affairs* 125; Brazier, 'The downfall of Margaret Thatcher' (1991) 54 *MLR* 471.)

Mrs Thatcher's successor, Mr John Major, was of a conciliatory disposition and, as head of a refractory ministerial team, practised a collegial style of governance, not characterised by strong leadership. With Mr Tony Blair there has been a reversion to a 'command and control' premiership (see Peter Hennessy, *The Prime Minister* (2000), ch 18), with centralised and informal processes of decision-making tending to displace collective discussion in Cabinet and Cabinet committees. The dominance of Mr Blair and his preference for doing business in small, informal groups of ministers, officials and policy advisers were evident in the period leading up to and during the Iraq conflict of 2003 (see Hennessy, 'Informality and circumscription: the Blair style of government

in war and peace' (2005) 76 *Political Quarterly* 3). Traditional procedures of collective decision-making may seem to have been displaced by a style of government wryly described by Hennessy as 'sessions on the sofa in the Prime Minister's study': (2005) 58 *Parliamentary Affairs* 6, 10. (See further C Foster, *British Government in Crisis* (2005), ch 12.) As evidence of strengthened prime-ministerial control under Mr Blair, commentators have cited a new paragraph 88 (now 9.2) of the *Ministerial Code*, giving greater precision and emphasis to a previous, unformalised practice:

> In order to ensure the effective presentation of government policy, all major interviews and media appearances, both print and broadcast, should be agreed with the No 10 Press Office before any commitments are entered into. The policy content of all major speeches, press releases and new policy initiatives should be cleared in good time with the No 10 Private Office. The timing and form of announcements should be cleared with the No 10 Strategic Communications Unit.

(See further Amy Baker, *Prime Ministers and the Rule Book* (2000), pp 96–8.)

James Barber, *The Prime Minister since 1945* (1991), pp 130–3

> The debate on the Prime Minister's power continues and will continue because no absolute conclusions can be drawn. The available evidence is always partial, open to different interpretations and subject to normative judgements (what we believe 'ought to be'). The bold lines of the debate between the advocates of the presidential and chairmanship approaches have advantages, but such approaches can undervalue the shifting pattern of behaviour and the ups and downs of political life, not just between different Prime Ministers but in the experience of each Prime Minister. Three main factors are involved: first the constitutional and political frameworks in which Prime Ministers operate; second, the circumstances that they face; and third, their personality and personal qualities.

The constitutional and political frameworks, Barber reminds us, 'are built on precedent and convention'. These change only slowly and Prime Ministers 'have to work within the context created by Cabinet and parliamentary government'. The circumstances that face a Prime Minister, on the other hand, 'are constantly changing and are unpredictable', while the personal qualities 'vary markedly between Prime Ministers':

> By putting the three factors together – constitutional and political frameworks, circumstance and personality – the picture that emerges is one of fluctuating powers, whereby at some times a Prime Minister may appear to have a presidential-like position, whereas at others he/she is subject to obvious constraints.

Shifts in prime-ministerial authority and style justify Peter Hennessy's remark that the premiership is 'a personally shaped instrument' (*The Prime Minister*

(2000), p 15). On the other hand, Graham Allen MP is persuaded that the premiership has evolved, by an irrevocable accretion of power, into a United Kingdom Presidency – an evolution which he does not decry, while arguing for the need to develop means to check and legitimise the exercise of presidential powers (*The Last Prime Minister: Being Honest about the UK Presidency* (2003)). Martin Smith sees the question as one of 'power dependency': 'Ministers have resources and therefore the exercise of prime ministerial power depends on the support of ministers'.

Martin Smith, 'Interpreting the rise and fall of Margaret Thatcher: power dependence and the core executive', in R Rhodes and P Dunleavy (eds), *Prime Minister, Cabinet and Core Executive* (1995), pp 109–10, 123–4

Both Prime Minister and cabinet have resources. The Prime Minister has patronage, the authority to intervene in key policy areas and the ability to direct resources. Ministers have the responsibility, knowledge and administrative capabilities to develop policies in their own particular areas. Ministers, particularly if they are senior, will have their own political authority. To an extent resources derive from each other. The Prime Minister's authority derives from the cabinet, the ministers' position is determined by the Prime Minister. To achieve goals they exchange resources; they need each other. There are frequently coalitions between the Prime Minister and senior ministers, particularly the chancellor, and this coalition can set the framework for the overall determination of policy and so to an extent 'regulate the process of exchange'. Finally it is clear that the relative power of actors is highly variable.

As a consequence the power of the Prime Minister and the cabinet is not fixed but varies according to the resources available, the rules of the game, administrative ability, political support, political strategies, relationships within the core executive and external circumstances. After winning an election, the Prime Minister has the clear support of voters and MPs and so has greater freedom to use resources than at times of poor polls and economic problems. However the Prime Minister's power will also vary according to the issue in question. In certain issue areas the Prime Minister might have the authority to intervene but if it is a policy area in the remit of a minister with high authority and popular support the influence of the Prime Minister might be less. For example, after the 1987 election Margaret Thatcher had limited ability to intervene in economic policy because Nigel Lawson was seen as a very successful chancellor by Conservative MPs. Wherever the Prime Minister intervenes he or she must weigh up the costs of intervention and a minister must assess the cost of resistance . . . British government is not cabinet government or prime ministerial government. Cabinets and Prime Ministers act within the context of mutual dependence based on the exchange of resources with each other and with other actors and institutions within the core executive. A Prime Minister can only be dominant with the support or acquiescence of cabinet and attempts at dominance without this support undermine the relationships of dependence. The power of the Prime Minister varies greatly according to the issues, the external circumstances and the resources of other actors within the core executive.

These arguments are more fully developed in M Smith, *The Core Executive in Britain* (1999), ch 4 and by the same author in R Rhodes (ed), *Transforming British Government*, vol 1 (2000), ch 2. See too Heffernan, 'Prime ministerial dominance? Core executive politics in the UK' (2003) 5 *British Journal of Politics and International Relations* 347. The authority of Mr Blair as Prime Minister has been tempered, Peter Hennessy suggests, by the stature in his administration of the Chancellor of the Exchequer, Mr Gordon Brown, such that the government has been run by a duopoly of collaborating powers ('Rulers and servants of the state: the Blair style of government 1997–2004' (2005) 58 *Parliamentary Affairs* 6). See further on these issues below, pp 397–400.

(See also Richard Rose, *The Paradox of Power: The Prime Minister in a Shrinking World* (2000).)

(i) The Prime Minister's office

Cabinet government assumes a collective leadership of ministers, even if one of their number is *primus inter pares*. This indeed is the basis of the 'collective responsibility' of ministers to Parliament. Some maintain that the collective leadership of Cabinet government, in accommodating the views of different ministers through bargain and compromise, cramps decision-making and results in makeshift policies. For instance, Peter Riddell, citing a former Cabinet Secretary's discovery of 'the hole in the centre of government', says that the hole 'results from the strength, and vested interests, of individual departments and the increasing load on Prime Ministers that inhibits a strategic view' (*The Times*, 20 April 1998). This has led to arguments for *strengthened* power at the centre, with more resources of information, policy analysis and advice being made available to the Prime Minister to assist him or her in developing the general strategy of the government.

At the centre of government is the Cabinet Office. Its head (under the Minister for the Cabinet Office) is the Cabinet Secretary, Britain's most senior civil servant, who reports to the Prime Minister and is his principal official adviser. Although the Office works for the Cabinet as a whole it has a particular responsibility to 'support the Prime Minister in leading the Government' (*Cabinet Office Departmental Report 2005*, Cm 6543, p 31; *Cabinet Office Annual Report*, HC 1190 of 2003–04, paras 9–11). Peter Madgwick saw this dual role of the Cabinet Office as a 'central ambiguity of British government': *British Government: the Central Executive Territory* (1991), p 101; while Peter Hennessy has drawn attention to an 'ever closer fusion' between the Prime Minister's Office and an expanded Cabinet Office under the Blair Government: *The Prime Minister* (2000), p 516.

The Prime Minister's Office has been reorganised and substantially enlarged under Mr Blair. Staffed by civil servants and special advisers (see below) and headed by a Chief of Staff, it is closely linked with the Cabinet Office to provide a powerful motor at the centre of government. The former Private Office and the Policy Unit in No 10 were merged in 2001 as an integrated Policy Directorate covering domestic and economic policy. Advice to the Prime Minister on European Union and foreign affairs is provided by the European and Foreign

Policy Advisers' Office, supported by Secretariats in the Cabinet Office. A Delivery Unit based in the Cabinet Office reports to the Prime Minister and its 'overriding mission' is to achieve the Prime Minister's objectives in such 'priority areas' as health, education, crime, asylum and transport. The Prime Minister is also supported by a Press Office, which manages his relations with the media, and a Strategic Communications Unit for advice on the presentation of policy. Party political matters are handled by the Director of Political Operations, who is paid by the Labour Party.

These continually expanded resources are still by no means comparable with those of a government department, and in arguing for a strengthened support system some have called for the establishment of a Prime Minister's department. On the other hand Sir Douglas Wass, a former Joint Head of the Home Civil Service, was unconvinced. In his opinion the fact that it is the Cabinet, and not the Prime Minister alone, that has the power to take major policy decisions 'has provided us with a valuable constitutional check', and he believed that it would be inconsistent with the principle of collective responsibility and a significant step towards a 'presidential' form of government for the Prime Minister to be given 'the responsibility and the means to co-ordinate policy, to order priorities and to challenge in detail the proposals of individual departments' (*Government and the Governed* (1984), pp 32–4). Similarly, George Jones argued against such a 'major constitutional change', which would 'shift responsibility from ministers and the cabinet to the Prime Minister' and undermine collective cabinet government: Jones, 'The United Kingdom', in W Plowden (ed), *Advising the Rulers* (1987), pp 63–4.

The model of collective, 'ministerial' government favoured by these authors has undoubtedly undergone a progressive shift to a more directive style of governance. While there is no present proposal to establish a Prime Minister's Department, evolutionary developments at the centre have provided the Prime Minister with more powerful instruments for the development, coordination and presentation of policy: a Prime Minister's department in all but name?

(See further Weller, 'Do Prime Ministers' Departments really create problems?' (1983) 61 *Pub Adm* 59; the rejoinder by Jones, *ibid*, p 79; Lord Hunt in W Plowden (ed), *Advising the Rulers* (1987), pp 66–70; Burch and Holliday, 'The Prime Minister's and Cabinet Offices' (1999) 52 *Parliamentary Affairs* 32; D Kavanagh and A Seldon, *The Powers Behind the Prime Minister* (1999), pp 316–25.)

(c) The Cabinet

In the mid-nineteenth and early twentieth centuries the British governmental system was commonly described as one of 'Cabinet government', expressing a principle that the Prime Minister and senior ministers assembled in Cabinet are the supreme governing authority in the state and that it is here that policies are agreed upon and the most important decisions are taken. Whether this was ever wholly true may perhaps be doubted: have ministers ever had the knowledge, the inclination – or the time – to become actively involved in subjects

beyond their own portfolios? In any case, and as we have seen, this view cannot be said to accord with modern government practice.

The Prime Minister decides on the membership of the Cabinet and allocates portfolios, although for an incoming Labour Prime Minister there is a constraint in the party rule which requires Cabinet places to be found for the elected members of the Parliamentary Committee (Shadow Cabinet). Secretaries of State and other heads of principal government departments nowadays always have seats in the Cabinet. Since the Second World War the size of the Cabinet has varied between sixteen and twenty-four members. After the general election of May 2005 the Cabinet had twenty-three members, as follows:

Prime Minister, First Lord of the Treasury and Minister for the Civil Service
Deputy Prime Minister and First Secretary of State
Chancellor of the Exchequer
Secretary of State for Foreign and Commonwealth Affairs
Secretary of State for Work and Pensions
Secretary of State for Environment, Food and Rural Affairs
Secretary of State for Transport and Secretary of State for Scotland
Secretary of State for Defence
Lord Privy Seal and Leader of the House of Commons
Secretary of State for Health
Secretary of State for Culture, Media and Sport
Parliamentary Secretary to the Treasury and Chief Whip
Secretary of State for the Home Department
Secretary of State for Northern Ireland and Secretary of State for Wales
Minister without Portfolio
Leader of the House of Lords and Lord President of the Council
Secretary of State for Constitutional Affairs and Lord Chancellor
Secretary of State for International Development
Secretary of State for Trade and Industry
Secretary of State for Education and Skills
Chancellor of the Duchy of Lancaster (Minister for the Cabinet Office)
Chief Secretary to the Treasury
Minister of Communities and Local Government

All members of the Cabinet have, in principle, an equal voice, but it is not usual for a vote to be taken. The Prime Minister normally sums up at the end of a discussion and declares what he or she takes to be the Cabinet view.

Patrick Gordon Walker, *The Cabinet* (rev edn 1972), p 15

A secret of the smooth adaptability of the British Constitution is that the Cabinet, which is central to the political life of the nation, is unknown to the law and thus extra-constitutional. Many constitutional changes and amendments that in other countries might have to be

> formally made are in Britain brought about by developments in the form and functions of the Cabinet. All that is necessary is that these developments should be accepted and carried on by successive Governments: often they may scarcely be noticed as constitutional innovations and may not be recognised and analysed until after they have passed into normal practice.

The modern Cabinet is the result of the slow growth of constitutional convention and has received only incidental recognition from the law (eg, in the Ministerial and other Salaries Act 1975, Schedule 1). No powers are formally vested in it. The Cabinet is not, however, correctly described as 'extra-constitutional' simply because it belongs to the conventional part of the constitution rather than to the part governed by law. The fact that firm rules about its composition, functions and procedure are lacking does mean, as Gordon Walker indicates, that changes in its role and operating practice may occur without formality or publicity. This feature has led one commentator to speak of the 'plasticity' of Cabinet government (Peter Hennessy, *Cabinet* (1986), p 4).

The *Ministerial Code* (2005), para 6.2, states that the business of Cabinet and of ministerial committees of the Cabinet consists, in the main, of:

> a. questions which significantly engage the collective responsibility of the Government because they raise major issues of policy or because they are of critical importance to the public;
> b. questions on which there is an unresolved argument between Departments.

The Code adds that: 'Matters wholly within the responsibility of a single Minister and which do not significantly engage collective responsibility as defined above need not be brought to the Cabinet or to a Ministerial Committee unless the Minister wishes to inform his colleagues or to have their advice'. The Prime Minister, Mr Blair, placed a noteworthy gloss on this in saying: 'Only where matters cannot be satisfactorily resolved elsewhere need they be referred to the full Cabinet': HC Deb vol 301, col 269 W (20 November 1997).

For Bagehot, writing in 1867, the Cabinet was a body chosen 'to rule the nation' and was 'the most powerful body in the State' (*The English Constitution* (Fontana edn 1963), pp 67, 68). Since then power has drained away from the Cabinet – to the great departments of state, the Prime Minister, Cabinet committees, coteries of senior ministers, and even to organisations and groups outside government. Richard Crossman expressed the view in 1963 that the Cabinet was becoming one of the 'dignified' (rather than 'efficient') elements of the constitution ('Introduction' to Bagehot, above, at p 54); he repeated his view in his *Diaries of a Cabinet Minister*, 3 vols (1975–77), but his account of the actual working of the Cabinet gives a more equivocal impression of Cabinet power.

Richard Rose, *Politics in England: Change and Perspective* (5th edn 1989), pp 97–8

The Cabinet is the court of last resort for the resolution of differences between ministers, but it takes relatively few decisions. One reason is the pressure of time: the Cabinet meets only once or twice a week [in recent years only once a week], and its agenda is extremely crowded by routine business, such as reports on pending legislation and foreign affairs, and by the need to deal with emergencies. A second reason is practical: most Cabinet ministers will not be informed about most of the work of other departments and have little interest in discussing activities for which they are not personally responsible. A third reason is organizational: it is possible to examine issues in formal or informal Cabinet committees.

The Cabinet is a framework within which many decisions can be taken committing the whole of the Cabinet *outside* the formal setting of a full Cabinet meeting. When a crisis requires prompt action, there may not be time to discuss matters with nonexpert ministers, and the full Cabinet may only be told about a decision when it is a *fait accompli*. During the Falklands War, for example, Mrs Thatcher constituted a small 'War Cabinet' to supervise military operations to which the whole of the Cabinet was committed. Actions that give little prospect of political controversy can be taken within a ministry. Measures low in controversy may be settled by bilateral discussions between two ministries, with the object of producing an agreement that will be formally ratified by Cabinet. Ministers who have not been involved in negotiations prefer to let recommendations pass without question, in the expectation that their bargains will similarly be approved when they appear on the Cabinet agenda.

Graham P Thomas, *Prime Minister and Cabinet Today* (1998), p 192

It is impossible to definitely state the role of the Cabinet and what its functions are. A great deal depends on the personalities involved and the political circumstances at any particular time. It is no longer the case (if it ever was) that the Cabinet directs and oversees government policy on a continuous basis. The sheer scale and complexity of governmental responsibilities make this impossible; many crucial decisions, especially those relating to defence, security and key financial and economic issues, are kept away from Cabinet and taken by the Prime Minister and a close circle of colleagues and advisers. The use made by successive Prime Ministers of the Cabinet, the extent to which it has acted in a collegiate manner as opposed to being in a sense a 'rubber stamp' for prime ministerial initiatives, has varied since the war. Thus the Cabinet is best seen as a part of a wider central executive, acting basically as a body to ratify decisions taken elsewhere, receiving reports rather than initiating action. On the other hand, its importance should not be ignored. Although rarely a policy-making body, its consent to major initiatives must usually be obtained and not even the most determined Prime Minister could prevail against the opposition of the majority of his or her colleagues for long.

Martin Smith held it to be a 'constitutional myth of collective responsibility, which sees the cabinet as the central decision-maker in government', whereas in reality 'the majority of decisions, most of the time, are made elsewhere' (*The Core Executive in Britain* (1999), p 72).

In the 1945–51 Attlee Government the decision to develop a British atomic bomb was made by the Prime Minister and an inner group of leading ministers in a Cabinet committee, Mr Attlee taking the view that 'the fewer people who were aware of what was happening, the better' (J Mackintosh, *The British Cabinet* (3rd edn 1977), p 502). The issue was not discussed in Cabinet. Similarly, in the 1974–79 Labour Government the critical decisions on development of the improved Polaris missile (Chevaline) and on support for a NATO programme of new theatre nuclear weapons in Europe, were taken not by the Cabinet but by small groups of senior ministers. In 1984 a controversial decision by the Conservative Government to ban trade union membership at the Government Communications Headquarters at Cheltenham was taken by a group of ministers without discussion in the Cabinet. The decision to allow British bases to be used for the American air attack on Tripoli in April 1986 was taken by the Prime Minister after consulting three Cabinet ministers: other ministers learned of the raid from the radio news. (See Peter Hennessy, *Whitehall* (1989), pp 317–8; Hugo Young, *One of Us* (1993 edn), p 476.) A contentious decision to close thirty-one coal pits in 1992 was taken by the Prime Minister together with ministers in economic departments without Cabinet discussion or approval (*The Times*, 16 October 1992).

It is generally agreed that collective decision-making in Cabinet suffered a marked decline during the 'Thatcher years', 1979–90, when Mrs Thatcher reduced the number of Cabinet meetings, asserted a dominating authority in Cabinet (at all events from 1981), and channelled decision-making to Cabinet committees and informal meetings with small groups of ministers. Sir Christopher Foster remarks that Cabinet was turned into a 'business meeting', and 'was not meant to discuss policy' (*A Stronger Centre of Government* (1997), pp 1, 6). It was on the ground of a failure of collective – or, as he expressed it, 'constitutional' – government that Mr Heseltine, Secretary of State for Defence, justified his resignation from the Government during the Westland affair in January 1986. In his resignation statement he deplored what he saw as a denial of opportunity for full, collective discussion by ministers of the issues of helicopter procurement, European collaboration and the defence industrial base arising from the reconstruction of the Westland helicopter company. (Mr Heseltine's resignation statement was published in *The Times* on 10 January 1986. The Westland affair has been considered above, pp 377–8. Nigel Lawson gives a more ambivalent assessment of Cabinet government under Mrs Thatcher (*The View from No 11* (1993 edn)). Remarking that 'in general and for good reason, key decisions were taken in smaller groups', he continues (p 125):

> The Cabinet's customary role was to rubber stamp decisions that had already been taken, to keep all colleagues reasonably informed about what was going on, and to provide a forum for general political discussion if time permitted.

Lawson also refers, however, to Mrs Thatcher's 'increasingly complex attempts to divide and rule' through very small, hand-picked groups (p 128).

Mr Major has said of his premiership (1990–97), 'I was very keen to bring Cabinet Government back' (*Evidence to the Public Administration Committee*, HC 821-i of 1999–00, Q8) and the Major years saw a partial revival of traditional decision-making in Cabinet and Cabinet committees. As Patrick Weller has observed, however, the 'party and parliamentary circumstances' of Mr Major's administrations were crucial in this: 'Every prime minister in the last fifty years who relied heavily on cabinet has been in a parlous political situation, either in Parliament or in the polls' ('Cabinet government: an elusive ideal?' (2003) 81 *Pub Adm* 701, 714).

The revival has not been maintained under Mr Blair: Cabinet and its committees have again been overshadowed by informal processes of decision-making, in ad hoc meetings and bilateral discussions between the Prime Minister and individual ministers – a 'creeping bilateralism', it is said, such as characterised the Thatcher years (P Hennessy, *The Blair Revolution in Government*? (2000), p 13. See also P Hennessy, *The Prime Minister* (2000), pp 517–23.) Before and during the Iraq war in 2003 the Cabinet, in its brief weekly meetings, was not kept fully informed; in particular, the Attorney General's written advice on the question of legal authority for the war was not made available to the Cabinet. The Prime Minister and the Foreign and Defence Secretaries briefed the Cabinet orally, but relevant and informative papers written by officials were not discussed in Cabinet or Cabinet Committee. In the year before the start of the war there were frequent informal meetings of the Prime Minister and a small number of leading ministers, officials and military officers, and during the conflict there was oversight by an informal 'war cabinet' consisting of the Prime Minister, three Secretaries of State and prime-ministerial official advisers. The Defence and Overseas Policy Committee of the Cabinet did not meet during the Iraq crisis. (On these matters see Clare Short's evidence to the House of Commons Foreign Affairs Committee, vol III, HC 813-III of 2002–03, QQ 63–156; Clare Short, *An Honourable Deception*? (2004), pp 147, 186–7, 247, 254–5; Butler Report, *Review of Intelligence on Weapons of Mass Destruction* (HC 898 of 2003–04), paras 606–11.) The Butler Report concluded:

> We do not suggest that there is or should be an ideal or unchangeable system of collective Government, still less that procedures are in aggregate any less effective now than in earlier times. However, we are concerned that the informality and circumscribed character of the Government's procedures which we saw in the context of policy-making towards Iraq risks reducing the scope for informed collective political judgement. Such risks are particularly significant in a field like the subject of our Review, where hard facts are inherently difficult to come by and the quality of judgement is accordingly all the more important.

With respect to Mr Blair's 'informal style', the former Cabinet Secretary, Lord Wilson of Dinton, has remarked (in W Runciman (ed), *Hutton and Butler: Lifting the Lid on the Workings of Power* (2004), p 85):

> Different Prime Ministers have different ways of doing business and there is no 'right' way of running a Government. It is quite possible to reconcile due process with an informal style. But the risk is that informality can slide into something more fluid and unstructured, where advice and dissent may either not always be offered or else may not be heard.

The role of the Cabinet in the working of central government is fluid and variable, and if Cabinet has suffered a decline it is not yet moribund. GW Jones' observation in 1975 that 'for the most politically important issues the Cabinet is the effective decision-making body' (in W Thornhill (ed), *The Modernization of British Government* (1975), p 31) may need qualification but has not yet been falsified. Professor Jones has since remarked that even Mrs Thatcher's style of government was not without precedent and that she 'streamlined cabinet government without losing its essential collective nature' ('Cabinet government since Bagehot' in R Blackburn (ed), *Constitutional Studies* (1994 edn), pp 20–3). It may be difficult to refute Martin Burch's conclusion that 'the idea that the Cabinet is in supreme control of decision-making must be judged untenable' ('The demise of Cabinet government?', in L Robins (ed), *Political Institutions in Britain* (1987), p 33), yet Cabinet remains capable of reasserting itself as 'the ultimate arbiter of all Government policy' as it is declared to be in Cabinet Office guidelines on the Cabinet and its committees. Its political power may most clearly be seen, perhaps, when its members judge that a Prime Minister is approaching (or has passed) his or her 'use-by' date, as Mrs Thatcher discovered in 1990 and as Mr Blair avoided rediscovering in the late summer of 2006 only by announcing that he will have resigned within a year. As more than one commentator has put it, Cabinet government is as an elastic band: it can be stretched but, as Mrs Thatcher's fall showed, it can snap back sharply on those who stretch it too far (see eg, Weller, 'Cabinet government: an elusive ideal?' (2003) 81 *Pub Adm* 701, 703).

(See further on the Cabinet system M Burch and I Holliday, *The British Cabinet System* (1996); S James, *British Cabinet Government* (2nd edn 1999), chs 3, 5, 6; G Thomas, *Prime Minister and Cabinet Today* (1998), ch 9; Foster, 'Cabinet government in the twentieth century' (2004) 67 *MLR* 753.)

(i) Neither 'Prime Ministerial' nor 'Cabinet' government: the 'core executive' thesis

It may be better to see contemporary British government as an example of neither Prime Ministerial nor Cabinet government. A number of political scientists have in recent years advanced the thesis that to think in terms of there being a 'core executive' may, instead, be a more accurate and helpful approach to take. (See eg, Dunleavy and Rhodes, 'Core executive studies in Britain' (1990)

68 *Pub Adm* 3; R Rhodes and P Dunleavy (eds), *Prime Minister, Cabinet and Core Executive* (1995); M Smith, *The Core Executive in Britain* (1999).) The 'core executive' thesis recognises that power in the centre has grown, without overstating the power of the Prime Minister. It also avoids discussing these matters as if the 'decline' in Cabinet government is something always and necessarily to be lamented and is even, in some sense, improper or unconstitutional. Walter Bagehot and Ivor Jennings were great constitutionalists. And they were great exponents of Cabinet government as a model and as a practice. But we do not necessarily have to follow them in this particular in order to stay loyal to the constitution.

The core executive thesis, in outline, runs as follows: that there is a small number of agencies at the centre of the executive branch of government in the United Kingdom that 'fulfil essential policy setting and general business coordination and oversight functions above the level of departments' (Burch and Holliday, 'The Blair government and the core executive' (2004) 39 *Government and Opposition* 1, 3). These agencies comprise the Prime Minister's Office, the Cabinet Office, the Treasury, the Foreign and Commonwealth Office, the central government Law Officers and offices managing the governing party's parliamentary and mass support bases (see further M Burch and I Holliday, *The British Cabinet System* (1996)).

The following extracts demonstrate the variety of advantages that proceeding in these terms may bring to the analysis of contemporary British government.

Patrick Weller, 'Cabinet government: an elusive ideal?' (2003) 81 *Pub Adm* 701, 703–4, 716

We need to avoid the assumption that there is a zero sum game, that if prime ministers are powerful then cabinet has 'lost' influence. Prime ministerial influence and cabinet government are not polar alternatives . . .

We should not be overwhelmed by recent events, by being surprised by the management and practices of recent prime ministers. The argument that prime ministers are powerful and the cabinet has been relegated to become one of the 'dignified' parts of the constitution is scarcely recent, even if it is constantly rediscovered. The explicit theoretical debate began with John Mackintosh [*The British Cabinet* (1962)] who emphasized that 'the country is governed by the Prime Minister who leads, coordinates and maintains a series of ministers'. The prime ministers on whose experience he drew were those who held office in the 1940s and the 1950s or earlier; Lloyd George and Chamberlain are described as dominant figures who almost did away with cabinet decision making. The thesis thus predates the 1960s and 1970s, yet often these are the very times to which commentators now look as a period when cabinet government flourished . . . Indeed, arguments about dominant prime ministers can be found in the descriptions of the governments of Gladstone and Peel . . .

Cabinet remains a useful forum for maintaining . . . collective support; indeed that still seems the most persuasive reason for the regular meetings of cabinet, whether they are seen as a focus group or a political forum. Indeed these traditional political functions of cabinet – exchanging information, taking the political temperature, geeing up ministers, providing a sense of solidarity, setting the tone, emphasising the current issues and their resolution – can be undertaken almost independently of policy functions. Hence the fact that often when big issues [come] to cabinet, the intent [is] as much to solidify support as [to] determine any direction. Every government seems to still use cabinet for these political purposes, as insurance and to lock in support.

But the pressure and complexity of modern government means that a weekly meeting of busy ministers no longer seems the best way to make timely and sophisticated policy. So prime ministers choose to work with the principal players in and around those regular meetings. The weaknesses of cabinet are . . . well established: too much information, too little time, too many busy people. Modern practices take this pressure into account by segmenting and organizing the decision-making . . .

If that is an accurate diagnosis, then cabinet is simply evolving as it did a century ago.

Martin Burch and Ian Holliday, 'The Blair government and the core executive' (2004) 39 *Government and Opposition* 1, 8, 12, 20–1

[C]hanges at the core under Labour mark the latest stage in the evolution of Britain's still functioning system of cabinet government . . . [T]he Blair reforms . . . reflect an acceleration of pre-existing trends, with the result that the executive arm of government has been substantially enhanced . . .

Labour's first term saw an augmentation of resources at the core. The work of the PMO [Prime Minister's Office] and CO [Cabinet Office] was better integrated through, for example, closer contacts between the Policy Unit and the secretariats, overseen by Chief of Staff [Jonathan] Powell. The Treasury developed a more substantial role in monitoring public expenditure and service provision . . .

[T]he Centre is far more substantial and integrated than in 1997. There are now 190 staff at the PMO, compared to 130 in 1997, and more units in the Centre as a whole. At the same time, the PMO and CO are more integrated and focused than before, with more staff working to the PM. The overall outcome is clearer lines of command and direction, and a strengthening of the position of the PM and his aides. But also it is worth noting that this has been coupled with a significant and expanding role for the Chancellor and his advisers in overseeing delivery . . .

[T]he British core is increasingly coordinated and coherent, and increasingly proactive and performance-driven. It also adopts a negotiating, collaborative style designed to maximise its leverage over the rest of Whitehall . . . That it does so reflects a recognition on the part of central actors that highly departmentalized government is not an ideal model for effective administration in an age when policy problems and solutions frequently cut across departmental boundaries and fiefdoms.

Looking at the structures now in place, it is clear that the Centre has more capacity to play a significant policy role. The extent to which that capacity is exploited, and with what success, of course depends on the motivation and skill of key actors, and on the circumstances in which they find themselves at any given moment in time. Furthermore, the notion, sometimes heard, that this amounts to the demise of cabinet government in Britain is something that we seriously question. It is true that the positions of the PM and his aides have been reinforced, but against that needs to be balanced an important and growing role for the Chancellor in domestic policy. There may also be less collective government than under, say, Major or Callaghan. However, each of those premiers was frequently crippled by crisis, and they had little option but to adopt a collective stance. Compared with Thatcher, Blair does not look markedly less collective in approach.

Pulling all this together, what we can say is that collective government still operates fully from time to time, and partially (in smaller groups of ministers) all the time on specific policy issues. In many ways, it simply has to, as the UK has neither a presidential institutional structure nor presidential institutional capacity. Thus, although bouts of prime ministerial dominance may infect particular governments now and then, they cannot be sustained because the system is not in essence presidential and is not designed to support them. The result is that British government exists, at the Centre, in permanent tension between individual (PM) and collective (cabinet) government, veering by time and issue from one tendency to the other. Under Blair, the resources of the PM have been increased, but the balance of the system as a whole has not been totally transformed. Thus, while there has clearly been substantial change, there has not been a revolution. Rather, the changes that have taken place are in keeping with UK traditions and practice.

If the foregoing analysis is correct, it is worth noting at this stage one significant consequence. This is that parliamentary mechanisms and systems of accountability are not based on the notion of the core executive, but continue to be structured around particular government departments (see further chapter 9). There is no House of Commons select committee, for example, on the core executive (although the Public Administration Committee does examine matters of public administration and government structure in the round). While it does from time to time happen, it continues to be rare for select committees to work together on policy problems that span different government departments (for an example of such cooperation, see the joint inquiry into arms exports conducted in the 1997–2001 Parliament by the Defence, Foreign Affairs, International Development and Trade and Industry Committees). See further on these matters, chapter 9.

(d) Ministerial committees of the Cabinet

Much of the work on government policy that was formerly the business of the Cabinet is now carried out in Cabinet committees (ministerial committees of

the Cabinet). Such committees have existed since the early nineteenth century, but a fully organised committee system became established as a normal part of Cabinet government only after the Second World War. Cabinet committees deal with matters of continuing governmental concern such as economic policy, home and social affairs, defence and overseas policy, local government and the environment, and a new administration may retain much of the previous government's standing committee structure. Ad hoc committees are appointed to deal with specific and immediate issues of policy and are wound up when the work entrusted to them has been completed. At any time there may be about twenty standing committees and a variable number of sub-committees and ad hoc committees. Under the Blair administrations there have been ad hoc committees on, for example, food safety, youth justice, animal rights activists and the Olympics.

The Prime Minister establishes and dissolves Cabinet committees, appoints the chairmen and members and specifies the terms of reference. The Prime Minister ordinarily chairs a number of Cabinet committees himself.

Rodney Brazier, *Ministers of the Crown* (1997), p 158

> From the point of view of the departmental Minister, a Ministerial Committee can reduce a problem to its essentials, and allow disagreeing Ministers to debate the key issues. With luck he will be able to find agreement in the Committee, especially given that other Ministers are acutely aware that they will bring matters to committees from time to time and that if they are helpful to this Minister over his problem, he may reciprocate over theirs. From the point of view of the Cabinet, this method of doing business should save its time: fewer policy matters will be referred to it for discussion (although Committee decisions may be submitted for ratification), and unresolved matters will only be considered to the extent of concentrating on outstanding points of dispute. Given the delegation of ministerial responsibility within departments, it is clearly sensible that junior Ministers should be full members of some Ministerial Committees, and indeed they are – although they are outnumbered by Cabinet Ministers on them. Junior Ministers, however, are very well represented on many Ministerial Sub-Committees.

Cabinet committees consider some matters with a view to making a recommendation to the full Cabinet, but a great many questions are decided by the committees themselves. Every Cabinet committee, said Richard Crossman, 'is a microcosm of the Cabinet' (*Inside View* (1972), p 56); the committees and their sub-committees 'act by implied devolution of authority from the cabinet and their decisions therefore have the same formal status as decisions by the full Cabinet' (Cabinet Office guidelines 2003). These decisions are often of considerable importance. For instance, it was a ministerial committee that made the decision, in 1980, to acquire the Trident nuclear missile system.

Ministerial Code (2005)

6.4. The Cabinet is supported by Ministerial Committees which have a two-fold purpose. First, they relieve the pressure on the Cabinet itself by settling as much business as possible at a lower level or, failing that, by clarifying the issues and defining the points of disagreement. Second, they support the principle of collective responsibility by ensuring that, even though an important question may never reach the Cabinet itself, the decision will be fully considered and the final judgement will be sufficiently authoritative to ensure that the Government as a whole can be properly expected to accept responsibility for it. When there is a difference between Departments, it should not be referred to the Cabinet until other means of resolving it have been exhausted, including personal correspondence or discussions between the Ministers concerned.

6.5. If the Ministerial Committee system is to function effectively, appeals to the Cabinet must be infrequent. Those who chair Committees are required to exercise their discretion in advising the Prime Minister whether to allow them. The only automatic right of appeal is if Treasury Ministers are unwilling to accept expenditure as a charge on the reserve; otherwise the Prime Minister will entertain appeals to the Cabinet only after consultation with the Minister who chairs the Committee concerned. Departmental Ministers should normally attend in person meetings of Committees of which they are members or to which they are invited. Unless they make it possible for their colleagues to discuss with them personally issues which they consider to be important, they cannot – except where their absence is due to factors outside their control – expect the Prime Minister to allow an appeal against an adverse decision taken in their absence.

The Cabinet committee system was formerly not a publicly acknowledged part of the constitution: governments did not announce the establishment or even admit the existence of Cabinet committees. Mrs Thatcher let in some light by disclosing the existence (but not the membership or responsibilities) of four principal ministerial standing committees of the Cabinet. A greater concession to open government was made in 1992 when Mr Major gave details of the membership and terms of reference of sixteen standing ministerial committees and ten sub-committees; updated lists have been published subsequently. Details of the proceedings of the committees are not made public.

The structure of Cabinet committees was as follows in 2006.

Ministerial Committees of the Cabinet, 2006

Ministerial Committee on Anti-Social Behaviour
Chair: Prime Minister
Terms of reference: 'To develop the Government's policies on anti-social behaviour and respect and to monitor delivery'.

Ministerial Committee on Asylum and Migration
Chair: Prime Minister
Terms of reference: 'To consider the impacts of migration; and co-ordinate and oversee delivery of the Government's policies on asylum and immigration'.

Ministerial Committee on Civil Contingencies
Chair: Home Secretary
Terms of reference: 'To consider, in an emergency, plans for assuring the supplies and services essential to the life of the community and to supervise their prompt and effective implementation where required'.

Ministerial Committee on Constitutional Affairs
Chair: Lord Privy Seal and Leader of the House of Commons
Terms of reference: 'To consider strategic issues relating to the Government's constitutional reform policies including House of Lords reform and issues arising from devolution to Scotland, Wales and Northern Ireland'.

Ministerial Committee on Intelligence Services
Chair: Prime Minister
Terms of reference: 'To keep under review policy on the security and intelligence services'.

Ministerial Committee on Defence and Overseas Policy
Chair: Prime Minister
Terms of reference: 'To set strategies for the Government's defence and overseas policy'.

Ministerial Committee on Domestic Affairs
Chair: Deputy Prime Minister and First Secretary of State
Terms of reference: 'To consider issues relating to the Government's broader domestic policies'.

Ministerial Committee on Economic Affairs, Productivity and Competitiveness
Chair: Chancellor of the Exchequer
Terms of reference: 'To oversee and drive forward policies to improve productivity and the competitiveness of the UK economy'.

Ministerial Committee on Energy and the Environment
Chair: Prime Minister
Terms of reference: 'To develop the Government's energy and environmental policies, to monitor the impact on sustainable development of the Government's policies, and to consider issues of climate change, security of supply and affordability of energy'.

Ministerial Committee on European Policy
Chair: Foreign Secretary
Terms of reference: 'To determine the United Kingdom's policies on European Union issues, and to oversee the United Kingdom's relations with other member states and principal partners of the European Union'.

Ministerial Committee on European Union Strategy
Chair: Prime Minister
Terms of reference: 'To oversee the Government's European strategy and the presentation of its Government's European policy.'

Ministerial Committee on Housing and Planning
Chair: Deputy Prime Minister and First Secretary of State
Terms of reference: 'To set the Government's strategy to improve the effectiveness of the planning system and the supply and affordability of housing in England, and to monitor delivery'.

Ministerial Committee on Identity Management
Chair: Lord Privy Seal and Leader of the House of Commons
Terms of reference: 'To co-ordinate the Government's policy and strategy on identity management in the public and private sectors, and to drive forward the delivery of transformational benefits across government'.

Ministerial Committee on Legislative Programme
Chair: Lord Privy Seal and Leader of the House of Commons
Terms of reference: 'To consider legislation and related matters'.

Ministerial Committee on Local and Regional Government
Chair: Deputy Prime Minister and First Secretary of State
Terms of reference: 'To consider issues affecting regional and local government, including the annual allocation of resources'.

Ministerial Committee on National Health Service Reform
Chair: Prime Minister
Terms of reference: 'To drive forward the Government's policies to reform the NHS while achieving value for money and to monitor delivery'.

Ministerial Committee on Public Services and Public Expenditure
Chair: Chancellor of the Exchequer
Terms of reference: 'To review public expenditure allocations and to make recommendations – including on Public Service Agreements – to Cabinet; and to review progress in delivering the Government's programme of investment and reform to renew the public services'.

Ministerial Committee on Public Services Reform
Chair: Prime Minister
Terms of reference: 'To oversee the delivery of public services'.

Ministerial Committee on Regulation, Bureaucracy and Risk
Chair: Prime Minister
Terms of reference: 'To provide strategic oversight of the better regulation agenda, risk and reducing unnecessary bureaucracy both in the public and private sectors'.

Ministerial Committee on Schools Policy
Chair: Prime Minister
Terms of reference: 'To develop policies to improve schools and to monitor progress'.

Ministerial Committee on Science and Innovation
Chair: Secretary of State for Trade and Industry
Terms of reference: 'To determine and oversee the implementation of the Government's policies in relation to science, innovation and wealth creation'.

Ministerial Committee on Serious and Organised Crime and Drugs
Chair: Prime Minister
Terms of reference: 'To develop and co-ordinate the Government's strategies for reducing crime, in particular organised crime and drugs misuse'.

Ministerial Committee on Social Exclusion
Chair: Minister for the Cabinet Office and Social Exclusion (Chancellor of the Duchy of Lancaster)
Terms of reference: 'To develop an Action Plan for tackling persistent social exclusion; to ensure mechanisms for delivering the Action Plan are put in place; and to oversee longer term strategy development'.

Ministerial Committee on Welfare Reform
Chair: Prime Minister
Terms of reference: 'To develop policies on welfare reform and to monitor progress'.

The above list does not include ad hoc committees or the seventeen sub-committees functioning in 2006.

In July 1997 Mr Blair took what was described as an historic step in setting up a joint consultative Cabinet committee to consider policy issues of common interest to the Government and to the Liberal Democrat Party. It was chaired by the Prime Minister, other ministers and Liberal Democrat spokesmen being invited to attend as necessary. It was intended that the joint committee would enable the Government 'to explore with a party with which it shares many common aims, how those aims might be achieved in what we perceive, jointly, to be the national interest' (HL Deb vol 583, col 578, 19 November 1997). The committee discussed projects of constitutional reform and EU common foreign and security policy issues, but the Liberal Democrats, disappointed by what it had failed to achieve (in particular, proportional representation for parliamentary elections), withdrew from the committee in 2001.

The system of ministerial committees is anything but a tidy arrangement and governmental decision-making is diffused not only among these committees but through a constantly changing network of informal groups, inter-departmental meetings and correspondence between ministers. In consequence Cabinet committees may fail to meet, their business being instead dealt with in unminuted discussions between the Prime Minister and the departmental ministers concerned. (See Foster, 'Cabinet government in the twentieth century' (2004) 67 *MLR* 753, 760–1, 767–71.) Many matters are, of course, decided wholly within individual government departments.

(e) Government departments

The central government of the United Kingdom, as a former head of the home civil service, Sir William Armstrong, remarked, 'is a federation of departments' (Peter Hennessy, *Whitehall* (1989), p 380). Departments are the power-houses of government, continually involved in the development and execution of government policies. Statutory powers vested in ministerial heads of departments and prerogative powers delegated to them are alike available to the departments for carrying out their functions.

The Prime Minister, it is stated in the *Ministerial Code* (2005), para 8.1, 'is responsible for the overall organisation of the Executive and the allocation of functions between Ministers in charge of Departments'. (In this the Prime Minister exercises devolved prerogative power.) Changes in departmental structure are frequently made, departments being created, dissolved, amalgamated and divided in accordance with the priorities of successive governments.

A feature of the 1960s and early 1970s was the bringing together of a number of related governmental functions in new departments, some of them of considerable size and popularly described as 'giant' departments. For instance, a reconstituted Ministry of Defence absorbed the Admiralty, the War Office and the Air Ministry in 1964; a Department of the Environment, set up in 1970, took over the functions of three former Ministries (Housing and Local Government, Public Building and Works, and Transport) and the Department of Trade and Industry, also created in 1970, assumed the functions of the Ministry of Technology and the Board of Trade. A result of these and other amalgamations was that all major departments could be represented in the Cabinet without increasing its size. It was also hoped that the making and implementation of policies would be better coordinated by grouping related functions together in a single department.

Repeated changes in departmental responsibilities are costly and disruptive of the work of administration, but the reallocation of functions has continued in a quest for greater efficiency or in response to changing priorities. For instance, Health and Social Security, combined in 1968, were again separated in 1988; the Department of Social Security was absorbed in 2001 into a new Department for Work and Pensions. The Department of Trade and Industry dissolved into four departments in 1974 but Trade and Industry were again merged in 1983. A Department of National Heritage was created in 1992, to be reconstituted as the Department of Culture, Media and Sport in 1997. A new Department for International Development was created in 1997, giving a greater prominence to policies that previously fell to a wing of the Foreign and Commonwealth Office. Further restructuring, involving the splitting or dissolution of a number of departments, took place after the 2001 general election. A Department for Constitutional Affairs was created in 2003.

There is no legal definition of a government department and there can be disagreement about the bodies that are properly so described: even different

official lists do not agree in this matter. (See eg, Smith *et al*, 'Central government departments and the policy process' (1993) 71 *Pub Adm* 567; Hogwood, 'Whitehall families: core departments and agency forms in Britain' (1995) 61 *International Review of Administrative Sciences* 511; and see the definition proposed by Rodney Brazier, *Ministers of the Crown* (1997), pp 32–3.)

At all events no such doubts attach to the following principal departments (in 2007), each of them headed by a Secretary of State or other Cabinet minister:

Cabinet Office
Department for Communities and Local Government
Department for Constitutional Affairs
Department for Culture, Media and Sport
Ministry of Defence
Department for Education and Skills
Department for Environment, Food and Rural Affairs
Foreign and Commonwealth Office
Department of Health
Home Office
Department for International Development
Northern Ireland Office
Scotland Office
Department of Trade and Industry
Department for Transport
Her Majesty's Treasury
Wales Office
Department for Work and Pensions

Departments are sometimes headed by ministers not in the Cabinet (eg, the Attorney General's Office). There are also *non-ministerial departments* – bodies with departmental status that are headed by officials, for instance the Charity Commission for England and Wales, HM Revenue and Customs, the Office of Fair Trading, the Serious Fraud Office and the Forestry Commission. For each of these some or other minister has ultimate responsibility.

The functions of most government departments are broadly indicated by their names, but the work of departments changes as issues rise or fall in urgency or salience and as governments come and go or modify their policies, and from time to time responsibility for particular programmes is reallocated between departments. The Home Office, a department of ancient origin, has for long been charged with a wide and heterogeneous range of functions, relating to such various matters as crime and policing, prisons, probation, immigration and asylum, race relations, extradition, dangerous drugs and the Royal Pardon. It was once said that 'all domestic matters not assigned by law or established custom to some other Minister fall to the Home Secretary, so that he has been described as "a kind of residual legatee" ' (Sir Frank Newsam, *The Home Office* (2nd edn 1955), p 12). In 2001 a number of traditional Home

Office responsibilities were transferred to other departments, for example, elections, human rights, data protection, freedom of information (these being now responsibilities of the Department for Constitutional Affairs) as well as fire services, liquor licensing and gambling. Decisions taken in the Home Office often directly affect individuals (juvenile offenders, prisoners, asylum-seekers and others) and the Law Reports reveal frequent instances of legal challenge (by way of judicial review) of decisions taken by or in the name of the Home Secretary.

Responsibilities for law reform, legal services and the administration of justice are at present divided between a number of departments (the Home Office, the Department for Constitutional Affairs and the Attorney General's Office). Might these functions be better managed, accountability made more sure, and a stimulus provided for reforms in the law, the court system and access to justice, if the divided responsibilities were brought together in a new Ministry of Justice, headed by a minister responsible to the House of Commons? The case seems compelling but has been resisted by the Bar, the judiciary and government. (See J Spencer (ed), *Jackson's Machinery of Justice* (8th edn 1989), pp 506–10; Drewry, 'The debate about a Ministry of Justice' [1987] *PL* 502; Brazier, 'Government and the law: ministerial responsibility for legal affairs' [1989] *PL* 64; *ibid, Constitutional Reform* (2nd edn 1998), ch 9.)

The Treasury is a department of wide-ranging influence and power at the centre of government. It is both a finance and an economics department and, since its approval is required for all government expenditure, departments are constrained in adopting policies that cost money by the need for the Treasury's agreement. Departmental estimates of expenditure ('Supply Estimates') must be approved by the Treasury before being presented to Parliament.

To a great extent we live under a system of 'departmental government'. Most governmental decisions are made in the departments, sometimes in negotiation with outside interest groups. The bulk of legislation is initiated in government departments. The departments act within a general framework of government policy, but have policies and interests of their own. Sometimes their interests come into conflict. The tobacco industry, for instance, may be viewed differently in the Department of Health and the Department of Trade and Industry. The Treasury engages in a continuing round of sometimes contentious bargaining with the spending departments. Tensions like these may be constructively resolved through formal and informal inter-departmental networks, but at worst policies may become confounded as departments pursue their own goals or, on occasion, work against each other's interests. In reporting on the Westland affair (above, pp 377–8), the House of Commons Select Committee on Trade and Industry expressed its 'deepest concern at the lack of co-ordination on matters of major policy formulation between two departments of State' (*Second Report*, HC 176 of 1986–87, para 14). In 1996 the Scott

Report (HC 115 of 1995–96) found that there had been disagreements between the Department of Trade and Industry and the Foreign and Commonwealth Office on exports of defence-related goods.

Policies can often be successfully implemented only through coordinated action by several departments. The House of Commons Select Committee on Public Administration has noted that, while departments are organised vertically, 'many of the most intractable problems of modern government have a horizontal or inter-connected nature – for example, social exclusion encompasses a range of issues and multiple departmental responsibilities' (*Seventh Report*, HC 94 of 2000–01, para 7). The institutional machinery for achieving the necessary cooperation of departments is to be found in the Cabinet, ministerial committees, the Cabinet Office and the Treasury, but these have not always been effective to ensure coherent policy-making and implementation. In 1999 the Government White Paper, *Modernising Government* (Cm 4310) emphasised the need to challenge departmentalism and engage, in a 'holistic' or 'joined-up' way, with issues that crossed departmental boundaries. It is a principal objective of the Cabinet Office to 'achieve coordination of policy and operations across government': in this it 'works with the Treasury and other departments to provide strategic management and direction on a wide range of issues, many of which have implications for all government departments and the public sector as a whole' (*Cabinet Office Annual Report 2003–04*, HC 1190 of 2003–04, paras 1, 12). (The administrative machinery for carrying out this work is described in the Cabinet Office's *Departmental Report 2005*, Cm 6543.) Increased central control (under prime-ministerial direction) may on the other hand weaken the capacity of departments to develop their own policies. A further initiative has been taken in the form of Public Service Agreements, in which departments agree with the Treasury on sets of objectives and related performance targets for three years ahead, in return for financial resources made available to them. The Treasury monitors the performance of departments (as well as some cross-departmental programmes) against their targets. (See Kavanagh and Richards, 'Departmentalism and joined-up government' (2001) 54 *Parliamentary Affairs* 1; *2004 Spending Review: Public Service Agreements 2005–08*, Cm 6238/2004.)

(i) 'Next Steps': executive agencies

In 1988 the Government launched a programme of organisational reform in the departments which was based on the idea of 'accountable management', responsibility for 'blocks' of work being delegated to civil service managers, who would be given control of resources, with a large measure of operational independence, and be held accountable for results. The scheme was introduced following a report by the Prime Minister's Efficiency Unit, *Improving Management in Government: The Next Steps* (1988). Its main recommendation, accepted by

the Government, was explained by the Prime Minister in the House of Commons (HC Deb vol 127, col 1149, 18 February 1988) as being that:

> to the greatest extent practicable the executive functions of Government, as distinct from policy advice, should be carried out by units clearly designated within Departments, referred to in the report as 'agencies'. Responsibility for the day-to-day operations of each agency should be delegated to a chief executive. He would be responsible for management within a framework of policy objectives and resources set by the responsible Minister, in consultation with the Treasury.

By 2004 there were ninety-six executive agencies and some 73 per cent of civil servants were employed in them. The list of agencies includes the Central Office of Information, the Child Support Agency, HM Prison Service, the Highways Agency, the UK Patent Office and the Identity and Passport Service. A few agencies are (non-ministerial) government departments in their own right: these include HM Land Registry, Ordnance Survey and the Treasury Solicitor's Department. Most of the administrative work of central government is now carried out by executive agencies. Similar agencies are attached to the devolved administrations.

The policies, budgets and tasks of the executive agencies are settled by the responsible minister. For each agency a 'framework document' is drawn up (and published) which specifies, amongst other matters, the functions, aims and objectives of the organisation, its Chief Executive's financial freedoms and responsibilities and its relationship with the minister and departmental officials. The setting of performance targets and monitoring of the extent to which they have been met is a mechanism for improving the efficiency and quality of service of the agencies. Each agency is reviewed, usually at five-yearly intervals, its efficiency and effectiveness – and scope for improvement – are assessed and a decision is taken whether it should continue as an agency, or be abolished, or privatised, or whether some of its functions should be contracted out to the private sector.

The executive agencies are intended to have a large measure of autonomy in *operational* matters, while *policy* remains the responsibility of the minister and the 'core' department. This distinction has proved problematic. Policy and operations impact on each other and are not easily separated. Moreover, 'Ministers retain the right to look at, question and, if necessary, intervene in the operation of their agencies if public or parliamentary concerns require this' (*Next Steps Report 1997*, Cm 3889/1998, p v). If ministers withdraw from engagement in agency matters, 'a vacuum of governance will occur' (*Better Government Services*, below, para 25). In the early 1990s ministerial interventions in the Prison Service executive agency were especially frequent, with resulting confusion as to the respective roles of minister and chief executive (for the accountability problems this generated, see A Tomkins, *The Constitution after Scott* (1998), pp 45–9 and see further below, pp 587–8). It has been

suggested that executive agency status is not appropriate 'where day-to-day provision of the service is liable to give rise to issues of policy, or at least of political controversy, such that the minister is bound to become engaged in them, and . . . obliged to intervene in the day-to-day performance of the function' (Memorandum by Lord Armstrong, Select Committee on the Public Service, *Special Report*, HL 68 of 1996–97, p 1).

It is claimed that the Next Steps initiative 'has brought a much clearer focus on the executive functions of Government by setting clear aims, objectives, and targets and giving Chief Executives the management authority they need in order to deliver them' (*Government Response to the Public Service Committee*, Cm 4000/1998, para 41). The agency programme is generally considered to have brought about greater efficiency in the delivery of public services. On the other hand, it raises important issues of accountability to Parliament, considered in chapter 9.

The introduction of executive agencies was effected without enabling legislation. Why was this not needed?

(See further A Davies and J Willman, *What Next*? (1991); P Greer, *Transforming Central Government: the Next Steps Initiative* (1994); B O'Toole and G Jordan, *Next Steps: Improving Management in Government*? (1995); M Freedland in M Sunkin and S Payne (eds), *The Nature of the Crown* (1999), ch 5; *Better Government Services: Executive Agencies in the 21st Century*, Report of the Agency Policy Review 2002.)

(f) Non-departmental public bodies

On the fringes of central government there is a large constellation of commissions, boards, committees and other bodies which are involved in manifold ways in the processes of government. *Advisory* committees are set up to provide independent and expert advice to ministers and to enlist the cooperation of outside interest groups in government policy-making, while *executive* bodies perform various administrative, regulatory or commercial functions on behalf of government. These non-departmental public bodies (NDPBs) are sometimes termed 'fringe bodies', and the acronym QUANGO (quasi-autonomous non-governmental organisation) has been coined for them, but they are in fact closely linked with central government and their functions are often of a governmental nature. (We are not dealing in this section with tribunals or National Health Service bodies or with public corporations, such as the BBC.)

An official description of an NDPB runs as follows (*Public Bodies: A Guide for Departments* (2006), para 2.1):

> A body which has a role in the processes of national government, but is not a government department, or part of one, and which accordingly operates to a greater or lesser extent at arm's length from ministers.

Such bodies have been set up to harness expertise only available outside the civil service or to carry out functions which it is thought should be detached from direct ministerial control and be free from the constraints of civil service organisation. For some public functions NDPBs have the particular advantage that they 'can exercise their judgement independently of the political preferences of the Government of the day' (Culture, Media and Sport Committee, *Sixth Report*, HC 506-I of 1998–99, para 6). Our main concern in this section is with executive NDPBs, but the advisory bodies also have an important role in support of government. (They include, for example, the Civil Justice Council, the Council on Tribunals and the Law Commission.) The following are some of the better-known executive NDPBs:

Advisory, Conciliation and Arbitration Service (ACAS)
British Council
Civil Aviation Authority
Competition Commission
Criminal Cases Review Commission
Criminal Injuries Compensation Authority
Environment Agency
Gaming Board for Great Britain
Health and Safety Commission
Housing Corporation
Human Fertilisation and Embryology Authority
Legal Services Commission
Parole Board

Since NDPBs have very diverse functions and have not developed in a coherent fashion, there is a lack of consistency in their legal status, organisation, funding and degree of autonomy. Brian Hogwood ((1995) 48 *Parliamentary Affairs* 207, 209) cautions that 'any attempt to define quangos by listing distinguishing characteristics will break down, since some of these characteristics will not apply to some quangos and some will be shared by other types of bodies'. Hogwood's caveat is borne in mind in offering the following list of main features of NDPBs.

1. NDPBs function at arm's length from ministers with substantial operational autonomy, but within limits set by any relevant statute and by government policy.
2. Most executive NDPBs are set up by statute, but some are incorporated under Royal Charter or under the Companies Act. (Advisory bodies may be set up by administrative action.)
3. The members of the managing boards of NDPBs are usually appointed by ministers.
4. NDPBs (unlike executive agencies) are not normally Crown bodies but there are exceptions (eg, the Advisory, Conciliation and Arbitration Service and the Health and Safety Commission).

5. Some NDPBs are entirely financed by government, some are partially so financed, while some (especially advisory bodies) may receive no government funding.
6. Executive NDPBs publish their accounts and an annual report.
7. NDPBs employ their own staffs, who are not normally civil servants.

Ministers are responsible for over 21,000 appointments to NDPBs and other public bodies, many of them carrying salaries or other emoluments. In the 1980s and early 1990s there was public concern that political considerations were influencing appointments, and that NDPBs were coming to be occupied by party (at that time Conservative) placemen. In consequence, the making of appointments to executive NDPBs (and National Health Service bodies) was one of the matters examined by the Nolan Committee in its Inquiry into Standards in Public Life (see the *Nolan Report* (1995)).

The Nolan Committee recommended the appointment of a new, independent Commissioner for Public Appointments who would monitor, regulate and advise on ministerial appointments to executive NDPBs and National Health Service bodies. The first Commissioner, who took office in 1995, issued a *Code of Practice for Ministerial Appointments to Public Bodies* (revised edn 2005). The Code sets out a number of principles to be observed in making appointments to public bodies, placing emphasis on selection on merit (the 'overriding principle'), independent scrutiny of the appointments process, openness and transparency in appointments and procedures. Government departments are required to follow the Commissioner's principles and the Code of Practice in making public appointments. The House of Commons oversees the work of the Commissioner through its Public Administration Committee and the arrangements for public appointments are also reviewed by the independent Committee on Standards in Public Life. (See the Committee's *Tenth Report, Getting the Balance Right: Implementing Standards of Conduct in Public Life*, Cm 6407/2005.) The Government is committed to improving diversity in public appointments: see the report *Delivering Diversity in Public Appointments 2004* (www.publicappointments.gov.uk). Scotland and Northern Ireland have their own Commissioners for Public Appointments.

In 2006 there were 198 executive and 448 advisory non-departmental bodies sponsored by United Kingdom government departments (Cabinet Office, *Public Bodies* (2006)). The corresponding figures in 1979 were 492 and 1,485. In that year the Thatcher Government undertook a critical scrutiny of the work of these bodies and many were abolished as 'non-essential' or reduced in size and scope. But a considerable number of NDPBs survived this culling and new ones continued to be created. The Blair Government, also, committed itself 'to keeping the number of NDPBs to a minimum' (HC Deb vol 310, col 68 W, 6 April 1998) but its tally of NDPBs abolished and created has resulted in a relatively modest net reduction, and it has acknowledged the 'enormous contribution' of public bodies 'to providing and delivering public

services in the UK' ('Foreword', *The Governance of Public Bodies: a Progress Report*, Cm 3557/1997). No government can do without the expert services that can be secured by this means, and the desirability of keeping some executive functions separate from government departments is generally admitted. The Public Administration Committee of the House of Commons was persuaded that 'the quango state is a permanent and dynamic aspect of modern government in the United Kingdom' (*Fifth Report*, HC 367 of 2000–01, para 44). It is of the greatest importance, however, to ensure that these unelected bodies are properly accountable.

(i) Control and accountability

The independence which is believed necessary to the proper functioning of non-departmental bodies gives rise to problems of control and accountability. Organisations to which governmental functions and public money are entrusted cannot be left to operate as uncontrolled baronies. Powers of intervention – for example, to give binding directions or to call for information – are generally reserved to the minister, who also has the ultimate power of dismissal (or non-renewal of appointments) of board members of NDPBs. Ministers are accountable to Parliament for the exercise of these powers and, more generally, for 'the degree of independence which an NDPB enjoys; for its usefulness as an instrument of government policy; and so ultimately for the overall effectiveness and efficiency with which it carries out its functions' (*Public Bodies: A Guide for Departments* (2006) para 6.1). Ministers are not, however, formally answerable for the day-to-day activities of these bodies.

The accounts of almost all executive NDPBs are audited on behalf of Parliament by the Comptroller and Auditor General, who may also conduct 'value for money' audits of the economy, efficiency and effectiveness of their operations and report the results to the House of Commons. (See the National Audit Act 1983, sections 6, 7 and 9, *Audit and Accountability of Central Government*, Cm 5456/2002, para 6 and HC Deb vol 379, col 322 W, 30 January 2002.) The select committees of the House of Commons which monitor the work of the principal government departments are empowered to examine the 'associated public bodies' of these departments, although the resources of the committees do not allow of a regular and systematic scrutiny of all of them. Executive NDPBs will normally be included in the list of public authorities in Schedule 1 to the Freedom of Information Act 2000 (as that list is amended from time to time by orders made under section 4 of the Act), and the Act's provisions, giving rights of access to information, will accordingly apply to these bodies. By such means most of these unelected public bodies have been made subject to a measure of accountability. The Government has undertaken a programme of making NDPBs 'more efficient, transparent and accountable' (see *Quangos: Opening the Doors* (1998) and the House of Commons debate on 'Quangos' on 16 March 2000: HC Deb vol 346, col 115 W *et seq*). Executive NDPBs are set performance targets and their progress in meeting these is

reported annually to Parliament. They are also subject to regular reviews, like those applied to executive agencies (above), when it is considered whether the function is really needed, and if so whether it should continue to be performed by an NDPB.

Executive NDPBs may have grant-giving or licensing powers, or provide legal services, enforce standards, levy charges, or conduct or supervise investigations of individuals' complaints. Persons may suffer detriment if powers such as these are improperly exercised. Initially only very few NDPBs were within the jurisdiction of the Parliamentary Ombudsman to inquire into allegations of maladministration, but the Parliamentary and Health Service Commissioners Act 1987 extended this jurisdiction to a number of important executive bodies (see Schedule 1). All executive NDPBs (as well as those advisory NDPBs that have direct dealings with members of the public) now fall within the Parliamentary Ombudsman's jurisdiction unless there are exceptional reasons against this, such as that they are within the jurisdiction of another ombudsman.

A degree of control is also exercised by the courts, in that bodies performing public functions are subject to judicial review. Public bodies created by statute are held by the courts to the limits of their statutory powers under the doctrine of ultra vires: a case of this kind was *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, in which the House of Lords struck down a decision of the Commission as having been made outside its jurisdiction. A public body is also open to legal challenge on the grounds that it misapplied the rules (even if non-statutory) under which it operates (*R v Criminal Injuries Compensation Board, ex p Schofield* [1971] 1 WLR 926); or failed to act fairly in deciding a question affecting the rights or interests of an individual (*R v Gaming Board, ex p Benaim and Khaida* [1970] 2 QB 417; *R v Parole Board, ex p Wilson* [1992] QB 740); or failed to take account of relevant considerations (*R v Human Fertilisation and Embryology Authority, ex p Blood* [1999] Fam 151); or acted irrationally (cf *R v Radio Authority, ex p Bull* [1998] QB 294). Executive NDPBs, in exercising 'functions of a public nature', are public authorities for the purposes of the Human Rights Act 1998 (see section 6).

An Australian Royal Commission on Government Administration has warned (Parliamentary Paper No 185/1976, para 4.4.26) that, taken to extremes, the creation of non-departmental bodies:

> could represent a substantial modification of the constitutional system through the addition of what would amount to a fourth branch of government, separate from the executive branch and largely exempt from the operation of the constitutional conventions which harness the executive to the legislature.

(See further S Weir and W Hall, *Ego Trip: Extra-governmental Organisations in the UK* (1994); F Ridley and D Wilson (eds), *The Quango Debate* (1995); C Skelcher, *The Appointed State* (1998); M Flinders and M Smith (eds), *Quangos,*

Accountability and Reform (1999). D Lewis, *Efficiency in Government: The Essential Guide to British Quangos* (2005) is a sceptical report published by the Centre for Policy Studies.)

(g) The civil service

The civil service comprises the Home Civil Service and the Diplomatic Service. (There is a separate Northern Ireland Civil Service.) A concise description of civil servants is that they are servants of the Crown employed in a civil (ie, non-military) capacity in government departments, but there is no all-purpose legal definition of a civil servant. For many years the generally accepted definition was that adopted by the Tomlin Royal Commission on the Civil Service in 1931 (Cmd 3909). Civil servants, it said, are:

> servants of the Crown, other than holders of political or judicial offices, who are employed in a civil capacity and whose remuneration is paid wholly and directly out of monies voted by Parliament.

This definition is still serviceable but has been modified in recent government publications. The *Civil Service Statistics 2004: Sources and Definitions* has the following:

> A civil servant is a servant of the Crown working in a civil capacity who is not: the holder of a political (or judicial) office; the holder of certain other offices in respect of whose tenure of office special provision has been made; a servant of the Crown in a personal capacity paid from the Civil List.

The revised definition takes account of those civil servants who are employed in government departments or executive agencies that are financed by means of trading funds and not from money voted annually by Parliament. (See the Government Trading Funds Act 1973.)

These definitions exclude, besides ministers and judges, members of the armed forces, the police, local government employees, and the employees of nationalised industries, the National Health Service and most non-departmental public bodies. The total number of permanent civil servants at 1 April 2005 was 550,000. Since its peak in 1976 the number of civil servants had by 2001 fallen by 36 per cent, as a result of government policies to scale down the activities and size of the public sector (through privatisation and contracting-out as well as the use of computers and gains in efficiency). The number has risen again from year to year with increasing volumes of work (for instance in immigration and nationality services) but has not approached the high level of the 1970s. It is the present Government's policy to reduce very substantially the number of civil service posts – in part, it would seem, by employing private consultants to do work previously done by civil servants.

The Prime Minister, as Minister for the Civil Service, has ultimate responsibility for the management of the civil service as a whole, and is supported by the Minister for the Cabinet Office who exercises day-to-day responsibility for the service. The Cabinet Secretary is the official Head of the Home Civil Service.

A civil service ruled under the prerogative and founded on infirm and uncertain (if estimable) traditions originating in the Northcote-Trevelyan Report of 1854 may be thought less than well fitted for the administration of the modern British state. In recent years it has been urged, notably by the House of Commons Public Administration Committee and the Committee on Standards in Public Life, that the management, conditions of service and responsibilities of the civil service should be put on a secure statutory basis in a Civil Service Act. In response the Government published a draft Civil Service Bill in November 2004, saying that it wished 'to consult on whether legislation is a necessary and desirable step to take in support of the values that have characterised the Civil Service' (*A Draft Civil Service Bill*, Cm 6373). (See the Public Administration Committee's response to this consultation document in its *Third Report*, HC 336 of 2004–05.)

Many Acts of Parliament affect the rights, duties and liabilities of civil servants (eg, the Official Secrets Acts 1911–1989, the Superannuation Act 1972 and the Civil Service (Management Functions) Act 1992), but their conditions of service have been regulated mainly by Orders in Council made under the royal prerogative and by regulations and instructions issued by the Minister for the Civil Service under the authority of the Civil Service Order in Council 1995. The rules are collected in the *Civil Service Management Code* issued by the Cabinet Office. The Code is supplemented by regulations made by individual departments for their staff.

At common law, civil servants hold office at the pleasure of the Crown and can be dismissed at any time. (See *Dunn v R* [1896] 1 QB 116; *Hales v R* (1918) 34 TLR 589; *Denning v Secretary of State for India* (1920) 37 TLR 138.) This rule has in the past sometimes been explained as resting upon an implied term in the contract of employment, but is better regarded as a rule of constitutional law established by the courts on the basis of public policy (and attributed by the majority of their Lordships in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 to the prerogative). But public policy changes over time, and the modern view of the nature of public employment is expressed in legislation which extends to civil servants rights such as protection against unfair dismissal enjoyed by other employees. (See the Employment Rights Act 1996, section 191.) In practice civil servants are not notably insecure in their employment, although dismissals for inefficiency or disciplinary offences do occur and some civil servants have lost their jobs when departments have been merged or dissolved or functions have been contracted out to the private sector. An aggrieved civil servant may be able to appeal to the Civil Service Appeal Board, a non-statutory internal tribunal, for instance against dismissal or compulsory early retirement from the service. The Board can award compensation

or recommend reinstatement. Civil servants benefit from the provisions of the Equal Pay Act 1970 and the Sex Discrimination Act 1975; and the provisions of the Race Relations Act 1976 and the Disability Discrimination Act 1995 relating to discrimination against employees apply to employment under the Crown. (Equal Pay Act 1970, s 1(8); Sex Discrimination Act 1975, s 85; Race Relations Act 1976, s 75; Disability Discrimination Act 1995, s 64.)

(i) The civil service: principles and conduct

Recruitment of civil servants has long been based on the principle of selection on merit in fair and open competition and has been insulated from political influence by entrusting responsibility for appointments to independent Civil Service Commissioners. In recent decades responsibility for appointment of the great majority of civil servants has been progressively delegated to the departments (and to the new executive agencies within them), but appointment to the most senior positions requires approval of the Commissioners, who also issue a Recruitment Code which must be followed in all civil service appointments. The Commissioners monitor observance of the code by the appointing authorities.

A head of the home civil service defined the essential principles of the service as follows (*The Civil Service: Continuity and Change*, Cm 2627/1994, para 2.7):

> The particular standards that bind the Civil Service together are integrity, impartiality, objectivity, selection and promotion on merit and accountability through Ministers to Parliament.

In the 1980s and 1990s, developments such as the establishment of executive agencies (above, pp 409–11), the 'market testing' of departmental activities and the retrenchment of civil service personnel and functions, associated with a long tenure of government by the same political party, affected traditional understandings and practices in the civil service (see A Tomkins, *The Constitution after Scott* (1998), ch 2). Officials were more exposed to public criticism and relationships with ministers came increasingly under strain (see William Plowden's observations on the 'flawed relationship' in *Ministers and Mandarins* (1994), pp 102–9). John Garrett MP spoke of the 'dismemberment' of government and of a threat to the integrity of the civil service in a 'process of moving from a unified Civil Service of some 30 main departments to a Civil Service which consists of 30 ministerial headquarters; about 150 executive agencies and units; hundreds of quangos . . . and thousands of contracts with private contractors, all of which are trying to make a profit' – all these enterprises having 'varying standards of service delivery, public accountability and staff relations' (Treasury and Civil Service Committee, *Fifth Report*, vol II, HC 27-II of 1993–94). There was widespread concern that traditional values of the civil service were being eroded and the Government was persuaded in 1996 to introduce, by prerogative Order in Council, a *Civil Service Code* to give clearer definition to principles of the civil service and the duties of civil servants and of

ministers towards them. The Code was based on a draft proposed by the Treasury and Civil Service Committee of the House of Commons (*Fifth Report*, HC 27-I of 1993–94, Annex 1). A new version of the Code was published in 2006. It summarises the values and standards of behaviour which are expected of all Home civil servants and their rights and responsibilities. It forms part of their conditions of service.

The Civil Service Code, 2006

Civil Service values

1. The Civil Service is an integral and key part of the government of the United Kingdom. It supports the Government of the day in developing and implementing its policies, and in delivering public services. Civil servants are accountable to Ministers, who in turn are accountable to Parliament.
2. As a civil servant, you are appointed on merit on the basis of fair and open competition and are expected to carry out your role with dedication and a commitment to the Civil Service and its core values: integrity, honesty, objectivity and impartiality. In this Code:
   - 'integrity' is putting the obligations of public service above your own personal interests;
   - 'honesty' is being truthful and open;
   - 'objectivity' is basing your advice and decisions on rigorous analysis of the evidence; and
   - 'impartiality' is acting solely according to the merits of the case and serving equally well Governments of different political persuasions.
3. These core values support good government and ensure the achievement of the highest possible standards in all that the Civil Service does. This in turn helps the Civil Service to gain and retain the respect of Ministers, Parliament, the public and its customers.
4. This Code sets out the standards of behaviour expected of you and all other civil servants. These are based on the core values. Individual departments may also have their own separate mission and values statements based on the core values, including the standards of behaviour expected of you when you deal with your colleagues.

Standards of behaviour

Integrity

5. You must:
   - fulfil your duties and obligations responsibly;
   - always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings;
   - make sure public money and other resources are used properly and efficiently;
   - deal with the public and their affairs fairly, efficiently, promptly, effectively and sensitively, to the best of your ability;

- handle information as openly as possible within the legal framework; and
- comply with the law and uphold the administration of justice.

6. You must not:

- misuse your official position, for example by using information acquired in the course of your official duties to further your private interests or those of others;
- accept gifts or hospitality or receive other benefits from anyone which might reasonably be seen to compromise your personal judgement or integrity; or
- disclose official information without authority. This duty continues to apply after you leave the Civil Service.

Honesty

7. You must:

- set out the facts and relevant issues truthfully, and correct any errors as soon as possible; and
- use resources only for the authorised public purposes for which they are provided.

8. You must not:

- deceive or knowingly mislead Ministers, Parliament or others; or
- be influenced by improper pressures from others or the prospect of personal gain.

Objectivity

9. You must:

- provide information and advice, including advice to Ministers, on the basis of the evidence, and accurately present the options and facts;
- take decisions on the merits of the case; and
- take due account of expert and professional advice.

10. You must not:

- ignore inconvenient facts or relevant considerations when providing advice or making decisions; or
- frustrate the implementation of policies once decisions are taken by declining to take, or abstaining from, action which flows from those decisions.

Impartiality

11. You must:

- carry out your responsibilities in a way that is fair, just and equitable and reflects the Civil Service commitment to equality and diversity.

12. You must not:

- act in a way that unjustifiably favours or discriminates against particular individuals or interests.

Political Impartiality

13. You must:

    - serve the Government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this Code, no matter what your own political beliefs are;
    - act in a way which deserves and retains the confidence of Ministers, while at the same time ensuring that you will be able to establish the same relationship with those whom you may be required to serve in some future Government; and
    - comply with any restrictions that have been laid down on your political activities.

14. You must not:

    - act in a way that is determined by party political considerations, or use official resources for party political purposes; or
    - allow your personal political views to determine any advice you give or your actions.

Rights and responsibilities

15. Your department or agency has a duty to make you aware of this Code and its values. If you believe that you are being required to act in a way which conflicts with this Code, your department or agency must consider your concern, and make sure that you are not penalised for raising it.
16. If you have a concern, you should start by talking to your line manager or someone else in your line management chain. If for any reason you would find this difficult, you should raise the matter with your department's nominated officers who have been appointed to advise staff on the Code.
17. If you become aware of actions by others which you believe conflict with this Code you should report this to your line manager or someone else in your line management chain; alternatively you may wish to seek advice from your nominated officer. You should report evidence of criminal or unlawful activity to the police or other appropriate authorities.
18. If you have raised a matter covered in paragraphs 15 to 17, in accordance with the relevant procedures, and do not receive what you consider to be a reasonable response, you may report the matter to the Civil Service Commissioners. The Commissioners will also consider taking a complaint direct. If the matter cannot be resolved using the procedures set out above, and you feel you cannot carry out the instructions you have been given, you will have to resign from the Civil Service.
19. This Code is part of the contractual relationship between you and your employer. It sets out the high standards of behaviour expected of you which follow from your position in public and national life as a civil servant. You can take pride in living up to these values.

Similar Codes apply to civil servants working in the devolved governments in Scotland and Wales and in the Northern Ireland Civil Service and the Diplomatic Service.

The Civil Service Code gives emphasis to the *impartiality* of civil servants, while at the same time underlining their obligation of loyalty to the administration in which they serve. 'Impartiality' is reflected in the convention that the civil service is non-political and is expected to give loyal service to administrations of every political complexion. (See paras 2 and 13 of the Code, above.) A new government, while it may introduce a number of political advisers of Cabinet ministers into the departments, keeps in office the senior civil service personnel who have advised its predecessors. In each department the Permanent Secretary, as its official head, having ensured the removal of files and documents of the previous minister from the sight of his or her successor, assumes the role of objective adviser to the new political head of the department.

By the House of Commons Disqualification Act 1975, section 1(1)(b), civil servants are ineligible for membership of the House of Commons, and under rules first laid down in 1953 (Cmd 8783) they are subject to restrictions on participation in political activities. In 1978 the Armitage Committee recommended relaxations of the rules so as to allow a wider freedom to take part in political activity (Cmnd 7057); the Government accepted the recommendations and the rules were liberalised in 1984. The rules now applicable are to be found in the *Civil Service Management Code*, section 4.4. Civil servants are divided into three groups: the politically free (industrial and non-office grades) who may take part in all political activities; a politically restricted group (primarily members of the Senior Civil Service) who are debarred from national political activity but may be given permission to take part in local politics; and an intermediate group, comprising all other staff, who may, with permission, take part in national or local politics. Permission, where required, 'should normally only be refused where civil servants are employed in sensitive areas in which the impartiality of the Civil Service is most at risk' (Annex A to section 4.4 of the Code), for example, civil servants closely engaged in policy assistance to ministers. The European Court of Human Rights dismissed a challenge to the restrictions on political activity in *Ahmed v United Kingdom* (1998) 29 EHRR 1.

Should civil servants give total and unqualified loyalty to the government, or do they have, in any circumstances, an overriding responsibility to the Crown, to Parliament or to the public?

Civil Service Management Code, para 4.1.1

> Civil servants are servants of the Crown and owe a duty of loyal service to the Crown as their employer. Since constitutionally the Crown acts on the advice of Ministers who are answerable for their departments and agencies in Parliament, that duty is, subject to the provisions of the Civil Service Code, owed to the duly constituted Government.

This authoritative statement acknowledges that a civil servant's duty to the government of the day is not unqualified, but is subject to the principles set out

in the Civil Service Code, which reminds of the duty of civil servants to comply with the law (para 5).

What is the duty of a civil servant who becomes aware that ministers are concealing politically embarrassing facts from the public, or are misleading Parliament and the public with false information, or are otherwise acting in a way that is constitutionally improper? He or she is required to act in accordance with paragraphs 15–18 of the Civil Service Code (above), first bringing his or her concerns to the attention of senior officers within the department and if this should not resolve the matter, reporting to the Civil Service Commissioners. The Commissioners have powers of investigation and may recommend redress. They publish an annual report which gives a general account of appeals made to them under the Code and they may make special reports on appeals, for instance, if the government should refuse to act on their recommendations. Civil servants (other than members of the security and intelligence services) are also secured by the Public Interest Disclosure Act 1998 (the 'Whistleblower's Act') against dismissal or other sanctions if they make 'protected disclosures' of malpractices such as a criminal offence, a miscarriage of justice, a risk to health or safety, etc.

(ii) Civil servants and ministers

It does not sufficiently explain the role of civil servants to say that they advise ministers on policy and execute ministers' decisions. In government departments and agencies very many decisions are necessarily taken by civil servants themselves without reference to ministers, and these decisions will often involve an element of policy-making. Moreover the senior civil servants who advise ministers can draw on an accumulated departmental experience and expert knowledge of the department's affairs in pressing for acceptance by their minister (perhaps a newcomer to the department, seldom as well versed in its business) of the 'departmental view'.

Peter Kellner and Lord Crowther-Hunt, *The Civil Servants* (1980), p 187

> The concept of the departmental view is difficult to define, or to reconcile with any conventional constitutional theory. Broadly it consists of the ideas and assumptions that, independently of which party is in office, flow from the knowledge and experience that are generated by civil servants working together. However much civil servants as individuals move around, they add their increment of information to the pool of knowledge about motorway building, or kidney machines, or food subsidies. Such knowledge does not exist in a moral or political vacuum: and so, by an often complex chemistry, a department's knowledge translates into a departmental view. Some of the greatest conflicts between ministers and their Permanent Secretaries occur when the minister's intentions conflict with the departmental view.

There have been ministers in both Conservative and Labour Governments who have, from time to time, asserted that they have been obstructed by civil

servants committed to departmental policies contrary to those being pursued by the minister. Among Labour ministers who have made this claim are Tony Benn, Barbara Castle and Richard Crossman (see K Theakston, *The Labour Party and Whitehall* (1992), ch 2). Michael Heseltine, a Cabinet minister in the Major Government, said to the Public Service Committee (*Evidence*, HC 265 of 1995–96, Q9):

> [A] Minister in charge of a department can give orders, but if he gives orders which are outside the broad conventions, there are endless ways in which his orders will be frustrated. The most obvious is that he will be told that this is not government policy, that he will be told that he has not got authority for what he said, that in some way it is unwise to take a decision on this matter at this stage because other events are about to unfold.

(See also Tony Benn in K Sutherland (ed), *The Rape of the Constitution*? (2000), p 46.) It may be said that civil servants have a legitimate constitutional role as a counterweight to politicians and an obligation to 'speak truth unto power'. Sir Brian Cubbon said to the Treasury and Civil Service Committee (*Fifth Report*, vol III, HC 27-III of 1993–94, Appendix 31, para 8):

> An apolitical civil service is one of the checks and balances that makes it tolerable to have Ministers who have so much more power than Parliament. Ministers' total dependence for support on apolitical civil servants means that they cannot secretly abuse their power without the knowledge of those who owe them no political allegiance and they cannot take decisions without the discipline of face-to-face discussion with them.

Of course, arguments of this kind do not justify *obstruction* by civil servants of the policies of elected governments. This seems sometimes to have occurred but is not a normal feature of the relations between civil servants and ministers. A Fabian Society study group concluded in 1982 (cited by Theakston, above, at p 40):

> It is doubtful if the civil service as a whole has a conscious political position of its own to defend. A united government can rapidly secure the support of the civil service in carrying through major and sharp changes of policy, and a strong minister – with the support of the Prime Minister and his colleagues – can impose his will on the government machine.

Government is most effectively conducted by a partnership of ministers and civil servants. In the 1980s and 1990s this balanced arrangement was disturbed by a tendency for ministers to devalue and dispense with the advice of civil servants and to rely on politically committed outsiders for policy advice. Keith Dowding, writing in 1995 (*The Civil Service* (1995), p 124), found that 'the power and influence of civil servants over their ministers have diminished during the last decade'. (The dislocation of the relationship is examined in

depth by Christopher Foster and Francis Plowden, *The State under Stress* (1996).) This trend has continued under Labour administrations since 1997, as ministers rely increasingly for policy support on special advisers, advisory NDPBs, task forces and other sources outside the traditional, permanent civil service. If civil servants exert less influence on ministers than formerly this may reflect a lack of adaptability of the civil service to the demands of modern government. Sir Christopher Foster, a well-informed observer, says of civil servants: 'They were excellent in a world in which changes were evolutionary and marginal, where there were not too many changes at once and none requiring profound reforms'; but, he adds, 'they were not good at organisational or culture change' and 'rarely gave much direct attention to citizens or the consumers of the public services they provided' ('Civil service fusion' (2001) 54 *Parliamentary Affairs* 425, 439–40). Among criticisms of the civil service expressed to the Public Administration Committee of the House of Commons were 'the perceived slowness of its reaction, poor performance in providing policy advice, an inattention to policy delivery, inadequate understanding of risk management issues, and bad project management' (*Seventh Report*, HC 94 of 2000–01, para 20). The Government has undertaken a civil service reform programme with a view to strengthening leadership, planning and performance in the service while preserving its core values such as selection on merit, integrity and impartiality. But ministers themselves, it would seem, have undervalued the contribution that civil servants can make to more effective formulation and implementation of policy. Sir Christopher Foster, in a memorandum for the House of Commons Public Administration Committee (HC 307 of 2004–05, p 59), observes that:

> the belief that the public sector can be satisfactorily run by politicians issuing instructions, as if private sector managers, is deeply flawed, even if an ample supply of superb private sector managers were on offer. The public sector is essentially different. It requires an effective partnership between Ministers, with their political policy objectives and experience, and experienced civil servants capable of providing the administrative expertise on which effective delivery depends.

He looks also for the 'revival of an earlier tradition by which the Civil Service regularly probed, tested and sometimes challenged new policy proposals, even those in the manifesto, to test their sense and practicality', while acknowledging that 'Ministers must ultimately decide'. (See further Horton, 'The civil service', in S Horton and D Farnham (eds), *Public Management in Britain* (1999); Foster, 'The civil service under stress' (2001) 79 *Public Adm* 725; C Foster, *British Government in Crisis* (2005), chs 2, 15.)

The *Ministerial Code* (2005), para 3.1, reminds ministers that they 'have a duty to give fair consideration and due weight to informed and impartial advice from civil servants, as well as to other considerations and advice, in reaching policy decisions'.

(iii) Special advisers

In recent decades ministers have looked outside the departments for advice from persons sympathetic to their policies. With prime-ministerial approval they have appointed temporary advisers to provide them with political advice or the benefit of specialised skills (eg, in economics). On taking office as Prime Minister in March 1974 Mr Harold Wilson decided to experiment in this way, authorising Cabinet ministers to appoint political advisers who would give advice from a perspective different from that of the 'Whitehall mandarin' and help ministers 'to play a constructive part in the collective business of the Government as a whole' (Harold Wilson, *The Governance of Britain* (1976), Appendix). The practice has continued under subsequent administrations and is now an established feature of British government.

Ministerial Code (2005), para 2.11

> The employment of Special Advisers on the one hand adds a political dimension to the advice available to Ministers, and on the other provides Ministers with the direct advice of distinguished 'experts' in their professional field, while reinforcing the political impartiality of the permanent Civil Service by distinguishing the source of political advice and support. With the exception of the Prime Minister, Cabinet Ministers may each appoint up to two Special Advisers. The Prime Minister may also authorise the appointment of one or two Special Advisers by Ministers who regularly attend Cabinet. The Government expects the appointment of experts normally to be made to permanent or temporary Civil Service posts in accordance with the rules of the Civil Service Commissioners. Where, however, an individual has outstanding skills or experience of a non-political kind which a Minister wishes to have available while in a particular post, the Prime Minister may exceptionally permit their appointment as an expert adviser within the usual limit of two advisers per Cabinet Minister. All appointments require the prior written approval of the Prime Minister, and no commitments to make such appointments should be entered into in the absence of such approval. Any departures from the rule of two Special Advisers per Cabinet Minister will need to be explained publicly. All such appointments should be made, and all Special Advisers should operate, in accordance with the terms and conditions of the Model Contract for Special Advisers and the Code of Conduct for Special Advisers.

In addition, ministers may exceptionally appoint unpaid advisers, with the written approval of the Prime Minister: these are not civil servants (*Ministerial Code* (2005), para 2.14).

Under the model contract special advisers are subject in general to the same rules of conduct as other civil servants but with important exceptions – in particular, in being able to advise and assist ministers 'with a degree of party political commitment and association which would not be possible for a permanent civil servant' (*Code of Conduct for Special Advisers*, para 18). They are not, however, to take part in public political controversy.

It is intended that special advisers should supplement or counter the conventional wisdom of the departments, follow up the implementation of ministerial decisions and maintain direct links with the party and with outside interest groups. The best special advisers, it has been said, 'combine expert knowledge of a field of policy, political commitment and an understanding of the Whitehall machine' (*Top Jobs in Whitehall*, Report of an RIPA Working Group (1987), p 56).

In July 2005 there were seventy-two special advisers in post. (There had been thirty-eight in the Major Government.) The draft Civil Service Bill does not propose an overall limit on the number of special advisers. An innovation was made by the Civil Service (Amendment) Order in Council 1997, allowing up to three special adviser posts in the Prime Minister's Office to have executive (not merely advisory) responsibilities, allowing them to authorise expenditure and give instructions to permanent civil servants. In general it appears that special advisers make a useful contribution in supporting ministers and are able to work in a constructive relationship with established civil servants. Some observers perceive a threat to the tradition of a politically neutral civil service, bringing a collective experience and objective judgement to bear on government policy-making. On the other hand, the Committee on Standards in Public Life reported: 'Almost all witnesses made clear their view that special advisers were valuable components of the machinery of Government' (*Sixth Report*, Cm 4557-I/2000, para 6.26).

See generally House of Commons Public Administration Committee, *Special Advisers: Boon or Bane*?, HC 293 of 2000–01; Committee of Standards in Public Life, *Ninth Report*, Cm 5775/2003, ch 7 (see also the Government response, Cm 5964/2003).

7

The powers of government

Contents

No one in the modern state is untouched by the power of government. The editors of a recent volume of essays on executive power write in their introduction that:

> at the opening of the twenty-first century, governments have become the most powerful organs of nation states. They determine the direction, if not always the detail, of domestic policy. They decide how public money should, and should not, be spent. Foreign policy is made almost entirely by governments. And control of military power is likewise the preserve of the executive. Whatever the truth of the claim that, in this era of apparent globalization, states are no longer the only or even the most powerful units of political power, within nation states governments still retain very considerable power. This is not to say that their power can never be checked. Governments may rule, but they do not always rule supreme. In democracies the personnel of the executive is subject to the verdict of the electorate; the policies of the executive may be subject to political or parliamentary accountability; and the legality of executive action may be reviewed by the courts of law.

(P Craig and A Tomkins (eds), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (2006), p 1.)

In this chapter we are concerned with the power and, more particularly, with the *powers* (plural) of British government. A considerable proportion of the

chapter is devoted to exploring the law- and rule-making powers of government. As such it should be read alongside what is said about delegated legislation in chapters 2 and 3, and what is said about parliamentary oversight and legislative procedure in chapter 9.

1 Executive power

Even in the first half of the nineteenth century the condition of working people in Britain was relieved or exacerbated by acts of government – by Corn Laws, Inclosure Acts, Poor Laws, Public Health Acts and Factory Acts. But the increase since that time in the activity of government and its impact on the daily life and work of the community has been immeasurable. Nineteenth-century governments were not called upon to regulate a welfare state and did not attempt to manage the economy, foster industrial development or protect the environment. They concerned themselves little or not at all with consumer protection, energy conservation, restrictive trade practices, full employment or equal pay for men and women. They had no need to be troubled with the construction and use of motor vehicles, the location of airports or the disposal of nuclear wastes. All these and many other new activities and concerns have made enormous claims upon the resources of government in our time.

Report of the Royal Commission on the Constitution, vol I (Cmnd 5460/1973)

The subject matter of government

227. Throughout most of the nineteenth century government was concerned mainly with law and order, external affairs and defence, the regulation of overseas trade and the raising of revenue; it exercised a narrow range of regulatory functions, but its attitude in domestic affairs was mostly passive and non-interventionist. . . . The situation today is quite different; there are now very few areas of public and even personal life with which government can be said to have no concern at all.

228. This expansion of government, while a constant feature of modern history, has markedly quickened its pace at certain times. In [the twentieth] century two periods stand out, both associated with the world wars.

229. The first period extended from 1908 to 1919. It began with the extensive social reforms which were embodied in the Old Age Pensions Act 1908, the Labour Exchanges Act 1909 and the National Insurance Act 1911. There followed in war-time the imposition of a widening range of administrative and economic controls. After the war those controls were quickly wound up, but many of the new government departments, including those established for Pensions, Labour, Air and Scientific and Industrial Research, remained in being, and two additional departments, for Transport and Health, were set up. Each of these new departments represented an enlarged area of government intervention.

230. The second period of rapid expansion was the decade from 1940. Apart again from the complex apparatus of war-time controls, finally dismantled in the 1950s, there were major developments in the social services and in the economic and environmental fields. Legislation was passed to bring about major changes in the arrangements for education, social security, health, agriculture, and town and country planning, and the Government's direct involvement in industry and the economy was increased through a series of Acts providing for the nationalisation of basic industries. Changes in the character of economic intervention were also implicit in the acceptance by the war-time Government of responsibility for maintaining full employment.

231. In these and other ways government responsibilities have . . . widened immensely. The range of subjects that may now be raised in Parliament provides some illustration of this. We have examined a recent series of Parliamentary Questions to see how far it would have been appropriate to put them at the beginning of the century. Our analysis covered Questions receiving both oral and written reply in the House of Commons in one week in June 1971. There were 718 Questions in all, and we estimate that between 80 and 90 per cent of them could not have been tabled in 1900 since they related to matters which were not then of government concern.

The system of government at the beginning of the twenty-first century remains, even though in the throes of reform, in many respects the same as that with which Britain entered the First World War, after the nineteenth-century Reform Acts had laid the foundations of parliamentary democracy and the Parliament Act 1911 had curbed the powers of the House of Lords. In carrying out their increased commitments, British governments have been able to use the constitutional powers traditionally available to the Crown, and have also captured powers from other institutions – from Parliament and from local government – although it might be without any change in the formal location of the power. Governments have often tried to remove restraints upon the exercise of their powers and have invented new techniques for putting their policies into effect. But far from being something malign, the growth of governmental power has followed inevitably from the increase in the tasks of government and has been stimulated, at least in part, by the demands of social justice and public welfare.

Conservative Governments from 1979 to 1997 espoused a political principle or ideology of reducing the role of the state, but if this was accomplished in certain respects (eg, through policies of privatisation and the 'contracting out' and 'market testing' of services) it was also associated with an accretion of powers to central government. As WH Greenleaf observes (*The British Political Tradition*, vol III, Part II (1987), p 994), 'a government of explicitly libertarian intent still accepts a very elaborate public agenda indeed'. In the early years of the twenty-first century we continue to inhabit a Britain of big government, ample public spending and centralised power.

Governments decide upon their objectives and policies in response to innumerable and varied – often overlapping and sometimes contradictory –

influences, among which are party policies, interest group pressures, media campaigns, departmental studies, parliamentary opinion, perceptions of public demand, foreign governments and the European Union. Michael Hill (*The Policy Process in the Modern State* (3rd edn 1997), ch 5) remarks that policy-making 'is a process which involves elected politicians, appointed civil servants and representatives of pressure groups who are able to get in on the action'. He accordingly distinguishes three elements in the process: party-political commitments or programmes; bargaining with influential pressure groups; the input of civil servants; and emphasises that these elements are 'mixed in varying combinations and often in all stages of the process'. A participatory (or 'deliberative') model of democracy would go further, to include arrangements for greater *public* involvement (through extensive consultation, citizens' juries and discussion in a variety of forums) in the formation of policies.

Robert Leach in Maurice Mullard (ed), *Policy-making in Britain* (1995), pp 34–5

Policies emerge in a variety of ways. Sometimes they seem to result from a relatively closed process internal to government, from the work of civil servants in major departments of state, perhaps aided by a handful of specialist outside advisers, but with little apparent public debate. Examples might include much of defence policy and some of the more technical aspects of economic policy, such as the decision of Nigel Lawson to maintain the value of sterling in line with that of the German mark from 1985. Such relatively technical policy issues often seem to exclude much of what is usually understood by political activity. Indeed, Lawson's policy of shadowing the mark was so little debated in public that even his own prime minister seemed for a time to be unaware of it. Yet even fairly abstruse technical issues may become caught up in a wider political debate, as indeed subsequently happened with Britain's membership of the Exchange Rate Mechanism.

Public policy may be more commonly perceived as the outcome of an overtly political process involving a highly public debate between political parties. Policy proposals may indeed be derived from party principles or ideologies, or connected with formal commitments in party manifestos. The privatisation programme of the Thatcher and Major governments and the introduction of competition and commercial principles into the operation of public services clearly reflect a particular and contested political philosophy.

The role of organised groups may, however, often be more significant than that of the party in the emergence of specific public policies. The debate between rival interests may take place largely in the corridors of power in Westminster and Whitehall, or it may be fought out in the public arena. It may involve the services of specialist consultants operating behind the scenes, influencing or purporting to influence key decision-makers, or it may involve highly visible public demonstrations. The conflict between rival interests may broadly parallel the party divide, or it may cut across party positions, as in the case of Sunday trading where conflicting pressures upon and within the Conservative Party, involving major retailing, trade union and religious interests, persuaded the Cabinet to allow a free vote.

The role of the wider public in the policy process is more debatable. The electorate is often held to give a 'mandate' to the party that forms the government, and this mandate may be cited to suggest public support for specific policies, particularly those included in the party's election manifesto. However, the notion of a mandate raises considerable theoretical and practical difficulties. Public influence may be more obvious in the negative sense, as a constraint inhibiting certain policies. Thus it was long assumed in the post-war era up until the 1970s that a government that abandoned a commitment to full employment would be decisively rejected by the electorate. More recently there has been a widespread assumption that commitments to increased public spending and taxation would spell disaster at the polls. Such assumptions may not always be correct, but if they are held by ministers, their advisers and other influentials, they are likely to have a significant impact.

Clear evidence of public opposition to specific policies has sometimes led to their reversal – the most notable example being the abolition of the Community Charge (or poll tax) only three years after its introduction as the 'flagship' of government policy. Rather more rarely, public opinion may pressurise a government to act, a possible example being the legislation to control dangerous dogs. Such instances frequently raise questions about the media presentation of particular events and issues. 'Public opinion' is often interpreted, and perhaps essentially moulded, by the press and electronic media, pushing issues such as homelessness or child abuse onto the public policy agenda.

So far, UK public policy has been related essentially to political activities and pressures from within the country. Clearly, however, public policy in the United Kingdom is often constrained by pressures and developments outside. The political system is far from closed. Key policy decisions may be abruptly forced on governments by forces beyond their control. Examples would include the devaluation of the pound sterling in 1967, or the United Kingdom's departure from the Exchange Rate Mechanism in 1992. More routinely, policy is clearly constrained by UK membership of various international associations, most obviously the European Union.

Of the pervasive influence of the laws and policies of the European Union on policy-making in the United Kingdom, Trevor Salmon remarks: 'this influence reaches deep into departmental life, limiting the freedom of action of British policy-makers' (R Pyper and L Robins (eds), *Governing the UK in the 1990s* (1995), p 190).

The choice of new policies is invariably constrained by an inheritance of policies and commitments from previous governments which have become 'embedded in public laws and public institutions': a government 'accepts the great bulk of its inheritance of legislation, willingly or *faute de mieux*'. Inherited policies may prove to be politically irreversible or may be sustained by inertia or lack of time to review them. (See R Rose and P Davies, *Inheritance in Public Policy: Change without Choice in Britain* (1994).) Governments do nevertheless take office with new policies to implement and will modify or rescind some of their inherited programmes.

Once a policy has been decided upon, the means must be found to implement it. Implementation of policy is a complex process which depends for its success

on a variety of factors, including the availability of the necessary resources of manpower and money, an efficiently designed implementation programme and the cooperation or at least submission of those affected by the policy. Fundamentally it brings into question the authority and powers of government.

2 The government's powers

Among the power-resources available to government for implementing its policies, Terence Daintith makes a useful distinction between the coercive power or the resource of force, which he terms *imperium*, and the power to employ the government's material resources of wealth or property, which he terms *dominium* ('Legal analysis of economic policy' (1982) 9 *Journal of Law and Society* 191). The use of coercion by government requires express legal authority, to be found in a body of 'imperium-law' which consists almost entirely of statutes and delegated legislation, but includes some remaining prerogative powers. The use by the government of its *dominium*, if expenditure is involved, must be covered by parliamentary authorisation – the annual Appropriation Act or specific legislation. Daintith includes in 'dominium-law' 'those legal devices of the common law, such as contracts, gifts and other transfers, through which the wealth of government may be deployed' (*ibid*, p 215). The government often prefers to rely on *dominium*, which is more flexible in use and may exact a lower political cost than recourse to *imperium*. (See further Daintith, 'The techniques of government', in J Jowell and D Oliver (eds), *The Changing Constitution* (3rd edn 1994).)

When the government requires an addition to its coercive powers, primary legislation by Parliament will normally be necessary, but delegated legislation may suffice if there is existing statutory authority for recourse to it, or, rarely, power to legislate under the prerogative may be available. Again, if the government needs to make provision for expenditure on a continuing basis, for which annual parliamentary appropriation is considered constitutionally insufficient, it is expected to obtain authorisation in a specific Act of Parliament. (This was done, for instance, in the Nursery Education and Grant-Maintained Schools Act 1996, which gave power to the Secretary of State to make grants to providers of nursery education.)

Imperium-law and *dominium*-law invest the government with a host of executive powers by which policies are carried out in detail. Such powers generally include some (often considerable) degree of discretion as to the way in which they are exercised. The exercise of governmental power in modern conditions frequently necessitates an informal, administrative rule-making which is a kind of self-regulation by the government. This 'quasi-legislation' does not (indeed cannot) effect alterations in statute or common law but, as we shall see, it can affect private interests and may have legal consequences. (See further below.) In some instances the government seeks to achieve its objects by the use of guidance – a hybrid technique which sometimes includes an element of legal authority and sometimes depends simply on the government's persuasive power.

All the powers of government are subject to constraints. Some of these are inherent in the specific powers themselves: for example, the power to legislate depends on parliamentary consent, and the exercise of discretionary powers under statute or common law is subject to legal limits supervised by the courts. Other constraints stem from the European context in which British governments must function (chapter 5). Then there are the countervailing powers possessed in various measure by opposition parties, organised groups, local authorities, multi-national corporations and international organisations. In an analysis which rests upon an idea of 'governance' rather than of 'government', some see the central executive as only one actor in a world of policy communities or 'networks', in which policies emerge through bargaining and agreement at a remove from Parliament and the public. But this analysis seems to underrate the primacy of government and Parliament in the constitutional system. Admittedly, the forces of limitation may be so powerful, especially in combination, as to compel government to make concessions or even to relinquish a policy. Or again the government may be driven to use one form of power instead of another, to exhort or bargain rather than to command. Some goals are in any event beyond the capacity of government to achieve, whatever the outpouring of laws, guidance or admonition.

But this is not to say that government in the United Kingdom is feeble and constricted. We have a central executive which is unconfined by a written constitution or a federal structure and unchecked by the balancing arrangements of a thoroughgoing separation of powers. It has established an ascendancy over the House of Commons and can dominate local government. In what the Memorandum of Dissent to the Kilbrandon Report described as 'the largest and most centralised unitary state in Western Europe' (Cmnd 5460-I/1973, para 34), the government has at its disposal great and far-reaching powers for putting its policies into effect.

See further D Marsh and R Rhodes (eds), *Policy Networks in British Government* (1992); R Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1997); M Bevir and R Rhodes, *Interpreting British Governance* (2003).

(a) Parliamentary legislation

For many of its purposes the government needs to obtain an Act of Parliament. In particular, an Act is necessary for implementing government policies that require changes in the law, the imposition of charges on the public or the assumption of new legal powers. Our present concern is with parliamentary legislation as a resource of government; attention will be given in chapter 9 to Parliament's scrutinising function in the passage of government bills.

Putting aside the Consolidated Fund and Appropriation Acts (which formally authorise expenditure), the annual Finance Act (for the raising of taxes) and Acts to consolidate the law, public Acts may be passed in order to change

existing policy or launch an entirely new policy or, on the other hand, to correct deficiencies in existing legislation or to provide 'running repairs to the machinery that has been established for securing policy objectives but without any intention of altering those objectives' (I Burton and G Drewry, *Legislation and Public Policy* (1981), distinguishing, at pp 36–40, between 'policy' and 'administration' bills).

(i) Making of government bills

Legislative proposals may arise from commitments made in the Queen's speech at the beginning of the parliamentary session or from bids by government departments. These will sometimes have as their source:

- recommendations of the Law Commission;
- European Union obligations: in particular, EU Directives which must be transposed into national law;
- an adverse ruling by a United Kingdom court, the European Court of Justice or the European Court of Human Rights;
- unanticipated events requiring an urgent legislative response.

The Cabinet Office advises (*Guide to Legislative Procedure 2004*, para 1.9):

> Before seeking a slot in the Government's legislative programme, the first thing a department should consider is whether primary legislation is really necessary. Parliamentary time is limited and departments should always consider whether the ends they wish to achieve could be reached by delegated legislation or purely administrative means.

Both in formulating policy and once it has been decided to introduce a bill the government may embark on a process of consultation with outside interests, and sometimes issues consultation documents (such as preliminary 'Green' or firmer 'White' Papers) which invite public comment. Consultation can help to improve and legitimise a bill and win the support of those whose cooperation is needed if the legislation is to be effective.

In *Making the Law* (1992), the Hansard Society Commission on the Legislative Process reported much dissatisfaction with the extent and manner of consultation and made a number of recommendations for more timely, open and sufficient consultation so that bills could be got into 'a form fit for enactment, without major alteration, before they are presented to Parliament'. Instead, as it found, consultation often continued during a bill's passage through Parliament and consequential government amendments might be introduced at a late stage of the parliamentary process. In 1997 the Select Committee on Modernisation of the House of Commons noted criticisms that there had been little, if any, consultation with the House before bills were formally introduced, and that consultation with bodies outside Parliament with a legitimate concern in the legislation had been 'patchy and spasmodic' (*First Report*, HC 190 of 1997–98, paras 5, 6). Subsequently the Government issued a

Code of Practice on Consultation which urges departments to consult widely throughout the process of policy development and sets out criteria for effective consultation. The House of Lords Select Committee on the Constitution reported in 2004 that there had been a positive development since *Making the Law* (above): proposed measures were being regularly put out for consultation and there was wide dissemination of consultation documents to interested parties (*Fourteenth Report*, HL 173-I of 2003–04, paras 15, 16).

Prelegislative scrutiny by Parliament as well as consultation with outside bodies are facilitated if bills are published in draft well before their formal introduction. Five draft bills were published in 1994–95, to be introduced in the following session of Parliament, and this salutary precedent has since been followed in respect of many major bills (eg, the Freedom of Information Bill, the Mental Health Bill and the Corporate Manslaughter Bill), but the practice has not yet become the norm. The Constitution Committee in its *Fourteenth Report* (above) recognised that some bills are not suitable for publication in draft but added that 'the occasions when bills are not published in draft should be the exception rather than the rule' (para 31). (See further below, p 634 with regard to prelegislative scrutiny.)

The government's legislative programme is managed by the Cabinet's Committee on the Legislative Programme which submits to the Cabinet proposals for legislation to be included in the programme, monitors the progress of bills in preparation and during their passage through Parliament, examines draft bills and considers the parliamentary handling of government bills in the current session. Once a bill has been approved, the sponsoring department gives instructions to Parliamentary Counsel for drafting the bill for presentation to Parliament. Their essential task 'is to give effect to the government's intentions in a form capable of withstanding Parliamentary and later judicial scrutiny' (T Daintith and A Page, *The Executive in the Constitution* (1999), p 250). This work has often to be done under great pressure of time and on the basis of incomplete instructions, with the consequence that Parliament has sometimes received an unfinished and flawed bill in need of extensive amendment.

Explanatory Notes are published together with the bill, to inform Parliament and others of the background, structure and content of the bill. A Regulatory Impact Assessment is also published, if the bill has an impact on business, charities or the voluntary sector, identifying the interests affected and estimating the likely impact in terms of costs and benefits. A memorandum must be produced for the Legislative Programme Committee with regard to the bill's compatibility with Convention rights, and the Explanatory Notes must also deal with any human rights aspects of the bill.

No distinction is made in parliamentary procedures between 'administration' and 'policy' bills although, as Gavin Drewry remarks, the former bills should in principle be dealt with more quickly, whereas 'all too often a great deal of time is taken reopening long settled issues of principle: the bulk of legislative

scrutiny should be directed at policy bills, but this does not always happen' (S Walkland and M Ryle (eds), *The Commons Today* (rev edn 1981), p 112).

From the government's point of view Parliament is part of the machinery by which its policies are implemented. The approving and legitimating function of Parliament dominates the perspective not only of the government front bench but also, in general, that of backbenchers on the government side. The improvement of a bill as an instrument of the government's policy is part of this function, and is carried out chiefly on the initiative of the government itself. Opposition members will often cooperate in the work of improvement of an uncontroversial bill, but if they oppose a bill will fight for concessions or – wholly rejecting the policy on which a bill is based – will set to work to defeat, weaken or delay it if they can. In short, government and opposition act, with respect to contested bills, upon different conceptions of the parliamentary function. But Parliament as an institution normally acts in accordance with the government's conception of its role, which is to support, perfect and enact the government's bills. For this reason it is commonly said that parliamentary legislation is in reality a function of government.

When a government bill is introduced in Parliament it has usually already been firmly shaped in a process of departmental and inter-departmental or Cabinet discussion and consultation with outside interests. Accommodations will have been reached and bargains struck. The House receives, as Mackintosh observed, 'what is, to all intents and purposes, a finished product' (P Richards, *Mackintosh's The Government and Politics of Britain* (7th edn 1988), p 149), even though, as we have seen, it may be far from polished or water-tight in its detail. The bill's passage through Parliament is generally assured by the government's disciplined majority, its control of the business of the House, the cooperation of the opposition (if cross-party agreement can be reached on a timetable) and, in the last resort, its command of procedural techniques such as the guillotine (allocation of time order) or the closure. (Closure motions are a means, in practice seldom having to be invoked, of terminating debate.)

Nevertheless the parliamentary process is not wholly conformable to the government's will and there may be a continuing necessity to accommodate the misgivings of backbenchers, the probing of opposition and the unresolved concerns of outside interests: on the considerable extent to which this has been required under the premiership of Tony Blair, see P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005), discussed in chapter 9).

JAG Griffith, 'The Place of Parliament in the Legislative Process' (1951) 14 *MLR* 279, 287–8

'Those who are familiar with Parliamentary procedure', writes Ilbert, 'are well aware of the difficulties with which the promoter of any important measure has necessarily to contend. The measure may have gone through a long period of gestation before its introduction to

Parliament. Information and opinions on different points will have been confidentially obtained from various quarters; the provisions of the measure will have assumed many varying forms; and the alternatives will have been carefully discussed and compared. Yet, in spite of all these precautions, as soon as the measure has been printed and circulated, swarms of amendments will begin to settle down on the notice paper, like clouds of mosquitoes.' [*Legislative Methods and Forms* (1901), p 230.] The procedure in Parliament which follows is so well-known that no detailed comment is called for. It is worth noting, however, that the opposition to the Bill in Parliament both in principle and on points of detail is to a large extent inspired by those sections of the community who, as affected interests, will already have had some opportunity of making their opinions known. Discussion and consideration at Westminster are not confined to the recognised stages of a Bill. Often the informal meetings are more important. These are of two kinds: those which take place within each Parliamentary party and those which take place between the parties. Of the first kind, are the regular meetings of the leaders of the parties with their Parliamentary members in the House of Commons. In these private meetings, matters of policy and detail are discussed at length and amendments to be urged (in the case of the Opposition) or made (in the case of the Government) are agreed. This is part of the planning stage for the Parliamentary battle and gives an opportunity for the opinions of backbenchers to be heard once again. The second kind comprises all the negotiations on a Bill which take place 'through the usual channels' or 'behind the Speaker's chair'. In the House of Lords in particular, informal negotiations between parties may involve discussion on the merits of different parts of the Bill. Short of this, the negotiations will do much to settle the course of the battle in the Chamber and in Committee. The whole of the Bill may not be discussed in detail due to the shortage of time and the use of the kangaroo and the guillotine procedures. But eventually, on receiving the threefold assent, the Bill becomes law.

Most bills (about three-quarters of the total number), and in particular those of substantial political importance, are introduced in the House of Commons. (Bills whose main purpose is financial cannot begin in the House of Lords.) The first reading of a bill is purely formal: the title is read out and a minister nods his assent. The motion for the second reading of the bill is normally debated on the floor of the House, but a few uncontroversial bills are debated in a second reading standing committee. Law reform bills resulting from proposals of the Law Commission are usually dealt with in this way. The second reading debate provides the government with an opportunity to explain the aims and principles of the bill and to outline its main provisions. This is also an opportunity for opposition parties to deliver their challenge to the policy of the bill. It is extremely rare for a government bill to be defeated on the motion for second reading. There have been only two instances since 1924: the defeat by one vote of the Reduction of Redundancy Rebates Bill in 1977 and that of the Shops Bill by fourteen votes in 1986.

For the committee stage in the House of Commons most bills are referred to a standing committee, with a membership of between sixteen and fifty MPs,

reflecting party strengths in the House. Among the members there is, besides the sponsoring minister, a government Whip, who has responsibility for ensuring the attendance and support of government backbenchers on the committee. The standing committee considers the bill in detail, clause by clause. From the government's point of view the committee stage provides it with an opportunity of making improvements to its bill. JAG Griffith observes (*Parliamentary Scrutiny of Government Bills* (1974), p 38):

> If moved by the Government, the purpose of an amendment is most likely to be to correct a drafting error or to make minor consequential changes, to record agreements made with outside bodies which were uncompleted when the bill was introduced, to introduce new matter, or occasionally to meet a criticism made by a Member either during the second reading debate or at an earlier part of the committee stage, or informally.

A minority government, or one with a slender majority, may have difficulty in managing the proceedings of standing committees and, like the Labour Government of 1974–79, may be unable to avoid numerous defeats there. If it resorts to taking the committee stage on the floor of the House, this may hold up other items of its legislative programme. (As to the rather loose convention that the committee stage of bills of 'first class constitutional importance' should be taken on the floor of the House, see above, pp 144–5.)

The report stage of a bill gives the government an opportunity to reverse defeats suffered in committee, and also to introduce new amendments embodying promised concessions or the results of its further reflections on the bill. A great number of government amendments may be tabled. The third reading allows a final brief debate on the principles of the bill as amended; no other than merely verbal amendments may be made at this stage.

The subsequent passage of the bill through the House of Lords enables the government to continue the process of refinement of the bill in response to arguments and pressures brought to bear on it. Here too amendments may be carried against the government. Lords amendments must be considered by the Commons, and if the Commons disagree with any of them there has to be further consideration of the disputed amendments by the Upper House. The bill may go back and forth between the two Houses a number of times until agreement is reached; if the Lords remain adamant the government can in the last resort, and if time allows, overcome their resistance by using the procedure of the Parliament Acts 1911 and 1949 (below, p 643).

By introducing some of its less controversial bills in the House of Lords, the government is able to make full use of the resources of both Houses in processing its legislation through Parliament. The Parliament Acts do not, however, apply to bills introduced in the House of Lords.

The procedure for the enactment of a public bill is not without its hazards for the government. Even if it has a sufficient majority to overwhelm opposition parties, they may by exploiting the procedures of Parliament cause trouble for

the government in its efforts to get a bill enacted, intact and on time. The government's own backbenchers cannot always be coerced by the Whips, and in recent years numbers of them have shown a robust willingness to vote in the Opposition Lobby (on which, see P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005)). Minority governments are especially vulnerable, as was shown in the 1976–77 session when a minority Labour Government failed to secure the passage of seven of its bills.

But in ordinary circumstances the obstacles of the parliamentary process can be overcome. Governments have normally enjoyed the support of mainly loyal majorities in the House of Commons; opposition parties are usually open to bargaining, and if persistently obstructive can be curbed by use of the guillotine or the closure. In a full session the government can generally achieve the passage of something between forty and sixty bills, substantially (sometimes entirely) in the form in which they are wanted. In urgent cases a public bill can be passed in a few days or even hours. Such speed of enactment, not conducive to well-judged law-making, has been a feature of legislation on terrorism. For instance, the Criminal Justice (Terrorism and Conspiracy) Act 1998, enacted in response to a terrorist bombing in Omagh, was read the first time in the House of Commons shortly before 4 pm on 2 September 1998 and had passed both Houses and been given the royal assent by 1.30 am on 4 September. The Anti-terrorism, Crime and Security Act 2001 (with 129 sections and eight schedules) was introduced on 12 November 2001 and given the Royal Assent on 13 December. More recently, the Prevention of Terrorism Bill introduced in the House of Commons on 22 February 2005, although strongly contested and passing back and forth between Lords and Commons, received the royal assent on 11 March 2005. (By way of contrast, the Planning and Compulsory Purchase Bill introduced in December 2002 received the royal assent on 13 May 2004 after being carried over from the previous session.)

Governments must govern, and they have a proper interest in getting their bills enacted. Procedural innovations have often been designed to protect this interest rather than to improve the effectiveness of parliamentary scrutiny. There is, indeed, a tension between these aims, and its balanced resolution should be the constant concern of parliamentary reformers. For example, considerations of efficiency might favour the introduction of 'framework' bills restricted to broad principles, the substance to be supplied by subordinate legislation, but such a development could debilitate parliamentary control of the executive. Several bills presented to Parliament by Conservative Governments between 1979 and 1997 did indeed provide it with a very incomplete statement of the whole legislative scheme, extensive rule-making powers being delegated to ministers for filling in the detail. Among statutes of this kind were the Social Security Act 1986, the Education Reform Act 1988, the Legal Aid Act 1988 and the Child Support Act 1991. The practice was seen as 'downgrading the role of Parliament'. (See P McAuslan and J McEldowney, *Law, Legitimacy and the Constitution* (1985), p 23.) A lavish delegation of powers of subordinate legislation is still a feature – perhaps an unavoidable feature – of many statutes,

such as the Pollution Prevention and Control Act 1999 and the Financial Services and Markets Act 2000. The latter Act includes no fewer than 400 delegated powers. Part 1 of the Civil Contingencies Act 2004 was said by a Cabinet Office minister to be 'heavily reliant on supporting regulations and guidance' (HC Deb vol 436, col 551W, 7 July 2005). One of the concerns of the House of Lords Committee on Delegated Powers and Regulatory Reform is to ascertain whether a bill 'sufficiently particularises the principles on which, and the circumstances in which, secondary legislation may be passed, and so avoids being characterised as a "skeleton bill" ': *Seventh Report*, HL 36 of 1999–2000, Appendix 2, para 3. (See also below, pp 449–50.)

The passage of bills has sometimes been facilitated by informal agreement between 'the usual channels' (linking government and opposition) on timetabling of the bill. In the 1997–2001 Parliament more formal arrangements for the programming of legislation by all-party agreement came into use. Following a report from the Select Committee on Modernisation of the House of Commons (*Second Report*, HC 589 of 1999–2000), sessional orders of November 2000 introduced procedures for the regular programming of legislation on an experimental basis. By this means, it was hoped, the government would be assured of getting its legislation through in a reasonable time while opposition parties and backbenchers would have a full opportunity to debate and vote on the issues of most concern to them. The new arrangements were contentious but were renewed (with some adjustments) for a further session in June 2001. The sessional orders on programming were made permanent (with certain amendments) in October 2004. Programme motions are tabled after cross-party discussions through 'the usual channels' and at best are agreed between the parties, avoiding the need for the government to resort to imposed and arbitrary guillotines on discussion.

The parliamentary scrutiny of bills is further considered below, pp 630–5, 642–8.

(ii) Implementation and effectiveness of legislation

Acts of Parliament commonly provide that their provisions will come into force on some specified future date (and not immediately on royal assent), or may entrust to a minister the power to make a commencement order bringing the provisions into force (or successive orders for different provisions of the Act). The coming into force of the Act's provisions may accordingly be delayed, for example until administrative arrangements have been put in place for their effective implementation. Events may indeed occur which persuade the minister – or successive ministers – that it is not appropriate to make a commencement order. In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 the House of Lords held that while the minister is under no duty in such cases to bring the provisions of the Act into force, his or her discretion whether or not to do so is not absolute and unfettered; rather the minister is under a continuing legal duty to consider whether it is appropriate to appoint a commencement date. The Act in this case had made provision for a new

criminal injuries compensation scheme. The minister was held to have acted unlawfully in deciding to renounce the statutory scheme, instead adopting under the prerogative a different scheme of compensation. To act in this manner, said Lord Browne-Wilkinson, was to 'frustrate the will of Parliament expressed in a statute'.

When a government bill has been passed by Parliament and the Act duly brought into force, it is still not certain that the government will have achieved its objective. The need for parliamentary consent is not the only limitation of the government's power to carry its policies into effect by legislation. Public or group consent is another limiting factor (one that is related to the *legitimacy* of the government and its measures – see chapter 1), in so far as the efficacy of an Act may depend on the cooperation or acquiescence of those affected by it. 'Legislation', it has been said, 'is not the end of the policy process, merely a step en route' (D Marsh and R Rhodes (eds), *Implementing Thatcherite Policies* (1992), p 4). The process of implementation of much legislation involves bargaining and compromise, and may be impeded if not thwarted by an adverse or lukewarm response from implementing agencies or from those upon whom the Act places new obligations or restrictions. The Industrial Relations Act 1971 failed to accomplish its main purposes when it encountered intense opposition from the trade union movement and only limited and equivocal support among employers (see M Moran, *The Politics of Industrial Relations* (1977), ch 8). The Caravan Sites Act 1968, which required local authorities to provide caravan sites for gypsies residing in or resorting to their areas, was not effective to ensure sufficient accommodation for gypsies: many authorities failed to comply with their obligations and the Secretary of State rarely used the coercive powers available to him under the Act. (The Criminal Justice and Public Order Act 1994, section 80, abolished the duty to provide sites and the present policy is to ensure the provision of sites for gypsies and travellers through the planning system: see ODPM Circular 01/2006.) The community charge or poll tax, introduced by the Local Government Finance Act 1988, proved a lamentable and costly failure, administratively complex, redolent of unfairness and widely unpopular (see D Butler, A Adonis and T Travers, *Failure in British Government: The Politics of the Poll Tax* (1994)). It was abolished in 1992. The Child Support Act 1991 was badly flawed and had unexpected and untoward consequences which successive reviews and amendments to the Act failed to redress. Implementing regulations were found by the Court of Appeal in *Smith v Smith* [2004] EWCA Civ 1318, [2005] 1 WLR 1318 to be marred by 'sloppy, untidy' drafting which had created a muddle resulting in 'absurdity and injustice'. It was eventually recognised that the system of child support established by the Act could not achieve its objectives and a report by Sir David Henshaw in 2006, concluding that the system should be fundamentally redesigned, was accepted by the Government.

Legislation may fail because it is insufficiently prepared, wrongly targeted or excessively complex, and the efficacy of a statute may be blunted if insufficient resources of money, administrative machinery, personnel or publicity are

committed to its implementation. Several of these deficiencies marred the Child Support legislation (above), demonstrating, as the Social Security Committee of the House of Commons observed, 'that policy can come close to being frustrated and derailed by over-hasty implementation and poor levels of administrative performance' (*Fifth Report*, HC 282 of 1996–97, para 18). Provisions of the Criminal Justice Act 2003 were said by the Court of Appeal in *R v Bradley* [2005] EWCA Crim 20, [2005] 1 Cr App R 397, to be 'conspicuously unclear in circumstances where clarity could easily have been achieved' and to have been brought into force prematurely, before appropriate training could be given to judges and magistrates. (See also, as to the Dangerous Dogs Act 1991, Hood *et al*, 'Assessing the Dangerous Dogs Act: when does a regulatory law fail?' [2000] *PL* 282.)

(The complex relation between policy and implementation is perceptively discussed by Christopher Ham and M Hill, *The Policy Process in the Modern Capitalist State* (2nd edn 1993), ch 6. Sir Christopher Foster has identified factors contributing to a decline in the quality of legislation in (2000) 53 *Parliamentary Affairs* 328, 336–40; see also his *British Government in Crisis* (2005), ch 4 and pp 134–5. Foster remarks (p 53) that 'good, or at least plausible, policy ideas are often reflected in bad legislation'.)

The parliamentary legislative process results in a verbal text which is authoritative but has to be interpreted. The courts, in the exercise of their power of interpretation, aided by recourse to a fund of common law principles, may give to an Act a meaning and effect contrary to what the government had in view in introducing the legislation. A striking instance was the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. In this case a statutory provision that a determination by the Foreign Compensation Commission should 'not be called in question by any court of law' was held ineffective to prevent a court from setting aside a 'determination' that went beyond the legal powers of the Commission. As JAG Griffith remarks, the decision 'shows how, on occasion, the courts will resist the strongest efforts of the government to exclude them from reviewing executive discretion' (*The Politics of the Judiciary* (5th edn 1997), p 106).

The decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 has had the effect of permitting the courts to refer to parliamentary materials as an aid to statutory construction if an Act is ambiguous or obscure or if its literal meaning leads to an absurdity. In particular a court may have regard to statements made in Parliament by the minister or other promoter of a bill to ascertain 'the intention with which the legislation is placed before Parliament' (per Lord Griffiths). It is the intention of Parliament that is decisive, but if a minister has made a clear and unambiguous statement as to the effect of words in the bill it is assumed that Parliament 'passed the Bill on the basis that the provision would have the effect stated' (per Lord Browne-Wilkinson). Whether this is a justified assumption is questioned by JH Baker [1993] *CLJ* 353. Scott Styles observes that the reference by the courts to ministerial statements 'will in practice

mean that the courts are directly deferring to the opinions of government ministers' and discerns in this 'a major shift in the British constitution': 'The rule of Parliament: statutory interpretation after *Pepper v Hart*' (1994) 14 *OJLS* 151. For further (and ongoing) argument, see Lord Steyn (2001) 21 *OJLS* 59; Vogenauer (2005) 25 *OJLS* 629; Sales (2006) 26 *OJLS* 585 and Kavanagh (2005) 121 *LQR* 98; and note the consideration of *Pepper v Hart* in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 391–3, 407–8, and in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, [56]–[60], [139]–[140].

The Hansard Society Commission on the Legislative Process recommended (*Making the Law* (1992), para 393) that the operation of major Acts should be reviewed by parliamentary select committees two or three years after they come into force. No such systematic post-legislative review of statutes is at present undertaken, although in a few instances select committees have conducted post-legislative scrutinies. (See eg, the report of the Northern Ireland Affairs Committee on the operation of the Fair Employment (Northern Ireland) Act 1989, HC 95-I of 1998–99, and the inquiry of the Education and Skills Committee into the impact on students of the Higher Education Act 2004, HC 369-ii of 2004–05.) Some legislation provides for post-enactment scrutiny to be conducted by specially appointed reviewers: the terrorism legislation is an example (the annual reports on the operation of the Terrorism Act 2000 and related legislation are available from http://security.homeoffice.gov.uk). Post-legislative review is more systematically undertaken by the Scottish Parliament (recent years, for example, have seen committees of the Scottish Parliament review the operation of the Transport (Scotland) Act 2001, the Housing (Scotland) Act 2001, the Protection from Abuse (Scotland) Act 2001, the Regulation of Care Act 2001 and the Community Care and Health Act 2002, among others). The Law Commission concluded in October 2006 (*Post-Legislative Scrutiny*, Cm 6945, Law Com 302) that there is a 'strong case for more systematic post-legislative scrutiny' (para 2.24) and recommended that 'consideration be given to the setting up of a new parliamentary joint committee on post-legislative scrutiny' (para 3.47).

There is more that can be demanded of legislation than that it should effectively implement the government's policy. A requirement of principle was expressed as follows by Sir John Donaldson MR in *Merkur Island Shipping Corpn v Laughton* [1983] 2 AC 570, 594–5 (with particular reference to the Trade Union and Labour Relations Act 1974, the Trade Union and Labour Relations (Amendment) Act 1976 and the Employment Act 1980):

> At the beginning of this judgment I said that whilst I had reached the conclusion that the law was tolerably clear, the same could not be said of the way in which it was expressed. The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two pre-requisites. First, people must understand that it is in their interests, as well as in that of the community as a whole, that they should

live their lives in accordance with the rules and all the rules. Second, they must know what those rules are. Both are equally important and it is the second aspect of the rule of law which has caused me concern in the present case. . . .

In industrial relations it is of vital importance that the worker on the shop floor, the shop steward, the local union official, the district officer and the equivalent levels in management should know what is and what is not 'offside'. And they must be able to find this out for themselves by reading plain and simple words of guidance. The judges of this court are all skilled lawyers of very considerable experience, yet it has taken us hours to ascertain what is and what is not 'offside', even with the assistance of highly experienced counsel. This cannot be right.

We have had to look at three Acts of Parliament, none intelligible without the other. We have had to consider section 17 of the Act of 1980, which adopts the 'flow' method of Parliamentary draftsmanship, without the benefit of a flow diagram. We have furthermore been faced with the additional complication that subsection (6) of section 17 contains definitions which distort the natural meaning of the words in the operative subsections. . . . But I do not criticise the draftsman. His instructions may well have left him no option. My plea is that Parliament, when legislating in respect of circumstances which directly affect the 'man or woman in the street' or the 'man or woman on the shop floor' should give as high a priority to clarity and simplicity of expression as to refinements of policy. Where possible, statutes, or complete parts of statutes, should not be amended but re-enacted in an amended form so that those concerned can read the rules in a single document. When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be expressed?' Having to ask such questions would no doubt be frustrating for ministers and the legislature generally, but in my judgment this is part of the price which has to be paid if the rule of law is to be maintained.

(See also the remarks of Lord Diplock in the House of Lords [1983] 2 AC 570, 612 and the example offered by P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005), pp 29–34.)

(b) Delegated legislation

Putting aside an exceptional and very limited power of legislation under the prerogative (below), the executive can legislate only if authorised to do so by Parliament. Many Acts of Parliament confer power upon the administration to legislate for specified purposes. In formal constitutional terms Parliament as supreme law-giver delegates a circumscribed portion of legislative competence to a minister of the Crown or other public authority. The reality is that the government, in drawing up a bill for enactment by Parliament, decides how much detailed regulation of the subject matter to include in the bill itself, and what powers to keep in its own hands for carrying out the purposes of the bill.

The delegation of legislative power by Parliament to the Sovereign or to ad hoc authorities was known in Tudor times and even earlier, but the expansion of governmental activity in the nineteenth and twentieth centuries brought about a great increase in delegated legislation. By the 1930s the number of departmental regulations issued annually was fifteen or twenty times that of Acts passed by Parliament. This abundant production of law by agencies other than Parliament was viewed by some with an exaggerated alarm as a triumph of bureaucracy over the constitution (eg Lord Hewart, *The New Despotism* (1929)). Others, like Harold Laski (*Parliamentary Government in England* (1938), p 216), recognised that:

> It would be foolish for Parliament to waste its time legislating separately upon applications or extensions of general principles about which it has already legislated. To say, for example, that a poison is a substance declared to be such by the Home Office in consultation with the Pharmaceutical Society is, under proper safeguards, infinitely more sensible than for the Cabinet to ask Parliament for a separate statute on each occasion when it is desirable to restrict the sale of some chemical substance on the ground of its poisonous nature.

The government responded to criticism of the practice of delegated legislation (and the vesting of judicial and quasi-judicial powers in ministers) by setting up the Committee on Ministers' Powers (Donoughmore Committee) which reported in 1932. The Committee expressed its general conclusion on the subject of delegated powers in saying (Cmd 4060, pp 4–5):

> We do not agree with those critics who think that the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers.

The Committee added:

> But in truth whether good or bad the development of the practice is inevitable.

It went on to give reasons why the delegation of legislative powers was necessary (pp 51–2). The reasons were restated, as follows, in 1967.

Select Committee on Procedure, *Sixth Report*, HC 539 of 1966–67, Appendix 8: Memorandum by Mr Speaker's Counsel, para 6

> The advantages and justifications of delegated legislation may be summarised as follows:
>
> (a) The normal justification is its value in relieving Parliament of the minor details of law making. The province of Parliament is to decide material questions affecting the public

interest; and the more procedure and subordinate matters can be withdrawn from their cognizance the greater will be the time afforded for the consideration of more serious questions involved in legislation.

(b) Another advantage is *speed of action*. Action can be taken at once in a crisis without public notice which might prejudice the object of the exercise. For instance an increase in import duties would lose some of its effect if prior notice was given and importers were able to import large quantities of goods at the old lower rate of duty.

(c) Another advantage is in dealing with *technical* subjects. Ministers and Members of Parliament are not experts in the variety of subjects on which legislation is passed eg trade marks, patents, designs, diseases, poison, legal procedure and so on. The details of such technical legislation need the assistance of experts and can be regulated after a Bill passes into an Act by delegated legislation with greater care and minuteness and with better adaptation to local and other special circumstances than they can be in the passage of a Bill through Parliament.

(d) Another is that it enables the Department to deal with *unforeseen circumstances* that may arise during the introduction of large and complicated schemes of reform. It is not possible when drafting legislation on a new subject, to forecast every eventuality and it is very convenient to have power to adjust matters of detail by Statutory Instrument without of course going beyond the general principles laid down in the Bill.

(e) Another is that it provides *flexibility*. Circumstances change and it may be desirable to take power to deal quickly with changing circumstances rather than wait for an amending Bill. [A recent instance was the Electronic Communications Bill, providing for delegation of powers 'to ensure flexibility in a field where the technology is changing rapidly in ways which cannot be anticipated at present': Select Committee on Delegated Powers and Deregulation, *Fifth Report*, HL 30 of 1999–2000, Memorandum by the DTI, p 5, para 4.]

(f) Finally, there is the question of emergency; and in time of war it is essential to have wide powers of delegated legislation.

The Cabinet Office has outlined the factors to be considered in deciding whether provision should be made in a bill for the delegation of legislative power.

Cabinet Office, *Guide to Legislative Procedures* (2004), para 8.18

Matters of detail are often set out in Schedules to a Bill; or they may be left over to be dealt with by statutory regulations or other forms of subordinate legislation. The following are some of the points which Parliamentary Counsel and the departments may need to take into account in preparing the Bill:

- the matters in question may need adjusting more often than it would be sensible for Parliament to legislate for by primary legislation;
- there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;

- the use of delegated powers in a particular area may be well precedented and uncontroversial;
- there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.

On the other hand,

- the matters, though detailed, may be so much of the essence of the Bill that Parliament ought to consider them along with the rest of the Bill;
- the matters may raise controversial issues running through the Bill which it would be better for Parliament to decide once in principle rather than arguing several times over (and taking up scarce Parliamentary time in so doing);
- Parliament will take a close interest in the nature and extent of Parliamentary control over subordinate legislation, so careful consideration should be given to this question.

The complex activity of a modern industrial society necessitates a far-reaching governmental regulation in the interests of public safety, health and welfare. Much of this regulation is carried out by means of the numerous powers of delegated legislation committed to the government, which each year acts upon these powers in issuing some 1,500 instruments (of the kind that are subject to parliamentary procedure: other, less important, instruments are issued which are exempt from parliamentary control procedures). Although delegated legislation is an executive function, it is subject to a measure of parliamentary supervision and to a check of another sort in the processes of consultation with outside interests. (See further below.) A balanced modern view of delegated legislation is given in the following passage.

SA Walkland, *The Legislative Process in Great Britain* (1968), pp 16–18

[A]lthough there have been many encomiums on the Public General Act as a legislative device, there has been a curious reluctance to recognize the legitimacy and permanence of Departmental legislation as the main twentieth-century vehicle of legislative regulation. Partly because the Public General Act was identified with the 'rule of law' (although much that has been done by its agency would not have met with Dicey's approval), and, to the same extent, supported formal-legal concepts of the legislative sovereignty of Parliament, it has been regarded as the normal end-product of the legislative process, from which Ministerial legislation is a distinctly inferior, temporary derogation, suspected by right-wing lawyers, at least, of containing the seeds of the overthrow of responsible government in Britain. . . .

. . . [D]espite the rapid growth in the volume of subordinate legislation and its importance in the regulatory roles of government, official enquiries into the place of statutory powers to make regulations in the legislative process have never directly recognized their potential. Instead the investigations have been almost entirely negatively conceived, concerned mainly with confining the scope of the process and improving judicial and Parliamentary controls

over it. This was particularly true of the 1932 Committee on Ministers' Powers, whose attempts at a formal and outdated analysis of governmental processes led it into semantic confusion, which together with its suspicious approach to the subject-matter of the enquiry, set the pattern for much subsequent discussion of delegated legislation. . . .

Much of the suspicion of delegated legislation is aroused by the fact that civil servants are intimately associated with its procedures, and that the opportunities for participation in the process by representative and politically responsible members of the House of Commons are necessarily limited. . . . It may be that the civil service, with its ability to evade immediate political responsibility, is unfitted to carry the sole weight of public policies which are matters of political dispute, or which are likely to bear very heavily on sections of the public. But charges of remoteness from some sections of public opinion and of inaccessibility must give way when the extent of consultation by the civil service with organized groups and its ability to have recourse to a vast network of advisory committees is taken into account.

As a result, whilst legislative procedure in Parliament has been relatively static for some time, the Departmental phase of the modern legislative process has seen considerable technical advances, which have had the result of introducing a marked degree of procedural flexibility and sensitivity into legislative rule-making by administrative agencies. Of these, the most widespread and influential procedure is the informal consultation with interests in the making of subordinate legislation.

The Hansard Society Commission on the Legislative Process concluded that, on balance, 'the main advantages of making greater use of delegated legislation outweigh the very real disadvantages', having regard in particular to the desirability of keeping primary legislation 'as clear, simple and short as possible' (*Making the Law* (1992), paras 262–3). The greater flexibility of delegated legislation may, however, dispose a government to proceed in this way even when the subject matter is of an importance that demands the fuller parliamentary scrutiny applied to primary legislation. There have been complaints that issues of policy and principle, instead of being included in the bill and submitted to Parliament, are left to be settled by ministers in delegated legislation (see above). Lord Simon of Glaisdale has spoken in this connection of an aggrandisement of the executive at the expense of Parliament, citing the Child Support Act 1991 which delegated over 100 regulation-making powers to ministers (HL Deb vol 533, col 747, 11 December 1991). The Procedure Committee concluded in 1996 that there was 'too great a readiness in Parliament to delegate wide legislative powers to Ministers, and no lack of enthusiasm on their part to take such powers' (*Fourth Report*, HC 152 of 1995–96, para 14. This conclusion was endorsed by the Procedure Committee in 1999–2000, *First Report*, HC 48, para 26.) The House of Lords responded to these misgivings in setting up a committee – now named the Delegated Powers and Regulatory Reform Committee – which has as part of its task the examination of bills to determine whether their provisions 'inappropriately

delegate legislative power' and to report to the House before the bill has reached the Committee stage of detailed consideration. The House of Lords Committee does valuable work in checking excessive delegation in government bills.

If the subject matter of delegation is of a constitutional character or is otherwise of particular importance, the power to legislate may be conferred on the Queen in Council. Orders in Council are drawn up in the department principally concerned and are formally ratified by the Sovereign and a small group of ministers meeting as the Privy Council. Among many enabling Acts which make this kind of provision is the Civil Contingencies Act 2004, which invests the government with a wide power to make emergency regulations by Order in Council for dealing with emergencies threatening the United Kingdom. While the Northern Ireland Assembly remains suspended (see chapter 4), Orders in Council may be made under the Northern Ireland Act 2000 for any purpose within the legislative competence of the Assembly (see also the Northern Ireland Act 2006, section 3).

Orders in Council made under statutory authority are to be distinguished from *prerogative* Orders in Council (see below) which are a type of primary, not delegated, legislation.

Other statutes give powers to ministers of the Crown to legislate by means of instruments variously named as regulations, directives, rules, orders, etc; we may refer to them generally as regulations. Law-making powers are also delegated to local authorities and to certain other public bodies (eg, the Financial Services Authority, the General Dental Council and the Electoral Commission) but our present concern is with powers conferred on ministers of the Crown. These powers are the means to a comprehensive ministerial regulation (within the statutory framework) of many public services and other activities, including the National Health Service, social security, industrial training, town and country planning, merchant shipping, health and safety at work, road traffic, and so on.

An important innovation was the Deregulation and Contracting Out Act 1994 which conferred power on ministers to amend or repeal by ministerial order primary legislation that was considered to impose unnecessary burdens on business. Restrictions on the scope of the power were considered to limit its effectiveness, and strengthened provision was made by the Regulatory Reform Act 2001, authorising ministers to make Regulatory Reform Orders to remove or reduce burdens 'affecting persons in the carrying on of any activity'. Within a few years the Government was persuaded that the powers in the 2001 Act were 'too technical and limited' and that ministers needed enlarged powers to enable them to remove unnecessary bureaucratic restrictions and to bring about 'swift and efficient regulatory reform', to the benefit of business and the public and voluntary sectors. The Legislative and Regulatory Reform Bill that was introduced to achieve these ends would have provided ministers with unprecedented power, subject only to minimal restrictions, to repeal or amend any legislation

for any purpose. As we saw in chapter 2, the bill was widely condemned as constitutionally outrageous and in response to well-mounted challenges from within and outside Parliament the Government agreed to significant concessions, introducing amendments to the Bill in the course of its passage so as to limit its scope and introduce safeguards. In the result the Legislative and Regulatory Reform Act 2006 provides ministers with wide, but no longer untrammelled, powers to amend Acts of Parliament and secondary legislation (see further below, pp 458–9).

(i) Statutory instruments

The legislative powers delegated to ministers or to the Queen in Council are exercised, for the most part, in the form of statutory instruments, which are defined in the following terms by section 1 of the Statutory Instruments Act 1946:

> 1(1) Where by this Act or any Act passed after the commencement of this Act [on 1 January 1948] power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty in Council or on any Minister of the Crown then, if the power is expressed –
> (a) in the case of a power conferred on His Majesty, to be exercisable by Order in Council;
> (b) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,
> any document by which that power is exercised shall be known as a 'statutory instrument' and the provisions of this Act shall apply thereto accordingly.
>
> (1A) The references in subsection (1) to a Minister of the Crown shall be construed as including references to the National Assembly for Wales.
>
> (2) Where by any Act passed before the commencement of this Act power to make statutory rules within the meaning of the Rules Publication Act 1893 was conferred on any rule-making authority within the meaning of that Act, any document by which that power is exercised after the commencement of this Act shall, save as is otherwise provided by regulations made under this Act, be known as a 'statutory instrument' and the provisions of this Act shall apply thereto accordingly.

The regulations referred to in section 1(2) are the Statutory Instruments Regulations 1947, SI 1948/1, as amended.

In broad terms the effect of the section is as follows. By section 1(1) an instrument made under a post-1947 Act is a statutory instrument either if it is an Order in Council or if it is made by a minister of the Crown and the empowering Act expressly provides that the power is to be exercised by statutory instrument. Section 1(2) deals with instruments made under pre-1948 Acts. All such instruments made by ministers or by Her Majesty in Council are statutory instruments unless excepted by the Statutory Instruments Regulations: instruments so excepted are those having an executive and not a legislative character. Statutory instruments are subject to the provisions of the Statutory Instruments

Act relating to publication and the procedure for laying before Parliament. (See below.) The exercise by the government of powers of delegated legislation may also be subject to conditions specified in the enabling Act.

Consultation

Merits of Statutory Instruments Committee, *Twenty-ninth Report*, HL 149-I of 2005–06, para 85

> Proper consultation is a crucial part of the process of determining the most effective way of achieving a policy objective and, where legislation is deemed to be necessary, of getting an instrument right before it is laid. It should be remembered that the House cannot amend an instrument: it can only accept or reject it. It is important therefore that, when an instrument comes before Parliament, it should have been exposed to those who will be affected by its provisions and its suitability reviewed in the light of their reactions.

Some enabling Acts oblige the minister concerned to consult organised interests or other bodies before making regulations. The particular organisations to be consulted may be specified by the Act, or may be left to the judgement of the minister in accordance with some general formula. A typical example of the latter kind occurs in the Medicines Act 1968. The Act empowers the Health and Agriculture Ministers to make regulations and orders for certain purposes, and section 129(6) provides:

> Before making any regulations under this Act and before making any order under this Act . . . the Ministers proposing to make the regulations or order shall consult such organisations as appear to them to be representative of interests likely to be substantially affected by the regulations or order.

Does a provision of this kind give the minister an unfettered discretion as to the organisations to be consulted? No: it is a matter for the minister's judgement, but 'subject always to *bona fides* and reasonableness': see *Agricultural Training Board v Aylesbury Mushrooms Ltd* [1972] 1 WLR 190 (noted by Foulkes (1972) 35 *MLR* 647). Is there any limitation at all upon the discretion of a minister who is empowered to make regulations after consultation with 'any organisation appearing to him to be appropriate'? The discretion is not absolute: the minister must fairly and reasonably consider which organisations are appropriate: *cf R v Post Office, ex p Association of Scientific, Technical and Managerial Staffs* [1981] 1 All ER 139, 141–2.

Some enabling Acts combine a general formula with a direction to consult named organisations. Section 14(3) of the Building Act 1984 provides:

> Before making any building regulations . . . the Secretary of State shall consult the Building Regulations Advisory Committee and such other bodies as appear to him to be representative of the interests concerned.

In *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1, the court was concerned with the 'kind or amount' of consultation that would satisfy a statutory requirement to consult certain organisations before making regulations. Webster J said:

> [T]he essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer.

In determining whether there has been proper consultation a court will have regard, said Webster J, to the circumstances as they would have appeared to the Secretary of State, acting in good faith at the relevant time. In this case the judge held that the minister had not given sufficient time to the applicant association to respond adequately to his invitation to them to comment on the proposed regulations. He accordingly granted the association a declaration that the minister had failed to comply with his statutory duty to consult them. The judge declined, however, to strike down the regulations which, he said, had 'become part of the public law of the land'. (Is it questionable whether they had so become?) In deciding to exercise his discretion in this way, Webster J noted that there had not been a total failure of consultation; administrative inconvenience would be caused by the revocation of the regulations; and they were in any event being replaced by new, consolidating regulations. He expressed the view that 'it is not necessarily to be regarded as the normal practice, where delegated legislation is held to be ultra vires, to revoke the instrument, but that the inclination would be the other way, in the absence of special circumstances making it desirable to revoke that instrument'. When such restraint is exercised, is the court simply administering 'an ineffective slap on the wrists'? (See Logie, 'Promoting participation through the courts: enforcing consultation procedure' (1986) 136 *NLJ* 768.)

There was a different outcome in *R v Secretary of State for Health, ex p United States Tobacco International* [1992] QB 353. In this case the company was the sole UK manufacturer of oral snuff. It had been encouraged by the Government to manufacture and market its product and had received a government grant to help it in setting up its UK operation. Some three years later the Secretary of State for Health was advised by the Committee on Carcinogenicity (COC), an independent body of scientific experts, that oral snuff should be banned on health

grounds. The Secretary of State then announced that he proposed to make regulations under section 10 of the Consumer Protection Act 1987 banning the marketing of oral snuff. By section 11(5) of the Act he was required, before making the regulations, to consult organisations appearing to him to be representative of interests that would be substantially affected. The Secretary of State invited the company to make representations to him, but then refused its request to be shown the advice and reasons that had been submitted to him by the COC. The company applied for judicial review of the decision to make the regulations, on the ground inter alia that the Secretary of State had failed in his statutory duty of consultation. The Divisional Court held that the Secretary of State had a duty, in consulting, to be fair and to act in accordance with natural justice. What was required to meet the standards of fairness and natural justice would depend on the facts of the particular case, but in the present case, where the company had been 'encouraged to embark upon a substantial commercial operation' in the United Kingdom, where the regulations 'impinged almost exclusively' on the company, and since 'the effect of the regulations was likely to be catastrophic' to the company's UK business, a high degree of fairness and candour was required to be shown by the Secretary of State. The court held that in refusing to disclose the COC's advice and reasons the Secretary of State had acted unfairly and unlawfully, and it ordered that the regulations should be quashed.

How would it have benefited the company to have been given particulars of the COC's advice? (See generally Jergesen, 'The legal requirements of consultation' [1978] *PL* 290.)

Although ministers are not under a legal duty to consult affected persons or organisations if the enabling Act imposes no such requirement (see *Bates v Lord Hailsham* [1972] 1 WLR 1373) it is the regular practice of government departments to consult affected interests before regulations are made. Consultation is often essential if the regulations are to be properly tailored to the objectives sought and if the support is to be won of interests whose cooperation is needed for them to work effectively. The Government's *Code of Practice on Consultation* (2004) is intended to provide 'a clear framework of standards and advice' for departments in their consultation exercises, so as to further 'responsive, open administration'. The Code directs government departments and agencies to consult widely throughout the process of developing policy and legislation (so avoiding privileged access), sets a standard minimum period of twelve weeks for responding in a written consultation exercise and encourages the giving of feedback, indicating what responses were received and how they influenced the policy. A Regulatory Impact Assessment, to be carried out if the proposed legislation may affect business, charities or the voluntary sector, must be attached to consultation documents.

Consideration of specified matters

The enabling Act may direct the minister to 'have regard to' specified matters in making regulations. For example, section 1(3) of the Industrial Development

Act 1982 provides that the Secretary of State, in exercising his powers to make orders specifying areas of Britain as 'development areas' or 'intermediate areas':

> shall have regard to all the circumstances actual and expected, including the state of employment and unemployment, population changes, migration and the objectives of regional policies.

Even in the absence of an express requirement of this kind, there is an implied obligation to have regard to relevant factors, to be gathered from the provisions and objects of the Act, and to disregard irrelevant factors in exercising a statutory power. Moreover the delegated power must be used for the purposes for which it was conferred by the Act, and not for unauthorised purposes. (See *Attorney General for Canada v Hallet & Carey Ltd* [1952] AC 427 and *Customs and Excise Comrs v Cure & Deeley Ltd* [1962] 1 QB 340.) Failure to observe these conditions may result in the invalidity of the regulations.

Publication

Section 2(1) of the Statutory Instruments Act 1946 provides for the publication of statutory instruments:

> Immediately after the making of any statutory instrument, it shall be sent to the King's printer of Acts of Parliament and numbered in accordance with regulations made under this Act, and except in such cases as may be provided by any Act passed after the commencement of this Act or prescribed by regulations made under this Act, copies thereof shall as soon as possible be printed and sold by or under the authority of the King's printer of Acts of Parliament.

The Statutory Instruments Regulations 1947, SI 1948/1, except certain instruments from the requirement of publication. For example, instruments classified as local by reason of their restricted application (and by analogy with local and personal or private Acts), those of which it is certified that their publication would be contrary to the public interest, temporary instruments and bulky schedules to instruments, need not be published. Regulations that are not statutory instruments as defined by the 1946 Act escape the Act's requirements for publication. It may be too – the matter is not free from doubt – that subdelegated legislation, authorised by an instrument itself made under delegated power (or by virtue of the prerogative), is not covered by the 1946 Act. (See P Craig, *Administrative Law* (5th edn 2003), pp 373–4.)

The requirement of publication of an instrument after it has been made is generally considered to be directory only and not mandatory, so that failure to publish does not invalidate the instrument: see *R v Sheer Metalcraft Ltd* [1954] 1 QB 586. (For discussion of this question, see Lanham (1974) 37 *MLR* 510, [1983] *PL* 395; and Campbell [1982] *PL* 569.) Section 3(2) of the 1946 Act

allows a qualified defence to a person charged with an offence against an instrument that has not been published in accordance with the Act.

Parliamentary procedure

When a government bill is being prepared which confers a power of delegated legislation, a decision has to be made on the appropriate form of parliamentary control.

For some instruments no parliamentary control is thought necessary and these are not required even to be laid before Parliament: they include, for example, commencement orders bringing Acts of Parliament into operation and orders prescribing forms. This is unexceptionable for routine instruments of these kinds, but in 1996 Lord Justice Scott found it to be a clear 'violation of . . . democratic constitutional principle' that there was no requirement to lay before Parliament orders made by the Secretary of State for Trade under section 1 of the Import, Export and Customs Powers (Defence) Act 1939, although the section conferred on him an extremely wide power to control exports and allowed for the creation of new criminal offences. (*Scott Report* (1996), vol I, para C.1.25-6.) The matter is now regulated by the Export Control Act 2002, which provides for parliamentary scrutiny of control orders made under it.

Every statutory instrument laid before Parliament is accompanied by a Regulatory Impact Assessment.

A few instruments have simply to be laid before Parliament so that members may be informed of them, without any further parliamentary procedure being prescribed. An example is section 2(4) of the Stock Transfer Act 1982 which provides that the power conferred by the Act upon the Treasury to make orders amending the Act's schedule of 'specified securities':

> shall be exercisable by statutory instrument which shall be laid before Parliament after being made.

To comply with such a provision, copies of the instrument must be delivered to the Votes and Proceedings Office of the House of Commons and to the Office of the Clerk of the Parliaments in the House of Lords. (Instruments of a financial nature are laid before the Commons only.) Section 4(1) of the Statutory Instruments Act 1946 provides that statutory instruments required to be laid before Parliament after being made 'shall be so laid before the instrument comes into operation'. But in urgent cases an instrument may be brought into operation before being laid, if an explanation of the reasons is sent to the relevant parliamentary authorities. The Government gave an undertaking to Parliament on 8 November 1971 that there would normally be an interval of twenty-one days between the laying of an instrument and its coming into operation (HC Deb vol 825, col 649). This undertaking, or convention, was unintentionally broken when a ministerial order was laid before Parliament on

19 June 2001 and expressed to come into force on the next day. When the mistake was discovered the order was immediately revoked and a new order in similar terms was laid before Parliament to come into force twenty-one days later. (See HC Deb vol 371, col 20 W, 2 July 2001.)

Departments have sometimes accidentally neglected to lay an instrument before Parliament as required by the enabling Act, and have taken corrective action when the failure has come to light. The effect of such a failure upon the validity of the instrument has not been definitely determined, and may depend on the terms in which the requirement to lay the instrument is expressed in the enabling Act. In some cases the direction to lay may not be mandatory. Suppose, however, that an Act provides that regulations made under its provisions:

> shall not be made unless a draft of the regulations has been laid before Parliament and approved by a resolution of each House.

What should be the consequence, in this case, of a failure to lay the regulations before they are made? (Cf *R v Secretary of State for Social Services, ex p Camden London Borough Council* [1987] 1 WLR 819; and see Campbell [1987] *PL* 328.)

Most general statutory instruments have not only to be laid before Parliament but are subject to a further procedure for enabling Parliament to exercise a degree of control. (About 1, 200 are laid for parliamentary proceedings each year.) In practice the choice between the available procedures is made by the department responsible for the enabling bill. A basic distinction can be made between 'affirmative' and 'negative' control procedures, although there are sub-varieties of each class. Under the affirmative procedure, the instrument or a draft of it has to be approved by resolutions of both Houses (exceptionally of the Commons only). Under the negative procedure, the instrument becomes law unless it, or a draft of it, is disapproved by a resolution, usually of either House. Examples follow of provision for each kind of procedure.

The Regulation of Investigatory Powers Act 2000. Section 28 of this Act provides for 'directed surveillance' of individuals and section 29 for the use of 'covert human intelligence sources' as methods of investigation by state agencies. Schedule 1 lists the public authorities (police forces, the intelligence services and others) able to conduct such investigations. Under section 30 the Secretary of State has power, exercisable by statutory instrument, to make orders amending Schedule 1. Section 30(7) provides that no such order shall be made which *adds* any public authority to the list in the Schedule, 'unless a draft of the order has been laid before Parliament and approved by a resolution of each House'.

The Transport Act 2000. Part II (Local Transport) of this Act confers various powers on specified ministers to make regulations and orders, chiefly concerning matters of detailed procedure. Section 160(1) provides that any such power is to be exercised by statutory instrument. Then it is provided by section 160(2): 'A statutory instrument containing regulations or an order made by a Minister

of the Crown under this Part . . . shall be subject to annulment in pursuance of a resolution of either House of Parliament'.

To a great extent departments follow precedent in choosing between the affirmative and negative procedures or in providing only for the laying of an instrument before Parliament for its information, but there are no firm rules or criteria governing the matter. A Memorandum by the Civil Service Department in 1972 (*Report from the Joint Committee on Delegated Legislation*, HC 475 of 1971–72, Appendix 8) concluded that:

> This is an area of legislation where criteria have not been considered desirable. Ministers and Parliament have instead preferred to maintain flexibility as to the choice of Parliamentary procedure, so that the procedure adopted has been determined by reference to the circumstances of each particular case, rather than by the application of a set of rules.

Governments have continued to take the view that it is not practicable to lay down precise criteria in this matter. In practice the negative procedure is most often chosen: only about one-tenth of instruments subject to parliamentary procedures require an affirmative resolution. The affirmative procedure obliges the government to move for approval of the instrument and allow a debate (which, in the House of Commons, is usually held in a standing committee, so saving government time on the floor of the House), and is generally reserved for instruments that raise issues of principle or are of some special importance. For example, the affirmative procedure is usually preferred for powers whose exercise will substantially modify Acts of Parliament, powers to impose financial charges and powers to create new offences of a serious nature. Parliament is provided with an explanatory memorandum for each instrument laid before it, giving an explanation of 'what the instrument does and how it does it'.

It is one of the functions of the House of Lords Select Committee on Delegated Powers and Deregulation to report whether bills that provide for delegated legislation 'subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny'.

An enabling Act may exceptionally incorporate a formula allowing the government to apply either the affirmative or the negative procedure in its discretion. The European Communities Act 1972, Schedule 2, para 2(2) provides:

> Any statutory instrument containing an Order in Council or regulations made in the exercise of a power so conferred [by this Act], if made without a draft having been approved by resolution of each House of Parliament, shall be subject to annulment in pursuance of a resolution of either House.

More stringent versions of the affirmative procedure are applicable to 'remedial orders' to be made under section 10 of the Human Rights Act 1998 (see

Schedule 2 to the Act) and (on certain conditions) orders to be made under sections 1 or 2 of the Legislative and Regulatory Reform Act 2006 (see sections 15, 18): 'super-affirmative' procedures. These procedures are intended to provide the opportunity for a fuller and better-informed consideration of the orders by both Houses.

The legislative powers assumed by the government are sometimes very great, and the scrutiny and control applied by Parliament to their exercise is of a weak kind. (Parliamentary control of delegated legislation is more fully considered in chapter 9; see also consideration of 'Henry VIII' clauses in chapter 2, above, pp 105–6.) The exercise of delegated legislative power is open to challenge, in proceedings for judicial review, just as are the executive acts of government. A court may be called upon to decide whether the delegated power has been exceeded or used for an improper (unauthorised) purpose, or in some other way misused (see further chapter 10).

For a thorough account of the making of delegated legislation, see E Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001).

(c) Prerogative legislation

The *Case of Proclamations* (1611) 12 Co Rep 74 established that the Crown has no power, by virtue of the prerogative, to alter the general law. Only in certain limited fields does the Crown retain a prerogative power to legislate, usually by Order in Council.

Prerogative Orders in Council can be used to regulate the civil service, so far as it is not governed by statutes. The principal Order is the Civil Service Order in Council 1995, which empowers the Minister for the Civil Service to make regulations prescribing the qualifications for appointments to the home civil service, controlling the conduct of the service and providing for the conditions of service of persons employed as civil servants.

Another domain of the prerogative was referred to by Diplock LJ in *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753:

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. The Queen's Courts, upon being informed by Order in Council or by the appropriate Minister or Law Officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it.

Prerogative must yield to statute, however, and the extent of the United Kingdom's territorial sea is now established by the Territorial Sea Act 1987 and Orders in Council made under the Act.

In the First World War, prerogative Orders in Council were among the instruments of economic warfare. (See the Reprisals Orders in Council of 1915 and 1917: SR & O 1915, III, p 107; SR & O 1917, pp 951, 952.) When the Falklands conflict of 1982 necessitated the requisitioning of ships, the Government was able to invoke the prerogative of the Crown:

At the Court at Windsor Castle

THE 4TH DAY OF APRIL 1982

PRESENT,

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

Whereas it is expedient in view of the situation now existing in relation to the Falkland Islands that Her Majesty should be enabled to exercise in the most effectual manner the powers at law vested in Her for the defence of the realm including Her Majesty's dependent territories:

Now, therefore, Her Majesty is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as the Requisitioning of Ships Order 1982.
2. A Secretary of State or the Minister of Transport . . . or the Lords Commissioners of the Admiralty may requisition for Her Majesty's service any British ship and anything on board such ship wherever the ship may be.
3. [Power to delegate functions under Article 2.]
4. The owner of any ship or thing requisitioned under this Order shall receive such payment for the use thereof during its employment in Her Majesty's service and such compensation for loss or damage to the ship or thing occasioned by such employment as may be provided by any enactment relating to payment or compensation in respect of the exercise of powers conferred by this Order and, in the absence of such an enactment, such payment or compensation as may be agreed between a Secretary of State [or the Minister or the Lords Commissioners] and the owner or, failing such agreement, as may be determined by arbitration.
5. In this Order:
   'Secretary of State' means any of Her Majesty's Secretaries of State;
   'Requisition' in relation to any ship or thing means take possession of the ship or thing or require the ship or thing to be placed at the disposal of the requisitioning authority;
   'British ship' means a ship registered in the United Kingdom or any of the following countries –
   (a) the Isle of Man;
   (b) any of the Channel Islands;
   (c) any colony;
   (d) any country outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the Government of the United Kingdom.

The government can also legislate under the prerogative to amend the constitutions of a few remaining colonies (only those once conquered or ceded:

see *R (Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] QB 1067), to create new courts of common law (see *Re Lord Bishop of Natal* (1864) 3 Moo PCCNS 115), and for a few other limited purposes.

(d) Executive powers

The government possesses a considerable number of executive powers – powers which do not extend to alteration of the law but may affect the rights or obligations of those with respect to whom they are exercised. (A distinction between legislative and executive powers cannot be very exactly made, but here we may say with P Craig, *Administrative Law* (5th edn 2003), p 398, that legislation 'signifies that the rule has a generality of application that distinguishes it from a mere executive order'.)

Most executive powers of government derive from statute and are vested in the 'Secretary of State', a designated minister, or (less often) in government departments. When power is conferred upon a departmental minister it does not necessarily follow that he or she must personally decide whether to exercise the power. In practice the decision may be taken by a subordinate minister or, very frequently, by officials on the minister's behalf.

Carltona Ltd v Commissioners of Works [1943] 2 All ER 560 (CA)

Under the Defence (General) Regulations 1939, SR & O 1939 No 927, the Commissioners of Works were authorised to requisition land if it appeared to them to be necessary to do so in the national interest. The powers of the Commissioners were by statute exercisable by the Minister of Works and Planning. An official of the Ministry of Works and Planning signed on behalf of the Commissioners of Works a notice to the owners of a factory stating that possession would be taken of the factory premises. The owners argued unsuccessfully that the requisition was invalid because the Minister had not personally directed his mind to the question.

Lord Greene MR: . . . In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is

he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.

See further Freedland, 'The rule against delegation and the *Carltona* doctrine in an agency context' [1996] *PL* 19; and note the observations of Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75, 95.

Acts properly done by departmental officials on the minister's behalf are in law considered to be the acts of the minister himself. (See also *Re Golden Chemical Products Ltd* [1976] Ch 300.) It has been conjectured that certain powers affecting personal liberty, such as deportation or the extradition of a fugitive offender, must be exercised by the minister personally. (See S de Smith, Lord Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn 1995), para 6–114.) It may be too that a minister's discretion to devolve decision-making to officials is not unqualified and would be open to challenge on the ground of irrationality if, say, the designated official were of wholly inappropriate standing or qualification: cf *R v Secretary of State for the Home Department, ex p Oladehinde* [1991] 1 AC 254, 282, 284, 303; *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, 566.

Exceptionally, statute may require that a power entrusted to a minister of the Crown is to be exercised by the minister personally. There are provisions to this effect, for instance, in the Intelligence Services Act 1994, section 6(1) and the Regulation of Investigatory Powers Act 2000, sections 7(1), 8(6). By convention certain powers, which perhaps could lawfully be exercised by officials on behalf of ministers, are exercised by ministers in person – for example, the making of deportation orders. (See HC Deb vol 271, col 514 W, 13 February 1996; HC Deb vol 365, col 489 W, 26 March 2001. As to the preliminary decision to deport cf *Oladehinde* above at 303.)

The executive powers of government are many and of great variety. They include powers to grant licences, authorise certain kinds of business, make appointments to public offices, remove or deport (certain classes of) persons from the United Kingdom, approve by-laws of public bodies, make compulsory purchase orders, give directions, require information and award contracts, loans and subsidies. Under various 'default' powers, ministers may take over the functions of other public authorities.

Powers conferred upon ministers will involve a greater or lesser degree of discretion as to their exercise. The nature and limits of the discretion must be looked for in the empowering Act, which may qualify the minister's discretion in a number of ways. In particular it may appear that the minister (i) may

exercise the power only if a certain state of affairs exists, or if he believes it to exist; (ii) must consult or receive representations from certain persons (or even obtain another's consent) before exercising the power; (iii) must have regard to specified factors in deciding whether, or how, to exercise the power; (iv) may exercise the power only for specified purposes. An example is section 7 of the Industrial Development Act 1982, which confers a discretionary power ('the Secretary of State may . . . ') qualified by a number of conditions which impose duties upon the Minister, while leaving considerable scope for his subjective judgement. The section reads as follows:

Selective financial assistance for industry in assisted areas

7.(1) For the purposes set out in the following provisions of this section the Secretary of State may, with the consent of the Treasury, provide financial assistance where, in his opinion –

(a) the financial assistance is likely to provide, maintain or safeguard employment in any part of the assisted areas; and
(b) the undertakings for which the assistance is provided are or will be wholly or mainly in the assisted areas.

(2) The purposes mentioned in subsection (1) above are –

(a) to promote the development or modernisation of an industry;
(b) to promote the efficiency of an industry;
(c) to create, expand or sustain productive capacity in an industry, or in undertakings in an industry;
(d) to promote the reconstruction, reorganisation or conversion of an industry or of undertakings in an industry;
(e) to encourage the growth of, or the proper distribution of undertakings in, an industry;
(f) to encourage arrangements for ensuring that any contraction of an industry proceeds in an orderly way.

(3) Subject to the following provisions of this section, financial assistance under this section may be given on any terms or conditions, and by any description of investment or lending or guarantee, or by making grants, and may, in particular, be –

(a) investment by acquisition of loan or share capital in any company . . .
(b) investment by the acquisition of any undertaking or of any assets,
(c) a loan . . .
(d) any form of insurance or guarantee to meet any contingency. . . .

(4) Financial assistance shall not be given under this section in the way described in subsection (3)(a) above unless the Secretary of State is satisfied that it cannot, or cannot appropriately, be so given in any other way; and the Secretary of State, in giving financial assistance in the way so described, shall not acquire any shares or stock in a company without the consent of that company.

(5) In this section 'industry', unless the context otherwise requires, includes any description of commercial activity, and references to an industry include references to any section of an industry.

(6) In this section 'the assisted areas' means the development areas, the intermediate areas and Northern Ireland.

A requirement to 'have regard to' specified factors (which we have already met in relation to delegated legislation) appears, for example, in section 11 of the Countryside Act 1968:

In the exercise of their functions relating to land under any enactment every Minister, government department and public body shall have regard to the desirability of conserving the natural beauty and amenity of the countryside.

This is a rather weak kind of limitation upon a minister's power, for it leaves him or her free to have regard, and give greater weight, to other considerations in reaching a decision.

Exceptionally a statute may specify matters to which a minister exercising a power is *not* to have regard (eg, the Immigration and Asylum Act 1999, s 97(2)).

Often a minister's power may appear to be virtually unfettered, for example, if the minister is authorised to act 'if it appears to him to be desirable in the public interest' that he should do so, or simply 'if he thinks fit'. But even in these cases the minister must exercise his or her discretion in accordance with the policy or objectives of the Act: see *Attorney-General for Canada v Hallet & Carey Ltd* [1952] AC 427, 450; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

In using discretionary power a minister must observe not only statutory constraints but also the principles of administrative law developed by the courts in exercising judicial review. (See chapter 10.)

(i) Prerogative powers

Some executive powers depend not on statute but on the prerogative. When the government – or the responsible minister – grants a royal pardon (through submission of advice to the Sovereign), terminates a prosecution by entering a *nolle prosequi*, convenes a naval board of inquiry or sends armed forces to quell a disturbance in a British city or a distant colony, it exercises a prerogative of the Crown (those prerogative powers which remain exercisable only by the monarch were considered in the previous chapter: here we are concerned with *ministerial* exercises of prerogative powers).

The principal prerogative powers exercised by ministers were identified in a report of the Public Administration Committee of the House of Commons.

Select Committee on Public Administration, *Fourth Report: Taming the Prerogative*, HC 422 of 2003–04, para 9

The principal royal prerogative, or Ministerial executive, powers exercised by Ministers include the following.

a) The making and ratification of treaties.
b) The conduct of diplomacy, including the recognition of states, the relations (if any) between the United Kingdom and particular Governments, and the appointment of ambassadors and High Commissioners.
c) The governance of British overseas territories.
d) The deployment and use of the armed forces overseas, including involvement in armed conflict, or the declaration of war. (The Royal Navy is still maintained by virtue of the prerogative; the Army and the RAF are maintained under statute.)
e) The use of the armed forces within the United Kingdom to maintain the peace in support of the police.
f) The Prime Minister's ability to appoint and remove Ministers, recommend dissolutions, peerages, and honours (save for the four Orders within The Queen's own gift) . . .
g) Recommendations for honours by the Foreign and Commonwealth Secretary and the Defence Secretary.
h) The organisation of the civil service.
i) The grant and revocation of passports.
j) The grant of pardons (subject to recommendations by the Criminal Cases Review Commission) and the Attorney-General's power to stop prosecutions.

To this list of powers there may be added, the distribution (by the Prime Minister) of functions between government departments, the appointment of official advisers and the management of the government's business in the Cabinet and its committees and through a variety of ad hoc arrangements.

Foreign relations (including the making of treaties and the declaration of war) are conducted under the prerogative. In 1982 while negotiations were taking place for a settlement of the Falklands conflict, the Leader of the Opposition urged that 'the House of Commons has the right to make a judgement on this matter before any decision is taken by the government that would enlarge the conflict'. Refusing to accede to this demand, the Prime Minister said, 'it is an inherent jurisdiction of the government to negotiate and to reach decisions. Afterwards, the House of Commons can pass judgment on the government.' (HC Deb vol 23, cols 597–8, 11 May 1982.) There was no explicit parliamentary authorisation for the subsequent military engagement. Again, the Government did not seek parliamentary authority for the commitment of armed forces to military operations in Yugoslavia in 1999 or in Afghanistan in 2001. On the other hand, the Government sought (and obtained) the approval of the House of Commons before going to war in Iraq in 2003. Whether this has created a precedent, politically binding on future governments, remains to be seen. In a powerful report the House of Lords Select Committee on the

Constitution recommended in 2006 that Parliament's role in deciding to deploy Britain's armed forces abroad be strengthened and formalised, and that the Government should not in the future be able to rely solely on the prerogative as it had in the past.

House of Lords Select Committee on the Constitution, *Fourth Report: Waging War*, HL 236 of 2005–06, paras 100–10

The majority of our witnesses agreed that it is anachronistic, in a parliamentary democracy, to deny Parliament the right to pass judgement on proposals to use military force in pursuit of policy, although there was no consensus on the best means to bring that about. Underlying this sentiment is an anxiety to ensure, so far as is possible, that the action is not only legal but legitimate and is seen to command the support of the nation as a whole. The contrary argument – for the retention of the *status quo* – had two main themes. First, that any alternative would constrain the Government of the day's freedom of action (both in terms of timing and of the objectives) that alone made it possible vigorously to pursue the national interest; and, secondly, that change would bring with it the politicisation of military decision making. Coupled with the second concern was a fear that political controversy surrounding a proposed deployment would sap the morale of the forces deployed and jeopardise their security.

Although there have been exceptions, such as emergencies, recent history shows that the processes leading up to deployments are generally protracted, allowing plenty of time not only to evaluate and plan for the action but to obtain parliamentary support. The fact that it might be inconvenient for the Government to seek this support is hardly a justification for denying it. The Government's preparations have also been conducted under full media coverage, rendering the arguments about security and secrecy more theoretical than real. The Government also argues that it is in any case accountable to Parliament; but it seems to us that if substance is to be given to the glib cliché that 'Parliament can decide' then significant adjustment needs to be made to the processes that are employed to enable it to do so . . .

Our conclusion is that the exercise of the Royal prerogative by the Government to deploy armed force overseas is outdated and should not be allowed to continue as the basis for legitimate war-making in our 21st century democracy. Parliament's ability to challenge the executive must be protected and strengthened. There is a need to set out more precisely the extent of the Government's deployment powers, and the role Parliament can – and should – play in their exercise . . .

In that spirit, we recommend that there should be a parliamentary convention determining the role Parliament should play in making decisions to deploy force or forces outside the United Kingdom to war, intervention in an existing conflict or to environments where there is a risk that the forces will be engaged in conflict . . .

While not seeking to be prescriptive, we recommend that the convention should encompass the following characteristics:

(1) Government should seek Parliamentary approval (for example, in the House of Commons, by the laying of a resolution) if it is proposing the deployment of British forces outside the United Kingdom into actual or potential armed conflict;

> (2) In seeking approval, the Government should indicate the deployment's objectives, its legal basis, likely duration and, in general terms, an estimate of its size;
>
> (3) If, for reasons of emergency and security, such prior application is impossible, the Government should provide retrospective information within 7 days of its commencement or as soon as it is feasible, at which point the process in (1) should be followed;
>
> (4) The Government, as a matter of course, should keep Parliament informed of the progress of such deployments and, if their nature or objectives alter significantly, should seek a renewal of the approval.

Indeed, a strong case can be made for replacing all the rather ill-defined and wide-ranging powers that currently rest on prerogative with a statutory code, bringing clarity and appropriate safeguards to the definition of these powers as a whole, and not only in the context of the deployment of the armed forces (see A Tomkins, *Our Republican Constitution* (2005), ch 4). Several private member's bills have been introduced in Parliament that would, if enacted, have codified aspects of the prerogative, but none has been passed into law (see eg, the Armed Forces (Parliamentary Approval for Participation in Armed Conflict) Bill 2005, presented by Clare Short MP and the Constitutional Reform (Prerogative Powers and Civil Service etc) Bill 2006, presented by Lord Lester of Herne Hill). The case has not commended itself to governments, however, although the Labour Government conceded in 2004 that 'it is possible, and sometimes desirable, that [the prerogative] should be replaced by either statute or conventions on parliamentary scrutiny where circumstances make that appropriate' (*Government Response to the Public Administration Committee*, Cm 6187/2004). The Public Administration Committee in its report, *Taming the Prerogative* (HC 422 of 2003–04), gave its approval to a draft bill submitted by Professor Rodney Brazier (included in Appendix 1 to the Report). The draft bill, in the committee's summary (para 55):

> Would require governments to list the prerogative powers exercised by Ministers within six months of the Act's passing. The list would then be considered by a committee (probably a joint committee of both Houses) and appropriate legislation would be framed to put in place statutory safeguards where these are required.

The draft bill itself included specific provision for controls on the exercise of executive powers relating to the use of the armed forces, the ratification of treaties and the issue and revocation of passports. In the result the Government declined to proceed to comprehensive legislation on the lines proposed in the draft bill (see *Government Response*, Cm 6187/2004).

(ii) Nature of the prerogative

It is disputed whether the prerogative covers all executive acts of the Crown that are not based on statute. Two classic definitions of the prerogative may be

compared. Blackstone, in his *Commentaries on the Laws of England* ((8th edn 1778), Book 1, ch 7, p 239), wrote:

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology, (from *prae* and *rogo*) something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch [*Law* (1627), p 85] lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.

This definition of the prerogative limits it to those common law powers that are possessed by the Crown alone. Dicey has a different definition in *The Law of the Constitution* (10th edn 1959), pp 424–5:

> The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. . . . From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority. . . . Every act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative.

Notwithstanding the initial references to 'authority' and 'sovereignty', the concluding words of this passage express a comprehensive view of the prerogative.

Blackstone's and Dicey's views have both received judicial and academic approval, although in general the courts have followed Dicey. It is therefore debatable whether the government is rightly said to exercise the prerogative of the Crown when, for example, it engages an employee or purchases goods or makes grants of money, these being acts that any other person may perform. Perhaps these are simply things that the Crown can do by virtue of its corporate capacity at common law – although in making payments of money it must act within the limits of parliamentary authorisation of expenditure. (Cf Harris, 'The "third source" of authority for government action' (1992) 108 *LQR* 626 and Cohn, 'Medieval chains, invisible inks: on non-statutory powers of the executive' (2005) 25 *OJLS* 97. The power of the Crown, as a corporation sole, to deal with its property or spend money was acknowledged in the judgments of the Law Lords in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681.) It is also questionable whether the prerogative label should be attached to governmental acts that have no effect on the rights or duties of persons under English law, as when the government publishes

official information or issues a passport. But these actions too have been held to belong to the prerogative: see *Jenkins v Attorney-General* (1971) 115 Sol Jo 674; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811. Again, the making of a treaty by the Crown has no effect on the domestic law, but the treaty-making power is regarded by the courts as part of the prerogative: see *Blackburn v Attorney-General* [1971] 1 WLR 1037 and *Ex p Molyneaux* [1986] 1 WLR 331. (On the whole question see Sir William Wade, *Constitutional Fundamentals* (rev edn 1989), pp 58–64.)

(iii) Prerogative and statutory powers

In using either prerogative or other common law powers, the government is free of the constraints of an enabling statute; it may therefore prefer to take this course when it is available, rather than obtain statutory authority for its actions. But there is an important limitation upon the government's freedom to act in this way. If statutory powers already exist which cover the same ground as a prerogative power, the government is in general not free to choose between them, but must act under the statute.

Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508 (HL)

During the First World War the Government took possession of De Keyser's Royal Hotel in London for the accommodation of staff officers. Afterwards the owners of the hotel sued the Crown (by the procedure known as petition of right, which has since been superseded) for compensation for the use and occupation of the hotel. The main ground of their claim was that the hotel had been taken under the Defence Act 1842, which provided for compensation. The Government's reply was that the hotel had been occupied under the prerogative power to take property for the defence of the realm, which (it was contended) imported no duty to pay compensation.

The House of Lords held that the Government could not lawfully act on the prerogative power when there was a statute which authorised it to take the property and prescribed the conditions on which that could be done. The taking could be justified only by the statute, and its provisions as to compensation must be observed. The reasoning of their Lordships is indicated by the following passages.

Lord Atkinson: . . . It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of a statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might

> theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same – namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

Lord Moulton, after discussing the legislation culminating in the Defence Act 1842, said:

> What effect has this course of legislation upon the Royal Prerogative? I do not think that it can be said to have abrogated that prerogative in any way, but it has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself. But it has done more than this. It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden shall not fall on the individual, but shall be borne by the community.
>
> This being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and therefore subject to the equitable provision for compensation which is to be found in it. There can be no excuse for reverting to prerogative powers simpliciter – if indeed they ever did exist in such a form as would cover the proposed acquisition, a matter which is far from clear in such a case as the present – when the Legislature has given to the Crown statutory powers which are wider even than anyone pretends that it possessed under the prerogative, and which cover all that can be necessary for the defence of the nation, and which are moreover accompanied by safeguards to the individual which are in agreement with the demands of justice.

Whether the prerogative power, had it been available to the government in this case, would have permitted the taking of property without compensation, did not fall to be decided. (On this question see *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75.) The principle in *De Keyser*, that prerogative must give way to statute, applies only where the statute is in force. (In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, the House of Lords held that the Secretary of State could not rely on the prerogative in introducing a scheme for the compensation of victims of crime, when to do so involved renouncing the scheme established by Parliament in the

Criminal Justice Act 1988, which he chose not to bring into force by commencement order.)

Statute and prerogative sometimes co-exist, for Parliament may have provided additional or alternative powers without intending to abridge the prerogative. In some statutes, indeed, we find the prerogative expressly preserved: for example, Immigration Act 1971, section 33(5). In other cases it is a question of construction of the relevant statute whether it has displaced, in whole or in part, a pre-existing prerogative. The inference should not, however, be readily drawn that the government remains free, when Parliament has provided a precisely regulated power, to resort to general (often ill-defined) prerogative powers to achieve its ends.

R v Secretary of State for the Home Department, ex p Northumbria Police Authority [1989] QB 26 (DC and CA)

Section 4(4) of the Police Act 1964 provided that the police authority for a police area 'may . . . provide and maintain such vehicles, apparatus, clothing and other equipment as may be required for police purposes of the area'. In May 1986 the Home Secretary sent a circular letter to chief officers of police and police authorities, saying that plastic baton rounds and CS gas would be made available to chief officers of police from a central store, for use in situations of serious public disorder. A police force might be supplied with these items even if the police authority did not agree, if the chief constable's request for them was endorsed by an Inspector of Constabulary. The Northumbria Police Authority, in an application for judicial review, sought a declaration that the circular was ultra vires, arguing that the Home Secretary had no power to issue plastic baton rounds or CS gas to a chief constable without the consent of the local policy authority.

The Divisional Court held that the only *statutory* power of equipping police forces was that conferred on police authorities by section 4(4) of the Police Act (above), but that the Home Secretary could make use of a *prerogative* power to supply a police force with equipment needed for the maintenance of peace. The Court of Appeal decided, differing in this from the Divisional Court, that section 41 of the Police Act (authorising the Home Secretary to provide and maintain services for promoting the efficiency of the police) allowed the minister to supply equipment to a police force without the consent of the police authority. Having so decided it was not strictly necessary for the Court of Appeal to consider whether a prerogative power was available to the Home Secretary for this purpose, but the matter had been fully argued and the Court gave its attention to this question also.

Did a prerogative power exist which could justify the Home Secretary's action? There was undoubtedly a prerogative of defence of the realm, or war prerogative and the Court of Appeal held that this, or a related prerogative, extended to keeping the peace and maintaining order in peacetime.

Nourse LJ: . . . It has not at any stage in our history been practicable to identify all the prerogative powers of the Crown. It is only by a process of piecemeal decision over a period of centuries that particular powers are seen to exist or not to exist, as the case may be. From time to time a need for more exact definition arises.

Nourse LJ saw the war prerogative as being founded on a 'wider prerogative' of protection of the realm and the subjects within it. He continued:

The wider prerogative must have extended as much to unlawful acts within the realm as to the menaces of a foreign power. There is no historical or other basis for denying to the war prerogative a sister prerogative of keeping the peace within the realm. . . . [T]he scarcity of references in the books to the prerogative of keeping the peace within the realm does not disprove that it exists. Rather it may point to an unspoken assumption that it does.

Are we to see this case as one in which an existing prerogative power was given 'a more exact definition', or was such a power significantly extended, or a new power created (one not found in the books: cf *Entick v Carrington*, above, p 78)?

The Court of Appeal had then to consider the argument that, having regard to *Attorney-General v De Keyser's Royal Hotel*, any prerogative power of keeping the peace had been abridged by section 4(4) of the Police Act. This argument was rejected.

Croom-Johnson LJ: . . . It is clear that the Crown cannot act under the prerogative if to do so would be incompatible with statute. What was said here is that the Secretary of State's proposal under the circular would be inconsistent with the powers expressly or impliedly conferred on the police authority by section 4 of the Police Act 1964. The Divisional Court rejected that submission for reasons with which I wholly agree; namely that section 4 does not expressly grant a monopoly, and that granted the possibility of an authority which declines to provide equipment required by the chief constable there is every reason not to imply a Parliamentary intent to create one.

Purchas LJ: . . . It is well established that the courts will intervene to prevent executive action under prerogative powers in violation of property or other rights of the individual where this is inconsistent with statutory provisions providing for the same executive action. Where the executive action is directed towards the benefit or protection of the individual, it is unlikely that its use will attract the intervention of the courts. In my judgment, before the courts will hold that such executive action is contrary to legislation, express and unequivocal terms must be found in the statute which deprive the individual from receiving the benefit or protection intended by the exercise of prerogative power.

Is this ruling consistent with the principle affirmed in *Attorney-General v De Keyser's Royal Hotel Ltd*? (See further Bradley [1988] *PL* 298.)

(e) Administrative rule-making (quasi-legislation)

Public authorities, in particular ministers or government departments acting in the name of ministers, frequently adopt rules without statutory authority which are intended to regulate the way in which they will exercise statutory or other discretionary powers. These are rules of administrative practice, not of law, and rule-making of this kind is commonly described as administrative quasi-legislation (see Megarry, 'Administrative quasi-legislation' (1944) 60 *LQR* 125 and G Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (1987)). Such 'quasi-legislative' rules may be described as 'tertiary rules' (distinguishing them from primary or parliamentary legislation and secondary or delegated legislation: cf R Baldwin, *Rules and Government* (1995), p 80 *et seq*) or simply as 'administrative rules'.

Quasi-legislative rules are a means by which the administration injects specific policies into the exercise of its discretionary powers. The courts have recognised that public authorities are entitled to adopt policies or rules for their own guidance in exercising discretions conferred upon them. (See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610.) In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, [143], Lord Clyde said:

> The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course there are limits to be observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision makers.

Administrative policies and rules help to ensure consistent decisions which further the administration's objectives and, applied reasonably, make for public confidence in the integrity and fairness of official conduct. It is therefore unsurprising that much administrative activity is regulated by such self-imposed rules. They may be expressed as broad principles, standards or guidelines, or may prescribe in quite specific detail the terms upon which action will be taken. In speaking generally of 'administrative rules' we should keep in mind that they may differ in this way. Let us look at some examples.

Naturalisation. The Home Secretary, in deciding on an application for naturalisation as a British citizen, has to be satisfied that the applicant fulfils certain requirements, among them that he or she is 'of good character': British

Nationality Act 1981, section 6(1) and Schedule 1. For the assessment of this element (which has existed in the law since 1844) a number of rules or criteria have been evolved. These were outlined by a Home Office minister in Parliament on 19 March 1981 (HC Standing Committee F (British Nationality Bill), cols 692–3). The Government's current understanding of the good character requirement is set out in the *Nationality Instructions* issued by the Immigration and Nationality Directorate of the Home Office. Applicants may be refused naturalisation on character grounds in case, for example, of involvement (or suspected involvement) in criminal activity; bankruptcy, debt or non-payment of taxes; notorious anti-social behaviour; deception or false statements in pursuing the application; evasion of immigration control. (These factors, with their limits and exceptions, are described in detail in the Instructions, which can be found at www.ind.homeoffice.gov.uk/lawandpolicy/policyinstructions/nismenu.) Is a requirement of 'good character' best left to ministerial discretion, subject to self-imposed criteria, or should the attempt be made to formulate precise and objective rules in legislation?

Passports. The Home Secretary (or the Foreign Secretary in respect of overseas applications) has a discretionary power under the prerogative to grant and withdraw passports. The exercise of this discretion is governed not by rules of law but by a set of departmental rules initially adopted by the Foreign and Commonwealth Office. The rules were stated as follows by a Home Office minister on 25 July 2002 (HL Deb vol 638, col 107 WA):

> Passports are . . . not issued to persons who are not British nationals and/or whose identity cannot be authenticated.
>
> Passport facilities are refused or can be withdrawn in certain other well defined categories, which have been reported to Parliament from time to time. These are:
>
> (i) a minor whose journey is known to be contrary to a court order, to the wishes of a parent or other person or authority in whose favour a residence order has been made or awarded custody or care and control, or to the provisions of Section 25(1) of the Children and Young Persons Act 1933, as amended . . . or Section 56 of the Adoption Act 1976, as amended . . .
> (ii) a person for whose arrest a warrant has been issued in the United Kingdom or who is wanted by the police on suspicion of a serious crime;
> (iii) in very rare cases, a person whose past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to public interest;
> (iv) a person repatriated at public expense, until the debt has been repaid.
>
> The refusal or withdrawal of passport facilities in these circumstances is rare and cases are considered on their individual merits. On the basis of the limited case law it is clear that such action is open to scrutiny by the courts.

> The possibility of introducing a statutory right to passports has been debated in Parliament in the past but successive governments have taken the view that the current system has worked well and change is not required.

Professor Brazier comments (Public Administration Committee, Fourth Report, HC 422 of 2003–04, Appendix 1, para 22):

> the citizen's possession of a passport should not depend largely on the exercise of Ministerial discretion based on non-statutory rules devised by Ministers themselves – especially given that those rules have never been approved by Parliament. If the executive is to decide whether a citizen can enter and leave his or her own country then that must be on the basis of law approved by the legislature.

It has been judicially confirmed that the Secretary of State can properly apply a set of policies or rules in the exercise of the power to grant or withdraw passports, but the rules must not be applied in an arbitrary or unfair manner: *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811. The rules may be varied from time to time, as in 1968 when the Government decided to declare invalid all then existing Rhodesian passports, and to issue British passports to certain specified categories of Rhodesians. (See HC Deb vol 766, cols 738–9, 17 June 1968.)

Interception of communications. The interception of postal and telephonic communications was for many years carried out without statutory authority under rules laid down by the Home Office. The rules were published for the first time in the *Report of a Committee of Privy Councillors* in 1957 (Birkett Report, Cmnd 283), whose recommendations led to the adoption of new rules, published in 1980 (*The Interception of Communications in Great Britain*, Cmnd 7873). It is questionable whether the rules were ever fully disclosed. Following the judgment of the European Court of Human Rights against the United Kingdom in *Malone v United Kingdom* (1984) 7 EHRR 14, the power of interception was put on a statutory footing by the Interception of Communications Act 1985, since replaced by the Regulation of Investigatory Powers Act 2000. The legislation does not, however, exclude the adoption of informal rules governing the exercise of the power. It is provided by section 5 of the 2000 Act (as previously by the 1985 Act) that a warrant for interception may be issued by the Secretary of State if he believes it to be necessary, inter alia, 'in the interests of national security'. 'National security' is not defined in the Act (or, indeed, in any other Act in which it appears), but the Secretary of State adopted the rule that warrants would be issued on this ground 'either because of terrorist, espionage or major subversive activity, or in support of the Government's defence and foreign policies' (*The Interception of Communications in the United Kingdom*, Cmnd 9438/1985, para 21). See further L Lustgarten and I Leigh, *In From the Cold* (1994), pp 53–5.

Governments frequently adopt non-statutory administrative rules instead of resorting to more formal, legislative procedures, and it is claimed that their use makes for efficient administration.

Robert Baldwin, 'Governing with Rules: The Developing Agenda' in Genevra Richardson and Hazel Genn (eds), *Administrative Law and Government Action* (1994), pp 167–8

> [A]dministrative rules are said to routinize the exercise of discretion swiftly and inexpensively; encourage consistency; increase the incorporation of expertise and experience into decisions; enhance publicity and participation; give a flexibility lacking in primary and secondary legislation; allow non-technical language to be employed so as to make the rules accessible; enable rules to be couched in persuasive terms rather than in the form of commands; encourage compromises to be effected between those with different interests; deal with broad policy issues in a manner not possible with more precise primary and secondary rules; and allow rules to be introduced where more formal legislation is inappropriate or of doubtful practical or political feasibility.

As against these claims, Baldwin notes that the making of administrative rules is not subject to parliamentary control or to requirements of accountability such as promulgation and consultation. Questions arise of *transparency* and *accessibility*. (See further R Baldwin, *Rules and Government* (1995), pp 80–121.)

Non-statutory administrative rules have not always been published. They may have been kept secret within the administration, or perhaps privately notified to bodies primarily concerned. Even when publicly announced, with or without full details – in published circulars, government White Papers, departmental publications, or ministerial statements or answers in Parliament – they have not always been easily accessible. Administrative rules often raise important issues of public concern or have a substantial impact on individual interests. The question whether rules should be published, and in what detail, has in general been a matter for the government itself to decide. In 1971 the government agreed to 'bear in mind' the need for publicity when significant changes affecting the public were made in administrative rules, and in particular undertook that where a rule had been announced in Parliament, subsequent changes of significance would also be announced there. (Parliamentary Commissioner for Administration, *First Report*, Cmnd 4729/1971, para 2.) In the *Code of Practice on Access to Government Information* (2nd edn 1997, Part I, para 3(ii)), the Government undertook to publish, or otherwise make available, such rules, procedures and internal guidance to officials 'as will assist better understanding of departmental action in dealing with the public', subject to certain exceptions on grounds of confidentiality. This appears to have given a stimulus to the publication of administrative rules (eg, the Immigration Directorate's Instructions to immigration officers, first published in 1998). The Freedom of Information Act

2000 generally assures access to information about administrative rules that have no bearing on security or law enforcement matters.

Exceptionally, non-statutory rules are made subject to a parliamentary procedure. For instance, the Immigration Rules made by the Home Secretary are not expressly authorised by the Immigration Act 1971 but the Act assumes or acknowledges the fact that the minister may make rules. Section 3(2) provides:

> The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances. . . .
>
> If a statement laid before either House of Parliament under this subsection is disapproved by a resolution of that House passed within the period of forty days beginning with the date of laying . . ., then the Secretary of State shall as soon as may be make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament at latest by the end of the period of forty days beginning with the date of the resolution.

If disapproved by Parliament the rules do not cease to apply, but the minister is obliged to make whatever changes in the rules he or she thinks necessary and lay a statement of the revised rules before Parliament.

The Immigration Rules are a peculiar amalgam of explanations of statutory provisions, information about administrative practice and procedures, and directions to be followed by officials in carrying out their duties. Their hybrid character has troubled the courts, which were at first disposed to regard them as delegated legislation: see *R v Chief Immigration Officer, Heathrow, ex p Salamat Bibi* [1976] 1 WLR 979, 985 (per Roskill LJ). Subsequently the Court of Appeal in *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 1 WLR 766 took the view that they are not delegated legislation or rules of law in the strict sense but 'rules of practice laid down for the guidance of immigration officers and tribunals who are entrusted with the administration of the Act' (per Lord Denning at 780).

Rules of the kind we are considering cannot alter the law or abridge rights conferred by law. But such rules may supplement the law in allowing concessions to which there is no legal entitlement or in laying down the conditions on which discretionary benefits will be granted. A statement of the relevant legal rules will therefore often give an incomplete account of the circumstances in which claims are admitted by the administration. An example can be found in the set of rules adopted by the Inland Revenue in 1971 for the remission of arrears of tax when the arrears resulted from a failure of the department to act on information supplied by the taxpayer. (The rules were published in the Government's reply to a *Report from the Select Committee on the Parliamentary*

Commissioner for Administration, Cmnd 4729/1971.) Extra-statutory concessions allowed by the revenue departments were formerly not necessarily publicised, but these as well as other concessions by HM Revenue and Customs are now published in the guide, *Extra-Statutory Concessions*, which is updated from time to time. The following passage is taken from the Introduction to the guide:

> An Extra-Statutory Concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concessions are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.

The government cannot lawfully apply an administrative rule by which benefits of any kind are *withheld* from those who are legally entitled to them. However, government departments do adopt and act upon their own interpretations of statutory provisions under which entitlements may arise, and these may be less favourable to claimants than other, perhaps equally tenable, interpretations. Unless and until the government's view is successfully challenged in the courts as being plainly wrong or irrational, it will effectively determine the question of entitlement.

Non-statutory rules may have legal consequences in so far as they are taken into consideration by courts or tribunals in reaching decisions. As regards the Immigration Rules, for instance, an appeal to the Asylum and Immigration Tribunal against an immigration decision (eg a refusal of leave to enter the United Kingdom) may be brought on the ground (inter alia) 'that the decision is not in accordance with immigration rules' (Nationality, Immigration and Asylum Act 2002, s 84(1)(a)). But even in the absence of a provision of this sort a court may take account of non-statutory rules and can intervene if the administration disregards or misconstrues rules of its own making: see *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864; *R v Chief Immigration Officer, Gatwick, ex p Kharrazi* [1980] 1 WLR 1396; and compare *R v Ministry of Defence, ex p Walker* [2000] 1 WLR 806. (Note also the reasoning of Lord Goff in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 569–70 and compare Lord Browne-Wilkinson's dissenting speech at 576–7.) An administrative rule may be set aside by a court if found to be irrational, or to be manifestly unjust, oppressive, or partial and unequal in its operation as between different classes of persons: see eg, *R v Immigration Appeal Tribunal, ex p Manshoora Begum* [1986] Imm AR 385.

The publication of non-statutory rules may give rise to a 'legitimate expectation' by those affected that the rules will be properly and fairly applied, and the courts may protect this expectation even though it is not a legal right: *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *R v Secretary of State for the Home Department, ex p Khan* [1984] 1 WLR 1337; *R (Abdi and Nadarajah)*

v Secretary of State for the Home Department [2005] EWCA Civ 1363. Compare *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1, at [11]–[12], [58]–[62]. (Legitimate expectations are further discussed in chapter 10.)

It is questionable whether the practice of administrative rule-making is under adequate constitutional control (see Baldwin and Houghton, 'Circular arguments: the status and legitimacy of administrative rules' [1986] *PL* 239).

(f) Guidance and codes of practice

Guidance is a means by which the government seeks to influence the conduct of public authorities (such as local authorities, health authorities, the police and magistrates), or of private individuals or organisations (such as employers or farmers). Guidance may be used in preference to coercive powers because it is believed that existing, perhaps long-established, practices are better modified through persuasion and cooperation than by a machinery of legal duties and sanctions. Guidance is also preferred when it is thought that the body concerned should have freedom to use its own discretion rather than be subject to governmental regulation in the performance of its tasks. This may be because it possesses an expertise which the government lacks, or because it is an elected body answerable primarily to its own electors rather than to the government, or for other reasons of principle or policy.

Guidance ranges from the formal, published and explicit to informal pressures, inducements and advice where 'much is likely to happen behind the scenes, in committees or even in private discussions' (Blondel *et al* (1969–70) 5 *Government and Opposition* 67, 71). Christine Parker and John Braithwaite remark that 'cooperative and persuasive strategies', although not always appropriate, 'are likely to be more effective than coercive law in achieving long-term compliance with norms, and coercive law is most effective when it is in reserve as a last resort' ('Regulation' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), pp 133–4. See too Karen Yeung's discussion of such 'suasion techniques' and their potentiality for abuse of power: 'Regulating government communications' [2006] *CLJ* 53, 71–4, 78–80.)

Some forms of guidance have a statutory basis. A statute may both empower a minister to give guidance to a public body and prescribe the duty of that body with respect to any guidance given. The strongest form of guidance gives rise to a duty to act in accordance with it. Such was the duty of the Civil Aviation Authority under section 3(2) (since repealed) of the Civil Aviation Act 1971, which provided that:

> the Secretary of State may from time to time, after consultation with the Authority, give guidance to the Authority in writing with respect to the performance of the functions conferred on it . . . and it shall be the duty of the Authority to perform those functions in such a manner as it considers is in accordance with the guidance for the time being given to it.

In *Laker Airways Ltd v Department of Trade* [1977] QB 643, the Court of Appeal held that guidance given under this subsection could not override the express provisions or the policy of the Act. Lord Denning MR said (at 699–700):

> the word 'guidance' in section 3 does not denote an order or command. It cannot be used so as to reverse or contradict the general objectives or provisions of the statute. It can only be used so as to explain, amplify or supplement them. So long as the 'guidance' given by the Secretary of State keeps within the due bounds of guidance, the Authority is under a duty to follow his guidance. Even so, the Authority is allowed some degree of flexibility. It is to perform its function 'in such a manner as it considers is in accordance with the guidance'. So, while it is obliged to follow the guidance, the manner of doing so is for the Authority itself.

Lawton LJ in the same case emphasised the difference in the meaning of the words 'guidance' and 'direction': 'The word "guidance" has the implication of leading, pointing the way, whereas "direction" even today echoes its Latin root of regere, to rule' (725). Yet a power to give guidance that must be followed (even with a degree of discretion as to the mode of compliance) evidently approximates to a legislative power.

A less stringent obligation is imposed by some statutes which require those to whom guidance is issued to 'have regard to' or 'take account of' the guidance. The Housing Act 1996 is an example. Section 182(1) provides:

> In the exercise of their functions relating to homelessness and the prevention of homelessness, a local housing authority . . . shall have regard to such guidance as may from time to time be given by the Secretary of State.

The Homelessness Code of Guidance having effect under this provision is intended to secure 'fair, consistent and good practice amongst housing authorities'; but they are not legally bound to comply with it. (See *De Falco v Crawley Borough Council* [1980] QB 460, 478, 482; and cf *R v Police Complaints Board, ex p Madden* [1983] 1 WLR 447.) They are, however, obliged to take account of the Code and give fair consideration to its provisions before reaching a decision. A public authority is open to challenge in proceedings for judicial review if it disregards, misconstrues or misapplies guidance which it is required to take into account: see *R v North Derbyshire Health Authority, ex p Fisher* (1997) 10 Admin LR 27. Guidance of this kind, also, will be unlawful if it contradicts or undermines the provisions of the relevant Act: see *R v Secretary of State for the Environment, ex p Tower Hamlets LBC* [1993] QB 632; *R v Secretary of State for the Environment, ex p Lancashire County Council* [1994] 4 All ER 165; *R v Brent London Borough Council, ex p Awua* [1996] AC 55.

Another kind of legal effect is sometimes given by statute to forms of guidance or codes of practice. Section 203 of the Trade Union and Labour Relations

(Consolidation) Act 1992 authorises the Secretary of State to issue codes of practice containing such practical guidance as he thinks fit for the purpose of promoting the improvement of industrial relations or desirable practices in relation to trade union ballots and elections, etc. Section 207(3) provides:

> In any proceedings before a court or employment tribunal or the Central Arbitration Committee any Code of Practice issued . . . by the Secretary of State shall be admissible in evidence, and any provision of the Code which appears to the court, tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

(See also eg, Police and Criminal Evidence Act 1984, section 67(11); Regulation of Investigatory Powers Act 2000, section 72.)

It is common for statutes to provide that codes of guidance (especially if they have legal effects of the sorts mentioned above) shall be subject to parliamentary procedures similar to those applied to delegated legislation. For example, draft codes prepared by the Secretary of State under the Trade Union and Labour Relations (Consolidation) Act 1992 must be laid before Parliament and may be issued only after approval by both Houses (s 204(2)). More commonly the negative control procedure (above, pp 457–8) is prescribed: for example, by the Environment Act 1995, section 4, for guidance issued to the Environment Agency. Provision for parliamentary control is, however, sometimes wanting, even where plainly appropriate. In *R v Secretary of State for Social Services, ex p Stitt* (1991) 3 Admin LR 169 the Court of Appeal was perturbed to find that the power of the Secretary of State (then under the Social Security Act 1988) to give *binding directions* to social fund officers, as to whether particular kinds of need should be met by payments from the fund, was exercisable without any parliamentary supervision – even though such directions were equivalent to delegated legislation.

A great deal of ministerial guidance has no statutory basis and is without any legislative element. It may nevertheless be effective in influencing the conduct of those to whom it is directed, especially when it is based on clear constitutional understandings or if the means of compulsion are available in reserve. The following are examples.

Local authorities. Local authorities have been the recipients of much guidance from central government. Conscious of their own powers and their democratic base, they have not always responded favourably to the government's attempts to influence them in the performance of their functions. But most circulars to local authorities contain guidance of a politically uncontroversial nature which is generally followed. They have dealt with such matters as the supply of teachers, conservation of old buildings, eviction of gypsies, disclosure of councillors' pecuniary interests, and so on. Planning Policy Statements (formerly Planning Policy Guidance Notes) issued by the Department for Communities and Local Government to local planning authorities set out government policies on land

use planning and development. Decision-makers on planning applications are required to take them into account as 'material considerations' and the department (or its inspectors) will be guided by them in the determination of planning appeals and in dealing with called-in planning applications. This has been an effective means of implementing government policies on such matters as Green Belts, planning for town centres and the provision of new housing. In 1979 the Government decided that the issue of circulars of guidance to local authorities on matters in which the Government had no statutory powers would in future be 'strictly limited' (*The Guardian*, 26 July 1979; see also HC Deb vol 9, col 534 W, 30 July 1981). Most circulars since then have given explanations and advice about recent legislation (or sometimes on the effect of recent judicial decisions).

The police. The Home Secretary has no power to direct chief officers of police as to the performance of their duties, but the Home Office issues many advisory circulars to chief constables. An example is Home Office Circular 133/71 which gave guidance to the police on the use of the power to stop and search persons reasonably suspected of being in possession of controlled drugs (Misuse of Drugs Act 1971, s 23(1): the Circular recommended that modes of dress and hair style should not be regarded as reasonable grounds to stop and search.) Powers to stop and search are now also conferred on the police by the Police and Criminal Evidence Act 1984, the Criminal Justice and Public Order Act 1994 and the Terrorism Act 2000: the exercise of these powers is regulated by *Code A on Stop and Search* (issued under section 66 of the Police and Criminal Evidence Act 1984) complemented by guidance in the Home Office's *Manual on Stop and Search* (2005). Circulars have also been issued to promote consistency in the enforcement of particular statutory provisions and in the use of cautioning, and a Circular to chief officers of police gave general guidance on the use of CS gas grenades in dealing with serious public disorder. Home Office guidelines formerly prescribed the principles and procedures to be followed in the use of electronic listening ('bugging') devices, which was unregulated by statute. (See now the Police Act 1997, Part III and the Regulation of Investigatory Powers Act 2000, Part II.)

When guidance fails to yield results the government may resort to legislation. A 1977 Circular asked local education authorities to provide parents with certain information about schools in their areas. The response was disappointing and the guidance was replaced by a statutory obligation: section 8 of the Education Act 1980 required local education authorities to publish their arrangements for admission of pupils to maintained schools and such other information about their policy and arrangements for primary and secondary education as the Secretary of State might by regulations require. (See now the School Standards and Framework Act 1998, section 92.)

There are limits to what can be lawfully achieved by guidance. The government cannot override a discretionary power which a public body has under statute by giving it guidance, and the public body cannot abdicate its discretion

by treating the guidance as binding on it: see *R v Police Complaints Board, ex p Madden* [1983] 1 WLR 447. Again, the government's interpretations of the law expressed in advisory circulars have no legal authority. While a departmental interpretation may acquire 'vitality and strength' through being accepted and acted upon in practice (see *Coleshill and District Investment Co Ltd v Minister of Housing and Local Government* [1969] 2 All ER 525, 538) and may have some limited persuasive force in the judicial construction of a statutory provision (cf *Wicks v Firth* [1983] 2 AC 214, 230–1; *R v DPP, ex p Duckenfield* [1999] 2 All ER 873, 895), it is to be disregarded if untenable (eg, *R v Wandsworth London Borough Council, ex p Beckwith* [1996] 1 WLR 60, 65). A person whose interests are affected by the department's interpretation may seek a declaration from the courts that it is wrong in law.

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800 (CA and HL)

Section 1 of the Abortion Act 1967 provides that a person is not guilty of an offence of abortion when a pregnancy is terminated 'by a registered medical practitioner', if the treatment is carried out in a National Health Service hospital (or approved private clinic) after a certificate has been given by two doctors as to the necessity for the abortion (and subject to certain other specified conditions).

The Department of Health and Social Security issued a Circular to health authorities and the medical and nursing professions stating its view that it was lawful for a nurse to administer the drug which induced labour and the termination of pregnancy, provided that a registered medical practitioner personally decided upon and initiated the process of induction (by inserting a catheter into the woman's body) and remained responsible for the subsequent treatment carried out by the nurse. The Circular said:

> [T]he Secretary of State is advised that the termination can properly be said to have been termination by the registered medical practitioner provided it is decided upon by him, initiated by him, and that he remains throughout responsible for its overall conduct and control in the sense that any actions needed to bring it to conclusion are done by appropriately skilled staff acting on his specific instructions but not necessarily in his presence.

The Royal College of Nursing, wishing to have the law clarified, brought proceedings for a declaration that the Department's advice was wrong in law. Woolf J held that, although a nurse might play a large part in the procedure approved by the Circular, it was still treatment by a registered medical practitioner, and accordingly was lawful. The Court of Appeal reversed this decision, holding that in these circumstances the pregnancy was in fact terminated by the nurses. Lord Denning MR concluded his judgment by saying (at 806–7):

> If the Department of Health want the nurses to terminate a pregnancy, the Minister should go to Parliament and get the statute altered. He should ask them to amend it by adding the words 'or by a suitably qualified person in accordance with the written instructions of a registered medical practitioner'. I doubt whether Parliament would accept the amendment. It is too controversial. At any rate, that is the way to amend the law: and not by means of a departmental circular.

The House of Lords by a majority allowed an appeal by the Department and restored the ruling of Woolf J. The procedure approved by the Circular was held to be in conformity with the requirement of the Abortion Act, which was that a registered medical practitioner should accept responsibility for all stages of the treatment. Parts of the treatment could properly be carried out, in accordance with established medical practice, by nursing staff under his instructions.

(See also *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *R v Secretary of State for the Environment, ex p Greenwich London Borough Council* [1989] COD 530; *R v Secretary of State for Health, ex p Pfizer Ltd* [1999] Lloyd's Rep Med 289; *R (Axon) v Secretary of State for Health* [2006] EWHC 37 (Admin); Karen Yeung [2006] *CLJ* 53, 74–83; J Beatson in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998), pp 235–43.)

(g) Voluntary agreement and self-regulation

The agreements to be considered here include both legally enforceable contracts (to which the government, like a private individual, may be a party), and agreements not intended to have legal consequences, and perhaps also lacking the element of 'bargain' or consideration necessary for a binding contract, which the government may make with either public bodies or private organisations. 'Voluntary agreement' provides another mechanism for achieving governmental objectives, and one that is in some circumstances preferable from the government's point of view to legislation. Anthony Barker has written (in D Hague *et al* (eds), *Public Policy and Private Interests* (1975), p 354):

> In advanced industrial nations, the official and legal systems increasingly interpenetrate with the economic and social systems. So, 'government' is expected to take some kind of 'responsibility' for almost everything that is wanted, or needed, or is thought to have gone wrong.
>
> This has created a vast public demand for 'government responsibility' of some kind in almost every significant walk of the nation's life: protecting the customer, defending the environment and regulating business relationships. Yet even the largest and most interventionist government machine cannot do everything itself. Because it controls the state and can make laws, the government obviously has the means of offering semi-official status to private groups and interests, who are willing and able to enter into a constructive relationship.

If the government wishes to see the adoption of new or improved standards or practices in a trade, industry or profession, it can sometimes achieve this by negotiating a scheme of self-regulation with the appropriate traders', manufacturers' or professional organisation. A code of practice or set of rules agreed to and supervised by the organisation may bring about the desired result, when a legislative scheme would, perhaps, be controversial or difficult to administer.

Codes of practice or similar arrangements have been negotiated by government departments with, among others, the Confederation of British Industry and other business organisations (prompt payment of bills submitted by small firms); the Trades Union Congress (employees' rights to contract out of the political levy); the Society of Motor Manufacturers and Traders (action on vehicle defects affecting safety); the Association of the British Pharmaceutical Industry (advertising practice); the Brewers' Society (tenancies and rents in the licensed trade); the Association of British Insurers (use by insurance companies of genetic information about persons seeking insurance); principal industrial users of hydrofluorocarbons (reduction of hydrofluorocarbon emissions to the atmosphere); and the industry biotechnology body SCIMAC (postponement of commercial growing of genetically modified crops pending evaluation). A notable instance is the agreement between the government and the Association of British Insurers (revised in 2005) by which the Association, in return for specific Government commitments to increased expenditure on flood management and on measures to reduce the risk of flooding, acceded to a 'Statement of Principles' designed to ensure the continued availability of flood insurance. (See HC Deb vol 439, cols 33–5 WS, 11 November 2005.)

A well known instance of this mode of regulation was the agreement of 1977, afterwards renegotiated and renewed from time to time, between the Health Ministers and the tobacco industry, represented by the Tobacco Manufacturers' Association and the Imported Tobacco Products Advisory Council, on tobacco advertising. The Conference of Medical Royal Colleges, among others, called for legislative controls, but the Secretary of State for Social Services said in the House of Commons on 9 May 1980 (HC Deb vol 984, col 783):

> [I]t has been the view of successive Governments that they should seek to achieve their health objectives by voluntary agreement. . . . In other words, this is a field where our tradition of proceeding by persuasion and consent rather than legislation and compulsion has a great deal to commend it. It would be wrong to force sudden abrupt changes on an industry on which tens of thousands of families depend. So long as progress by agreement is possible, it would be wrong to introduce legislation, for instance on advertising, although no Government could rule that out for all time.

In 2002 the Labour Government gave its support to a private member's bill, introduced in the House of Lords, providing for the prohibition of advertising and promotion of tobacco products. The bill was passed by the Lords and was

then taken over by the Government for its passage through the House of Commons, to become the Tobacco Advertising and Promotion Act 2002.

Provision for compensation of the victims of uninsured drivers is made by the terms of an agreement of 1999 between the Secretary of State for the Environment, Transport and the Regions and the Motor Insurers' Bureau (replacing an agreement of 1988; the original agreement was made in 1946). A separate agreement provides for the compensation of victims of untraced drivers. Lord Denning has described these agreements as being 'as important as any statute' (*Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 757).

In some instances there is a statutory basis for the adoption of voluntary codes of practice: an important example is section 8 of the Enterprise Act 2002, which empowers the Office of Fair Trading, as part of its general function of promoting good practice in activities affecting the interests of consumers, to make arrangements to approve consumer codes produced by suppliers of goods or services. It was said of such codes (then prepared under earlier legislation) that they were 'intended to *supplement* the requirements of the law by obtaining the agreement of trade associations on behalf of their members to raise their standards of trading' (Borrie, 'Laws and codes for consumers' [1980] *Journal of Business Law* 315, 322).

In the regulation of commercial institutions concentrated in the City of London, governments have been inclined to favour persuasion rather than compulsion and have fostered the establishment of self-regulatory agencies, such as the Panel on Takeovers and Mergers (set up in 1968): see *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815, 825. (The Companies Act 2006 has adopted a fundamentally different approach in placing takeover regulation in a statutory framework, empowering the Takeover Panel to make rules for the regulation of takeovers.) The government's former preference for voluntary agreement and self-regulation in dealing with City institutions was shown by events of July 1983. The Director General of Fair Trading had referred the rule book of the Stock Exchange to the Restrictive Practices Court, for a determination of its compatibility with the public interest. The Secretary of State for Trade and Industry intervened, and reached an agreement with the Council of the Stock Exchange. In return for the termination of the proceedings before the court and the exemption of the Stock Exchange from the restrictive trade practices legislation, the Council undertook to make certain changes in its structure and rules. (In particular, minimum scales of commission would be phased out.) The Government performed its side of the bargain by securing the passage of the Restrictive Trade Practices (Stock Exchange) Act 1984, which exempted rules and regulations of the Stock Exchange from the Restrictive Trade Practices Act 1976 and formally terminated the proceedings already begun in the Restrictive Practices Court. Arrangements were made for the Bank of England and the Government to monitor the implementation by the Stock Exchange of the changes to which it had agreed. (See Graham Zellick's comments on this episode: 'Government beyond law' [1985] *PL* 283, 291–3.) The

Financial Services Act 1986 established a supervisory system for the investment industry which was based on rule-making by self-regulatory organisations, but the complexity and failures of financial self-regulation induced the Government to introduce legislation to provide for a new, unified system of regulation by a single public body, the Financial Services Authority. Under the Financial Services and Markets Act 2000 the Authority exercises the former regulatory responsibilities of three self-regulating organisations, the Bank of England, and a number of other bodies such as the Building Societies Commission.

When self-regulation fails, recourse to legislation is likely. To give three example: first, governments were for long unwilling to introduce legislation to resolve the difficulties caused to small businesses by delayed payment of debts by large firms and instead attempted to foster prompt payment by means of a code of practice agreed with the Confederation of British Industry and other business organisations. The code having had little effect, the Government resorted to legislation in the Late Payment of Commercial Debts (Interest) Act 1998, giving suppliers a right to claim interest on late payment of commercial debt. Secondly, the private security industry was for many years left to regulate itself through its trade association and inspectorate organisation, but self-regulation was only partially effective and a statutory regime was introduced by the Private Security Industry Act 2001. Thirdly, the Government was in favour of self-regulation by the electronic communications industry but took the precaution of making anticipatory provision for statutory regulation in Part I of the Electronic Communications Act 2000. This Part of the Act was to lapse at the end of five years from royal assent unless an order should be made to bring it into force, in the event that the industry's self-regulatory scheme had not worked satisfactorily. (No such order was made and Part I accordingly lapsed in 2005.) A similar conditional arrangement was made in 2005 for self-regulation of voluntary sector fund-raising, the Secretary of State reserving power in the Charities Act 2006 to impose statutory regulation if self-regulation proves ineffective.

On grounds of democratic principle governments have refrained from seeking to regulate the conduct of the press, preferring to support self-regulation by the newspaper and magazine industry through the code of practice and complaints machinery of the Press Complaints Commission, a body established by the industry itself. The prevention of malpractice in advertising also depends largely on self-regulation. The Advertising Standards Authority, an independent body set up by the advertising industry, monitors observance of advertising codes of practice drawn up by the industry and adjudicates on complaints of breaches of the codes.

Voluntary agreement, it has been said, can be 'a more cost-effective instrument' for the government than legislation, and its basis in consent may provide a better prospect than the use of law and sanctions for gaining the government's ends (Baggott, 'By voluntary agreement: the politics of instrument selection' (1986) 64 *Pub Adm* 51). Agreed codes of practice and similar arrangements can

relieve the government of administrative costs and may be more effective in getting the cooperation of the individuals or firms concerned in applying the agreed code according to its spirit, whereas those bound by regulations may be more disposed to look for loopholes in them. Self-administered codes, it is said, are flexible in that they can be continually reviewed by those best informed about their effects and promptly updated as conditions change. There are, however, certain disadvantages and hazards – both for the government and for the public interest – in voluntary agreements as mechanisms for the implementation of policy. In the bargaining which precedes them the government as well as the private-sector body may have to make concessions, and the government may secure something less than a complete realisation of its objectives. Private bodies are brought into the making of policy as well as its implementation, and the process has often taken place behind closed doors, secluded from democratic control.

(See generally Ogus, 'Rethinking self-regulation' (1995) 15 *OJLS* 97; Moran, 'The rise of the regulatory state in Britain' (2001) 54 *Parliamentary Affairs* 19.)

The government enters into a great many ordinary commercial contracts for the procurement of goods or services. As a massive purchaser from the private sector, it has sometimes been able to use its purchasing power to advance its social and economic policies. Governments have in the past applied 'buy British' policies, giving preference to firms considered important to the economy, and formerly imposed a 'fair wages' condition on all government contractors. (This last was based on a House of Commons resolution, which was rescinded in 1983.) But the extent to which these collateral aims could be pursued was always limited, in particular by the Treasury's insistence on 'value for money' in contracting and the need to justify departures from this principle to the Public Accounts Committee of the House of Commons. Membership of the European Union has brought further constraints. European Community Directives (implemented in the United Kingdom by sets of public contracts regulations) provide for equal opportunities to bid for public contracts without discrimination on grounds of nationality and require competitive tendering for most classes of public contracts and clear statements of award criteria. Preferential treatment for domestic suppliers and products is accordingly prohibited. Much defence contracting, however, falls outside the Community rules (see Article 296 EC), and the Ministry of Defence (the largest single customer of British industry, placing over 50,000 new contracts each year) takes account of 'wider factors' in its purchasing decisions, such as security of supply, support for key technologies, future export potential and the desirability of sustaining British industrial capabilities. (See Ministry of Defence Policy Paper No 5, *Defence Industrial Policy* (2002).)

Government policies for the 'contracting out' of public services have significantly extended the use of the instrument of contract in the procurement and delivery of services. (See *Competing for Quality*, Cm 1730/1991; *Better Quality Services* (1998).) The Deregulation and Contracting Out Act 1994,

Part II, facilitated contracting out by empowering ministers to transfer public functions to the private sector without the need for specific legislation (see Freedland [1995] *PL* 21).

Many contracted-out services are of a routine nature, such as catering, vehicle fleet management and office and building services, but the range of contracted-out operations has greatly increased in recent years. For instance, the recruitment of senior civil servants is commonly contracted out by departments to private-sector recruitment agencies or search consultants (the department remaining responsible for the final selection). Again, contracts have been awarded to private bodies to run schemes to help lone parents to find work and to provide supported employment for disabled persons. Under Public Private Partnership (PPP) arrangements, private-sector firms are awarded contracts bringing them into 'partnership' with government on long-term projects such as hospital building, road construction, provision of social housing, refurbishment of public buildings and the development and operation of computer systems. The private-sector body may, for instance, undertake to design, construct, manage and finance the project in return for regular rental payments. In 'The politics of public-private partnerships' (2005) 7 *British Journal of Politics and International Relations* 215, Matthew Flinders discusses the 'host of political issues and tensions' raised by these arrangements. See too Institute for Public Policy Research, *Building Better Partnerships* (2001).

The 'hollowing-out' of the state that is brought about by extensive recourse to arrangements of these kinds may contribute to the 'efficient, economical and effective provision of public services' (C Foster and F Plowden, *The State Under Stress* (1996), p 118), but as the services are removed from direct ministerial control, private bodies acquire powers which need to be properly regulated and there must be accountability for their use. It is questionable whether this can be effectively achieved through the instrument of contract. Fundamental questions of propriety and accountability are raised in particular by the contracting out of such operations as prison management and prison escort services and the running of GP surgeries.

(See further Foster and Plowden, above, ch 6 and pp 149–53; I Harden, *The Contracting State* (1992); T Daintith and A Page, *The Executive in the Constitution* (1999), pp 46–9; A Davies, *Accountability: A Public Law Analysis of Government by Contract* (2001); Vincent-Jones, 'Regulating government by contract: towards a public law framework?' (2002) 65 *MLR* 611.

Part III
Accountability

8

Parties, groups and the people

Contents

This chapter and the following two are concerned principally with questions relating to accountability and, in particular, to the accountability of government. We have divided our discussion of accountability into three broad areas, although it is important to stress that these areas should be seen as operating with and alongside one another and not in opposition to one another. (This is not to say that there are no tensions between the various forms or institutional mechanisms of accountability, however.) In this chapter we consider what might rather loosely be called popular accountability and ask 'what role or roles does the British constitution accord to its people'? In chapter 9 we focus on questions of parliamentary accountability which, traditionally, has been the most important form of governmental accountability in the British constitutional order. In chapter 10 we consider the role of the courts in providing, for example, for mechanisms whereby government actions and decisions may be judicially reviewed.

1 The people in the constitution

An ideal conception of a democratic society is one in which the people continuously and actively participate in political affairs. In the real world, societies that fall short of this ideal are nevertheless termed democratic if by their constitutions the people freely elect a government and can at frequent intervals dismiss it and elect another. To this extent, at least, the constitution of the United Kingdom is democratic (see pp 34–40 above). Periodic elections provide for an accountability of the government to the people – in their role as electorate – who have in this respect a place in the constitutional system.

According to a modern theory of democracy fathered by Joseph Schumpeter (*Capitalism, Socialism, and Democracy* (6th edn 1987)), the intermittent electoral role of the people is as much popular involvement in the practice of government as can take place or is desirable. In this theory the people choose, from competing élites, the government whose business it is to make policies and laws and provide leadership, and do not themselves attempt to decide on issues or influence policy-making. Democracy, says Schumpeter, 'means only that the people have the opportunity of accepting or refusing the men who are to rule them' (at pp 284–5). Does this bleak and limited (but, its adherents say, realistic) conception of democracy fit the theory and practice of the British constitution? Do elections provide only a retrospective accountability of government, and not the possibility of choosing between or influencing policies? In our representative democracy, what role, and what influence or power, are allowed to the people in the government of the country between elections? David Judge has drawn attention to the 'paradox' that 'parliamentary representation serves to include "the people" in decision-making, indirectly and infrequently through the process of elections; yet, simultaneously, it serves to exclude them from direct and continuous participation in the decision-making process' ('Whatever happened to parliamentary democracy in the United Kingdom?' (2004) 57 *Parliamentary Affairs* 682, 683).

The official or dominant theory of the British constitution has never located a supreme authority in the people and when a concept of sovereignty was invented it was, as we saw in chapter 2, attributed not to the people but to the Crown in Parliament. Since the seventeenth century there have been writers, radical politicians and reformers – from the Levellers to Thomas Paine to the Chartists – who have claimed sovereignty for the people or have declared the people to be the constituent power of the state, by whose consent political authority is exercised. These ideas, in various forms (and various understandings of what was meant by 'the people'), flamed by turns bright and dim outside the pale of the pre-democratic constitution. Even the establishment of democracy in the nineteenth and twentieth centuries did not supplant the official theory with one of popular sovereignty. R McKenzie and A Silver wrote in 1968 (*Angels in Marble: Working Class Conservatives in Urban England*) of the 'modest role accorded "the people" in British political culture', and continued (p 251):

Though modern constitutions typically locate the source of sovereignty in 'the people', in Britain it is the Crown in Parliament that is sovereign. Nor is this a merely technical point. The political culture of democratic Britain assigns to ordinary people the role, not of citizens, but of subjects.

Or as Vernon Bogdanor tersely notes, the British constitution 'knows nothing of the people' (*Power and the People* (1997), p 15). Yet Dicey acknowledged that the electorate had come to possess – or at least to share in – the political as opposed to the legal sovereignty in the state (*Law of the Constitution* (1885), pp 73–6), and to declare, in his arguments for the referendum, that the time had arrived 'for the formal recognition of a principle which in fact, if not in theory, forms part of our constitutional morality' ((1910) 212 *Quarterly Review* 538, 550). In our own time the idea that the people are, or should be, sovereign has won increasing support, as when Lord Hailsham said that 'the essence of democracy is a statement about sovereignty residing in the electorate' (*The Dilemma of Democracy* (1978), p 194) or in Tony Benn's insistence that our parliamentary democracy is based 'not upon the sovereignty of Parliament, but upon the sovereignty of the people' (*Industry, Technology and Democracy*, IWC Pamphlet No 60 (1978), p 6). The draft Constitution of the United Kingdom, published by the Institute for Public Policy Research in 1991, declared the source of its authority as 'We the People of the United Kingdom' and the Liberal Democrats' Green Paper proposing a written constitution (*'We, the People': Towards a Written Constitution* (1990)) affirmed 'an unshakeable belief in the sovereignty of the people of the United Kingdom'. Will Hutton (*The State We're In* (rev edn 1996), p 288) argued that 'political power and authority needs to be firmly rooted in the people' and proposed institutional reforms for realising that goal.

The unresolved role of the people in the constitution lies at the heart of arguments about the electoral system, referendums, the relation between electors and their representatives in Parliament, and the public's 'right to information'. If the people were acknowledged in constitutional theory as the source of political authority, debates on these matters would be conducted in different terms. New ways forward might be opened up, towards greater democracy in the public and semi-public institutions of society.

2 Elections and the mandate

The Electoral Commission, *Election 2005: Turnout* (2005), p 53

Elections underpin our democracy, ensuring that our representative institutions are both accountable to public opinion and legitimised by it. They provide an opportunity for politicians and political parties to outline their ideas and to defend their performance. Elections can interest, inform and empower people and, by doing so, can help to build political engagement.

The maximum duration of Parliament is five years (Parliament Act 1911, s 7) and its life can be extended only by an Act to which both Houses have assented. (As to whether the Parliament Acts could be used to amend or delete the requirement in section 2(1) of the 1911 Act that both Houses must assent to any such extension, see the views expressed in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 at [32], [57]–[60], [79], [118], [122], [139], [164], [175], [194].) In practice Parliament is normally dissolved, at the request of the Prime Minister, before it has run its full term, and since the Second World War the average duration of a Parliament has been approximately three years and six months.

The franchise, which is governed by the Representation of the People Acts 1983 and 1985, as amended, is possessed by all adult British citizens, Commonwealth citizens and citizens of the Republic of Ireland who are not disqualified by law (eg as members of the House of Lords), are resident in a constituency and are included in the electoral register for that constituency. The procedures for registration have in the past been defective, with the result that large numbers of eligible electors were omitted from the register and consequently disabled from voting. It has been estimated that in 2000 approximately 3.5 million people in England and Wales who were entitled to vote were not on the electoral register (Electoral Commission, *Understanding Electoral Registration* (2005)). The Representation of the People Act 2000 introduced a new system of 'rolling registration' by which the register remains in force indefinitely and is continually updated, electors being able to register at any time of the year instead of by reference to a single annual qualifying date. The Act also made it easier for homeless persons to register. It does not appear, however, that these provisions significantly affected registration rates. New provisions in the Electoral Registration Act 2006 are designed to improve the process of registration so as to ensure that registers should be as complete and accurate as possible, and the Act places a duty on electoral registration officers to take all necessary steps to ensure comprehensive registers. (See further Constitutional Affairs and Office of the Deputy Prime Minister Committees, *First Joint Report*, HC 243 of 2004–05.)

British citizens who are resident abroad may qualify for the vote as 'overseas electors' under the Representation of the People Act 1985, as amended, if they were included as being resident in the United Kingdom in a parliamentary register of electors within the preceding 15 years. (In January 2005 only 7,850 British citizens living abroad were registered as overseas voters: HC Deb vol 429, col 547, 17 January 2005.)

From 1945 to 1997 the turnout of voters at general elections fluctuated between 71 per cent and 84 per cent of the electorate. In the June 2001 election the turnout was 59.4 per cent, the lowest since 1918, and in the election of May 2005 it increased only slightly to 61.4 per cent. (See Kellner, 'Britain's culture of detachment' (2004) 57 *Parliamentary Affairs* 830; Curtice, 'Turnout: electors stay home – again' (2005) 58 *Parliamentary Affairs* 776.)

The votes of the electorate in a general election not only determine the composition of the House of Commons but also – unless the result is a hung Parliament – decide which of the competing parties will form a government. The present system accords with a conviction – not universally held – of the merits of one-party government based on an absolute majority in the House of Commons. Views about the best system of election will differ according as emphasis is placed on electoral choice of a government, or on the desirability of a truly representative elected House from which a government, reflecting the balance of parties in the House, will emerge.

(a) Review of constituency boundaries

Within the constraints of the existing plurality (or 'first past the post') electoral system it is clearly desirable that votes should be, as nearly as possible, of equal value: a vote in Hammersmith should be worth as much as a vote in Huntingdon. If this is to be substantially achieved, the boundaries of constituencies should be drawn in such a way that their electorates do not differ too greatly in size. Other factors may also have to be taken into account in drawing the boundaries, but it is of the greatest importance that the process should not be influenced by considerations of party advantage.

The Parliamentary Constituencies Act 1986, consolidating previous legislation (and as amended by the Boundary Commissions Act 1992), provided for constituencies to be kept under review by four permanent Boundary Commissions, one each for England, Scotland, Wales and Northern Ireland. Following the completion by the Boundary Commissions of their Fifth Periodic Review of constituency boundaries in 2006, future reviews will be carried out by the Electoral Commission established by the Political Parties, Elections and Referendums Act 2000, which as one of its several functions is to assume the responsibilities of the Boundary Commissions. The following description of the process of boundary revision focuses on the new Electoral Commission, which will however be governed largely by the same rules, and will follow broadly similar working practices, as those which have guided the Boundary Commissions.

The independence of the Electoral Commission from government and from political parties is assured by the provision made for the appointment of its members. Electoral Commissioners are appointed by the Queen on an Address from the House of Commons, the motion for the Address to be made with the agreement of the Speaker of the House and after consultation with the leader of each political party that is registered under the Act and has two or more sitting MPs. (See below as to registration of parties.) No person may be appointed as a Commissioner if he or she is a member of a registered party or has in the past ten years been an officer or employee of a party or a registered donor to party funds or has held a relevant elective office (eg as an MP). An Electoral Commissioner may be removed from office only on an Address from the House

of Commons, which may not be moved unless the Speaker's Committee (see below) has reported that it is satisfied that there are grounds for removal, such as are specified in the Act.

The Electoral Commission will be required to carry out a general review of constituency boundaries in each part of the United Kingdom at intervals of not less than eight or more than twelve years, and to submit separate reports to the Secretary of State with respect to each part, setting out the changes it recommends. The Commission may also conduct interim reviews of particular areas in any part of the United Kingdom at any time, and this option may be used to realign parliamentary constituencies with revised local government boundaries, or to take account of a substantial change in the population of an area.

The Electoral Commission is to establish four Boundary Committees, one each for England, Scotland, Wales and Northern Ireland. Each Boundary Committee is to be chaired by an Electoral Commissioner and must include at least two other members, each of them to be either an Electoral Commissioner or a deputy Commissioner appointed by the Commission to serve on the Committee. When the Commission intends to prepare a report for submission to the Secretary of State, the Boundary Committees will carry out reviews of their respective areas with a view to proposing recommendations to be included in the Commission's report. The Commission may give binding directions to a Boundary Committee, provided that these are consistent with the rules in Schedule 2 to the Parliamentary Constituencies Act 1986 (below). Expert assistance (on population changes and mapping) is to be given to each Boundary Committee by two assessors, the Registrar General for the relevant part of the United Kingdom and the Director-General of Ordnance Survey (with a slightly different provision for Northern Ireland).

The Electoral Commission may accept a Boundary Committee's proposed recommendations in full, or subject to modifications agreed with the Committee, or may reject the proposed recommendations and require the Committee to reconsider its proposals or carry out a fresh review. In formulating its recommendations for the revision of constituency boundaries, the Electoral Commission must give effect to the rules for redistribution of seats contained in the Second Schedule to the Parliamentary Constituencies Act 1986. The Schedule (including the amendments made by the Political Parties, Elections and Referendums Act 2000) is as follows.

SCHEDULE 2

RULES FOR REDISTRIBUTION OF SEATS

The rules

1. (1) The number of constituencies in Great Britain shall not be substantially greater or less than 613.
   (2) [repealed].

(3) The number of constituencies in Wales shall not be less than 35.

(4) The number of constituencies in Northern Ireland shall not be greater than 18 or less than 16, and shall be 17 unless it appears to the Electoral Commission or (as the case may be) the Boundary Committee for Northern Ireland that Northern Ireland should for the time being be divided into 16 or (as the case may be) into 18 constituencies.

2. Every constituency shall return a single member.

3. There shall continue to be a constituency which shall include the whole of the City of London and the name of which shall refer to the City of London.

3A. A constituency which includes the Orkney Islands or the Shetland Islands shall not include the whole or any part of a local government area other than the Orkney Islands and the Shetland Islands.

4. (1) So far as is practicable having regard to rules 1 to 3A –

(a) in England and Wales, –

(i) no county or any part of a county shall be included in a constituency which includes the whole or part of any other county or the whole or part of a London borough,

(ii) no London borough or any part of a London borough shall be included in a constituency which includes the whole or part of any other London borough,

(b) in Scotland, regard shall be had to the boundaries of local authority areas,

(c) in Northern Ireland, no ward shall be included partly in one constituency and partly in another.

(1A) . . .

(2) . . .

5. The electorate of any constituency shall be as near the electoral quota as is practicable having regard to rules 1 to 4; and the Electoral Commission or (as the case may be) a Boundary Committee may depart from the strict application of rule 4 if it appears to them that a departure is desirable to avoid an excessive disparity between the electorate of any constituency and the electoral quota, or between the electorate of any constituency and that of neighbouring constituencies in the part of the United Kingdom with which they are concerned.

6. The Electoral Commission or (as the case may be) a Boundary Committee may depart from the strict application of rules 4 and 5 if special geographical considerations, including in particular the size, shape and accessibility of a constituency, appear to them to render a departure desirable.

General and supplementary

7. It shall not be the duty of the Electoral Commission or (as the case may be) a Boundary Committee to aim at giving full effect in all circumstances to the above rules (except rule 3A), but they shall take account, so far as they reasonably can –

(a) of the inconveniences attendant on alterations of constituencies, other than alterations made for the purposes of rule 4, and

(b) of any local ties which would be broken by such alterations.

8. In the application of rule 5 to each part of the United Kingdom –
   (a) the expression 'electoral quota' means a number obtained by dividing the electorate for that part of the United Kingdom by the number of constituencies in it existing on the enumeration date,
   (b) the expression 'electorate' means –
      (i) in relation to a constituency, the number of persons whose names appear on the register of parliamentary electors in force on the enumeration date under the Representation of the People Acts for the constituency,
      (ii) in relation to the part of the United Kingdom, the aggregate electorate as defined in sub-paragraph (i) above of all the constituencies in that part,
   (c) the expression 'enumeration date' means, in relation to any report of the Electoral Commission (or one made by a Boundary Committee for the purposes of it) under this Act, the date on which the notice with respect to that report is published in accordance with section 5(1) of this Act.

9. . . .

The operation of these rules brought about a cumulative increase in the number of constituencies in the United Kingdom (from 625 in 1950 to 659 in 1997) but with the reduction of the number of Scottish constituencies in accordance with section 86 of the Scotland Act 1998 (see chapter 4), the number of UK constituencies for the 2005 general election was 646. The rising trend is, however, likely to continue unless some adjustment is made to the rules. (See Home Affairs Committee, *Second Report*, HC 97-I of 1986–87; the Government's Reply, Cm 308/1988 and D Rossiter, R Johnston and C Pattie, *The Boundary Commissions* (1999), p 183 *et seq*).

The statutory criteria for the review of parliamentary constituencies and the practice followed in applying them are summarised by the Boundary Commission for England in their booklet, *The Review of Parliamentary Constituencies*, ch 4, as follows. (It can be expected that the Electoral Commission and the Boundary Committee for England will carry out their responsibilities in a similar manner.)

CRITERIA FOR REVIEWING PARLIAMENTARY CONSTITUENCIES

Application of Statutory Provisions

1. The criteria described [below] . . . apply equally to both general and interim reviews of parliamentary constituencies. However, there are differences between the two types of review.

General reviews

2. General reviews are mandatory. The Commission are required to submit a periodical report on a general review of all the constituencies in England not less than eight or more than twelve years from the date of submission of their last periodical report. . . . General

reviews normally involve some large-scale changes, including changes to the number of constituencies in an area. They take several years to complete and they may, in part, be contentious.

Interim Reviews

3. Interim reviews are discretionary. In between the times when general reviews are being held, the Commission have the discretion to hold interim reviews of one or more constituencies. Interim reviews normally involve small changes to small numbers of constituencies, usually as a result of local government boundary changes. They take less than a year to complete and they are generally less contentious, although a local inquiry may be required on occasion.

Rules for Redistribution of Seats

4. In reviewing constituencies and making their recommendations, the Commission are required to give effect to the Rules for Redistribution of Seats which form Schedule 2 to the Parliamentary Constituencies Act 1986 . . . In broad outline, these rules have the following features:

(a) a limit on the total number of constituencies;
(b) every constituency to return a single member;
(c) the City of London to be wholly within one constituency the name of which refers to the City;
(d) constituencies not to cross county or London borough boundaries; and
(e) constituency electorates to be as close as practicable to the electoral quota.

5. Departures from the rules are authorised in various respects, notably to:

(a) avoid excessive disparities in the electorates;
(b) take account of special geographical considerations; or
(c) take account of inconveniences which would be caused and local ties which would be broken by changes to constituencies.

6. The electoral quota is the average number of electors in a constituency and is found by dividing the total number of parliamentary electors in England by the existing number of constituencies in England. The electoral quota for the general review which formally commenced in February 2000 is 69,934.

7. The phrase 'special geographical considerations' is defined in rule 6 of Schedule 2 to the 1986 Act as 'including in particular the size, shape and accessibility of a constituency'. Rule 6 of Schedule 2 permits the Commission to depart from the strict application of rules 4 and 5 if special geographical considerations, including in particular the size, shape and accessibility of a constituency, appear to them to render a departure desirable (Rules 4 and 5 are directed at avoiding constituencies which cross county or London borough boundaries, and to creating constituencies with electorates as near the electoral quota as is practicable). The Commission consider that special geographical considerations which may have an impact on the ability to form a constituency which does not cross a county or London borough boundary, or with an electorate as near the electoral quota as is practicable, will primarily relate

to physical geography such as mountains, hills, lakes, rivers, estuaries, islands etc rather than to human or social geography. Matters of culture, history, socio-economics, and other possible aspects of non-physical geography are unlikely to have any impact on the desirability of crossing county and London borough boundaries, or the desirability of departing from the electoral quota. Some of those matters may, however, arise as issues when considering local ties under the second limb of rule 7.

8. In practice, this means that rule 6 is usually invoked in order to avoid large, inaccessible constituencies where the area is mountainous or has a sparse or unevenly distributed electorate. A situation which justifies departure from rules 4 and 5 for special geographical considerations will seldom occur in England. One example from the fourth general review of such a departure is the Copeland constituency in Cumbria, where the physical constraints of the Cumbrian Mountains, the Duddon estuary and the Irish Sea were considered to be compelling reasons for not altering the composition of the constituency which had only 55,548 electors (the electoral quota was 69,281).

Paragraphs 9 to 11 concern the Commission's recommendations of a name and designation (county or borough) for each constituency. The designation affects the level of a candidate's allowable expenses at elections (see below).

Practice

12. In considering their procedures for a general review, the Commission consult the major political parties on broad issues of policy ahead of the review. In formulating their provisional recommendations for particular areas, the Commission do not consult the major political parties, local authorities or other locally interested groups. The Commission consider that they should take the initiative in preparing provisional recommendations from all the information available to them. The proposals are therefore formed by the Commission from a position of independence and impartiality and are not influenced by any particular viewpoint or opinion. Once the proposals are published, the statutory procedures allow for a full public debate and interested parties can then make their views known to the Commission.

13. The Commission use district wards . . . as the smallest unit for designing constituencies and do not divide wards between constituencies. Wards are generally indicative of areas which have a community of interest and the local political party organisations are almost always based on them, or groups of them. Any splitting of these units between constituencies is therefore very likely to break local ties, disrupt political party organisation, cause difficulties for Electoral Registration and Returning Officers and confuse the electorate.

14. The Commission do not base their recommendations on forecast or projected electorates or on populations, actual or projected. The Commission are required to base their recommendations on the numbers of electors on the electoral registers at the start of a review and they are unable to take account of any under-registration or over-registration of electors which is sometimes claimed in some districts.

15. There may be several ways in which to distribute constituencies within an area under review which are of equal merit so far as the rules are concerned. The Commission take the

view that they have a general discretion in choosing between the different ways in which, say, a county could be divided into constituencies consistently with the rules referred to above. The question of what is and is not practicable may be influenced by many considerations including ones which are not specifically mentioned in any of the rules. For example, the Commission frequently take into account geographical features, not as authorising a departure from either rule 4 or rule 5, as rule 6 specifically authorises them to do, but as justifying one particular scheme for dividing a county into constituencies rather than another. Rivers, main roads, particularly motorways and even railway lines, can have such an effect. Similarly, other factors which are not strictly geographical, such as school catchment areas and travel to work areas, may influence choices between various possible schemes which comply with the rules.

In paragraphs 16 to 18 the Commission note that *in choosing between permissible options* they may take account of substantial growth or decline in the electorate which has occurred since the enumeration date for the review or which they are satisfied will occur in the very near future.

19. [Reference is made to considerations affecting a particular area which fall outside the rules and are not taken into account.]

Other Relevant Factors

20. The Commission are not required by rule 4 of the Rules for Redistribution of Seats to have regard to district boundaries in England, but districts are readily identifiable, important local units and it would obviously be unwise to ignore their boundaries. However, many districts have electorates that are either much too big or too small to form constituencies with electorates close to the electoral quota. Whilst the Commission propose constituencies which use the district boundaries as much as practicable, it is nevertheless often necessary to cross district boundaries in order to avoid excessive disparities in the electorates of neighbouring constituencies.

21. Other information which is routinely taken into account by the Commission, as a result of making considerable use of maps during their discussions on alternative redistributions, include, for example, major roads, railways, and other lines of communication; the juxtaposition of rural and urban areas; focal points and catchment areas ie small towns in rural areas and central points in large towns and urban areas.

22. [Use of maps in the review.]

The procedure for carrying out a review for any part of the United Kingdom will begin when the Electoral Commission gives notice to the Secretary of State of its intention to prepare a report. The relevant Boundary Committee, after arriving at provisional recommendations for any constituency which it has in mind to propose to the Electoral Commission, must publish the effect of these and invite representations, which it must take into account. If the Committee then revises the proposed recommendations it must publish

a notice of the revisions and invite further representations. The Committee is bound to arrange for a local inquiry if representations objecting to the proposed recommendations are received from an interested local authority or from a body of at least 100 electors. The findings of the inquiry must be taken into account by the Committee. These arrangements are meant to ensure fairness and due consideration of local opinions and criticisms in the fixing of constituency boundaries.

Before completing its report for the Secretary of State the Electoral Commission must, if it intends to modify or reject the proposed recommendations of a Boundary Committee, take into consideration any representations made to the Committee as well as the findings of any local inquiry. As soon as practicable after the Electoral Commission has delivered its report, the Secretary of State must lay it before Parliament, together with a draft Order in Council for giving effect to the recommendations contained in the report. Formerly the Secretary of State was empowered to modify the recommendations to be included in the draft Order, although required in that event to lay before Parliament a statement of his or her reasons for doing so. The exercise of this power to change the recommendations could excite accusations of political bias, and the power was removed by the Political Parties, Elections and Referendums Act 2000, Schedule 3, paragraphs 2(7), 4.

The legislation does not confer an express right on any person to challenge, in legal proceedings, a report and recommendations of the Electoral Commission or the proposals of a Boundary Committee, but such a challenge may nevertheless in principle be raised in a claim for judicial review (on which, see chapter 10). This was confirmed in *R v Boundary Commission for England, ex p Foot* [1983] QB 600, in which the Court of Appeal held, in proceedings for judicial review against the Boundary Commission for England, that any attack must be based on the common law *Wednesbury* principles, established in *Associated Provincial Picture Houses v Wednesbury Corpn* [1948] 1 KB 223 – in particular it would have to be shown that the Commission had misdirected themselves as to the rules they were bound to apply or had arrived at conclusions which no reasonable Commission could have reached.

There were (and remain) three obstacles to a successful challenge on these grounds. The first was that the rules in the Second Schedule to the Parliamentary Constituencies Act 1986 (above), in using expressions such as 'if it appears to the Commission', 'so far as is practicable' and 'excessive disparity', made their application in many respects 'dependent upon the subjective judgement of the Commission', which was not to be usurped by the court. Secondly, the Boundary Commissions, not being subject to the Tribunals and Inquiries Act 1992, were not required to give reasons for their decision to make any particular recommendation. This factor, said the court in *ex p Foot*, would usually make it impossible to establish that a Commission had failed to consider or apply the rules properly. (The Electoral Commission and the Boundary Committees are likewise not among the bodies required by the Tribunals and

Inquiries Act 1992 to give reasons for their decisions.) Thirdly, the effect of what was then section 2(2) of the House of Commons (Redistribution of Seats) Act 1958 (now rule 7 in Schedule 2 to the Parliamentary Constituencies Act 1986) was that the Boundary Commissions were relieved from the duty to give full effect in all circumstances to the rules. The effect of this provision, said the court, was that while the Commissions must indeed have regard to the rules, these had rather the status of guidelines than of rules of which a strict application was mandatory. (Rule 7 is now to apply to the Electoral Commission and Boundary Committees.) In the result it was held in *ex p Foot* that the Boundary Commission had not misconstrued the rules in Schedule 2; neither had it been shown that the Commission had not properly exercised the wide discretions allowed to them by those rules.

After the draft Order giving effect to the Electoral Commission's recommendations has been approved by both Houses it is submitted to the Queen in Council to be formally made, and takes effect at the next general election. If either House rejects the draft Order, the Secretary of State may amend it before again laying it before Parliament. Once the Order in Council has been made it may not be called in question in any legal proceedings: Parliamentary Constituencies Act 1986, section 4(7).

Our system of boundary delimitation does not ensure that votes have equal value. It was held in *ex p Foot* (above) that it is not the primary purpose of the system to achieve substantially equal constituencies so that each elector's vote should have as much weight as every other. The requirement of electoral equality in the first limb of rule 5 of Schedule 2 to the Parliamentary Constituencies Act 1986 is subordinate to rules 1 to 4, and in particular to the guidelines in rule 4 designed to prevent the crossing of county or London borough boundaries. In the United States, on the other hand, the Supreme Court has held that equal representation for equal numbers of people is demanded by the Constitution, and that votes are not to be substantially diluted on the basis of place of residence. 'Legislators', said Chief Justice Warren in *Reynolds v Sims* 377 US 533, 562 (1964), 'represent people, not trees or acres'. Some deviation from the equality of votes is, however, permitted if based on legitimate grounds. (See *Brown v Thomson* 462 US 835 (1983).)

The rules for redistribution of seats formerly indicated a limit of 25 per cent divergence from the electoral quota, but the present indefinite formula ('as near the electoral quota as is practicable') was substituted by the House of Commons (Redistribution of Seats) Act 1947 (see now rule 5 in Schedule 2 to the 1986 Act). Many commentators think that a more precise limit should be restored. It has been proposed, for instance, that there should be 'an overriding instruction that no constituency should have less than half the electorate of any other at the time of redistribution, except for the Scottish Island areas' (*Report of the Hansard Society Commission on Electoral Reform* (1976), para 45). It has also been suggested that 'a maximum tolerance limit of 15 per cent from the

electoral quota' should be imposed upon the application of the rule against crossing local government boundaries (R Blackburn, *The Electoral System in Britain* (1995), p 148).

The relative value of votes can be much affected by population movements which take place between delimitations. For instance, population changes had produced the result, before the 1983 revision, that the electorate of Buckingham was five times the size of that of Newcastle upon Tyne Central. The Boundary Commission for England subsequently made a successful effort to reduce the divergence of constituency electorates from the electoral quota (to this end departing for the first time from rule 4 so as to cross London borough boundaries): 84 per cent of the constituencies recommended in their 1995 Periodical Report had electorates within 10 per cent of the quota, and 99 per cent were within 20 per cent of the quota (*Fourth Periodical Report*, HC 433-i of 1994–95, p 283). Some discrepancies continue to be intractable, however: in December 2005 the largest constituency electorate in England was the Isle of Wight with 107,790 electors; the smallest, Salford, had 50,138 (in Scotland, Na h-Eileanan an Iar had only 21,404 electors) (*Electoral Statistics 2006.*) The general criticism has been made of the rules in Schedule 2 that they are 'at best imprecise and ambiguous and at worst contradictory' (I McLean and D Butler (eds), *Fixing the Boundaries* (1996), p 252 and ch 12).

The process of boundary revision has often aroused political controversy and it has not been immune from infection by considerations of party advantage (although bias has not been attributed to the Boundary Commissions themselves). In 1969 the Labour Government, instead of following the normal procedure for implementation of Boundary Commission recommendations, introduced a bill which absolved the Home Secretary from his duty and provided for the recommendations to be implemented only in part. The bill was lost as a result of resistance by the House of Lords, whereupon the Home Secretary performed his duty in laying before Parliament the Boundary Commissions' reports together with draft Orders in Council, but asked the Government's supporters in the House of Commons to vote against the Orders, which were duly disapproved. The Government justified its action on the ground that the Boundary Commissions had worked by reference to local government boundaries which were shortly to be extensively revised, following the Redcliffe-Maud Report (on which, see chapter 4). But since the recommended boundary changes were believed to be disadvantageous to the Labour Party's electoral prospects, the Government was widely criticised for acting from political bias. (Cf the subsequent rebuttal by Mr Merlyn Rees, a Home Office junior minister at the time: HC Deb vol 38, col 266, 2 March 1983.) On another occasion there were allegations that a Conservative Government was expediting the redistribution process so that the 1983 election might be held on boundaries more favourable to the Conservative Party. (See HC Deb vol 995, cols 279 *et seq*, 3 December 1980 and D Butler and D Kavanagh, *The British General Election of 1997* (1997), pp 22–3.)

See further Rallings and Thrasher, 'The parliamentary Boundary Commissions' (1994) 47 *Parliamentary Affairs* 387; R Blackburn, *The Electoral System in Britain* (1995), pp 142–56; I McLean and D Butler (eds), *Fixing the Boundaries* (1996); D Rossiter, R Johnston and C Pattie, *The Boundary Commissions* (1999).

(b) Fairness of the contest

In a general election the election is of members of Parliament to represent constituencies. In modern times, however, elections have become less about electing individual members of Parliament and more about electing a government. No member of the electorate actually has a vote on who should, and who should not, be in the government, but the overwhelming majority of the electorate now use their votes as if this is what they are for. As such, the free choice of the electorate may be impaired if the competing parties have unequal opportunities of making their policies known to the people, because of differences in financial resources or access to the media of communication. Electoral law and practice should as far as possible ensure that in these respects none of the parties is at an unfair disadvantage in the election campaign. It is also in the public interest that new political groups or independent candidates are not prevented from entering the contest to challenge the policies of established parties.

(i) Election deposit

Every candidate in a parliamentary election is required to deposit a sum of money with the returning officer, and this sum is forfeited if the candidate fails to poll more than a prescribed percentage of the votes cast in the constituency. The amount of the deposit was fixed at £150 in 1918, and the threshold below which the deposit was forfeited was 12.5 per cent of the votes cast. In 1983 the Home Affairs Committee of the House of Commons considered the requirement of the deposit (*First Report*, HC 32-I of 1982–83, para 70):

> Though it is sometimes argued that there is no reason why any individual who wishes to stand for Parliament should be prevented from doing so by financial considerations, there are valid reasons for imposing some form of constraint. Candidates in parliamentary and European elections automatically acquire a number of advantages and privileges, such as free postage for their election addresses, free use of publicly maintained buildings for public meetings . . . and, not least, a great deal of publicity. These privileges are capable of being abused, and it is generally accepted that a deposit of £150 would do little to prevent any number of frivolous or deliberately disruptive candidates from participating in election campaigns and distributing propaganda of a racially inflammatory or otherwise anti-social character.

Although the Committee found that there had been little serious abuse of electoral privileges, it was of the opinion that a safeguard was needed (eg to discourage candidates who set out to confuse voters by assuming a name similar

to that of a well-known candidate) and proposed that the deposit should be increased to £1,000. The Government accepted this recommendation, and also decided that the votes threshold should be reduced to 5 per cent of the poll (eg 2,500 votes in a poll of 50,000). (The majority of the Home Affairs Committee had proposed 7.5 per cent.) A bill was introduced in 1984 to give effect to these and other changes in electoral law; in the course of its passage the Government reached a compromise with opposition parties, to fix the deposit at £500: see the Representation of the People Act 1983, Schedule 1, rules 9(1), 53(4) as amended. The Home Affairs Committee returned to the matter in 1998, recommending that the deposit should be raised to £700 and thereafter be index-linked (*Fourth Report*, HC 768-I of 1997–98, para 134).

The requirement of a deposit may discourage some serious independent candidates and creates difficulties for less affluent political parties, deprived at least for the period of the election campaign of what may add up to a substantial sum. For these reasons it has several times been proposed that the deposit should be abolished and that there should instead be a large increase in the number of supporting signatures required for a nomination – from the present ten to, say, 0.5 per cent of the constituency electorate (250–400 in most constituencies). Governments have declined to adopt this solution, mainly on the ground that candidates who would poll only a handful of votes might yet have little difficulty in obtaining the additional number of signatures to a nomination (*Representation of the People Acts*, Cmnd 9140/1984, para 5.4). But the exaction of a substantial deposit may shut out fresh ideas and make it difficult for a new political movement or minority group to take the parliamentary way of advancing its cause. (See generally R Blackburn, *The Electoral System in Britain* (1995), pp 222–31.)

(ii) Election expenditure

The power of money could undermine the fairness of the electoral contest if there were no restriction on expenditure in the campaign. This was appreciated as early as 1883, when a Corrupt and Illegal Practices Prevention Act established a ceiling for expenditure by each candidate. The limitation of control to *constituency* expenditure continued until the end of the twentieth century, even though the main focus of election contests had shifted decisively to the national campaign.

Expenditure by a candidate, a candidate's election agent and by third parties is controlled by the Representation of the People Act 1983, sections 73–76A. A candidate's election expenses must in general be *paid* by the candidate's election agent, and no expense in excess of (at present) £500 may lawfully be *incurred* 'with a view to promoting or procuring the election of a candidate' – whether by presenting the candidate or his or her views to the electors or by disparaging another candidate – except by the candidate, the candidate's election agent or persons authorised by the agent. The Act makes provision for maximum amounts of expenditure that may be incurred by or on behalf of a candidate in

any constituency, such amounts being subject to variation from time to time by statutory instrument. The limit applicable at the 2005 general election was £7,150, plus 7p for every registered voter in a county constituency or 5p for every registered voter in a borough constituency. A higher maximum (at present £100,000) applies at by-elections, to which the parties devote a more intensive effort. In recent general elections the average recorded constituency expenditure per candidate has been well below the permitted maximum for all the parties. In the 2005 general election the average amount spent by candidates was under £4,000 and only 15 per cent of candidates spent over four-fifths of their limit (Electoral Commission, *Election 2005: Campaign Spending* (2006)). The authors of a study of the 1992 general election, while not persuaded that there had been gross overspending, observed that the recorded figures concealed 'the creative accounting which is universally acknowledged to occur in expense returns': D Butler and D Kavanagh, *The British General Election of 1992* (1992), p 244; see also *ibid, The British General Election of 1997* (1997), p 223.

The maximum sum allowed to be spent by a third party in support of or in opposition to a candidate was formerly fixed at £5 by the Representation of the People Act 1983, section 75, but this draconian limit was challenged in the European Court of Human Rights in the case of *Bowman v United Kingdom* (1998) 26 EHRR 1. Shortly before the 1992 general election Mrs Bowman, executive director of the Society for the Protection of the Unborn Child, distributed 25,000 leaflets in Halifax giving details of the voting records and views on abortion of the three main candidates in the Halifax constituency. She was charged with an offence under section 75 in having incurred expense in excess of £5 with a view to promoting or procuring the election of a candidate. Although acquitted on the technical ground that the summons had been issued out of time, she claimed that her prosecution had violated her right to freedom of expression under Article 10 of the European Convention on Human Rights (on which, see further chapter 11). The European Court held by a majority that the limitation of her expenditure to £5 – in effect a total barrier to publishing the information – was disproportionate to the legitimate aim (as the court recognised it to be) of securing equality between candidates. It followed that there had been a violation of Article 10. In consequence of this decision, section 75 was amended so as to raise the limit on expenditure by a third party to £500.

Expenditure on the national campaign was until recently not limited by law, even though national leaders and issues had come to dominate election campaigns. In *R v Tronoh Mines Ltd* [1952] 1 All ER 697, McNair J decided that the prohibition of unauthorised election expenditure (then contained in the Representation of the People Act 1949) did not extend to general propaganda in support of a political party, even if it incidentally assisted particular candidates of that party. The decision led, as David Butler remarks, 'to the innovation of expensive nation-wide advertising' (Committee on Standards in Public Life, *Fifth Report*, vol 2, Cm 4057-II/1998, p 221). The main parties spend considerable sums in the national campaign on such things as public opinion

research, poster campaigns, cinema and press advertising, and broadcasting. (Broadcasting time is provided without charge for party political broadcasts, but production can be a costly item.) The Conservative Party formerly had the largest resources and was able to out-spend other parties in election campaigns, but the discrepancy between Conservative and Labour spending diminished in more recent general elections and in 2005 Labour emerged as the largest spender by a small margin. The following returns of total campaign expenditure in Great Britain were made by the parties after the 2005 election:

Conservative	£17.85 million
Labour	£17.94 million
Liberal Democrats	£4.32 million

Pressure groups have also on occasion intervened in election campaigns through newspaper advertisements; business organisations, for instance, on one side of the political divide and trade unions on the other.

In 1998 the majority of the Committee on Standards in Public Life concluded that limits should be imposed on national campaign expenditure by political parties and other campaigning individuals and organisations (*Fifth Report*, vol 1, Cm 4057-I/1998, para 10.31). The Government in response brought forward proposals for national expenditure limits which were enacted in the Political Parties, Elections and Referendums Act 2000. The Act imposes limits on registered political parties' campaign expenditure for parliamentary general elections, normally applicable to the period of 365 days ending with the date of the election. The maximum amount a party may spend depends on the number of constituencies it is contesting, an allowance of £30,000 being made for each constituency contested. Accordingly a party contesting all the constituencies in the United Kingdom in the 2005 general election was able to spend up to £19.38 million on the national campaign. The Act also sets limits on expenditure by third parties intended to promote or oppose the election of a political party or its candidates. In 2005, twenty-six third parties were registered with the Electoral Commission. The trade union UNISON and the Conservative Rural Action Group together accounted for over 70 per cent of third party expenditure. (See Electoral Commission, *Election 2005: Campaign Spending* (2006).) (Similar controls are applied to expenditure by political parties and by third parties in elections to the European Parliament and the devolved legislatures in Scotland, Wales and Northern Ireland.) See further Marriott [2005] *PL* 764.

(iii) The media

The fairness of the electoral contest is put in question by partisanship in the media of communication. Most newspapers display a political bias, sometimes combined with an attempt at objectivity. There has been an unsurprising tendency for a capitalist press which is concentrated in the hands of a few owners, most of whom have other commercial interests, to uphold established viewpoints and propagate a conservative political consensus. (See M Hollingsworth,

The Press and Political Dissent (1986).) For much of the twentieth century the national press gave preponderant support to the Conservative Party. (For the 1979, 1983, 1987 and 1992 general elections, see D Butler and D Kavanagh, *The British General Election of 1979* (1980), ch 12; *The British General Election of 1983* (1984), ch 9; *The British General Election of 1987* (1988), ch 8; and *The British General Election of 1992* (1992), ch 9.) It has been argued that the tabloid press influenced voting behaviour in the 1992 election and 'almost certainly made the difference between a Conservative victory and a hung Parliament' (Thomas, 'Labour, the tabloids, and the 1992 General Election' (1998) 12 *Contemporary British History* 80. See also J Tunstall, *Newspaper Power* (1996).) The balance was redressed in the 1997 election, 'a landmark in the political history of Britain's press [and] the first campaign in which Labour secured the support of most national daily newspapers' (Butler and Kavanagh, *The British General Election of 1997* (1997), p 156). These authors commented that 'it would be naïve to regard the 1997 election as instituting a long-term "realignment" of Britain's newspapers' (p 184). Nevertheless the shift was consolidated in the 2001 general election, with increased support (fourteen out of nineteen national newspapers) for Labour, even if, as Butler and Kavanagh remarked, 'without gusto' (*The British General Election of 2001* (2002), p 156). In the election of 2005 the nine national newspapers supporting Labour 'still commanded more than half the total market by circulation and by historic standards the party's performance in the press remained strong' (Scammell and Harrop in D Kavanagh and D Butler, *The British General Election of 2005* (2005), p 119). But an increasingly de-aligned press has shown a diminished enthusiasm for any of the parties, seeming to reflect a scepticism and lukewarmness among the public at large. (See further Bartle, 'The press, television, and the internet' in P Norris and C Wlezien (eds), *Britain Votes 2005* (2005).)

It is debatable whether press comment and advocacy have a significant effect on voting behaviour, but it has been suggested that although the media 'may not persuade the public directly; nevertheless they affect what people know, and what they think is important' (J Curran and J Seaton, *Power without Responsibility* (1981), p 273. See further P Dunleavy and C Husbands, *British Democracy at the Crossroads* (1985), chs 1 and 5; W Miller, *Media and Voters* (1991); R Blackburn, *The Electoral System in Britain* (1995), pp 263–70; P Norris, *Electoral Change in Britain since 1945* (1997), pp 217–25.)

The independence and diversity of the press are essential if the public are to be able to acquire the information needed for the exercise of political choice in a mature democracy. The authors of the *Minority Report* of the Royal Commission on the Press (Cmnd 6810/1977), convinced of a 'manifest political imbalance in Britain's national press', argued for governmental measures which would achieve greater diversity in the press without prejudice to its freedom. The majority, on the other hand, were not in favour of public measures to correct political partisanship in the press, such as the establishment of a public launch fund to help new newspapers. They expressed their 'firm

belief . . . that the press should be left free to be partisan', restrained only by the law and a strengthened Press Council (since replaced by another self-regulatory body, the Press Complaints Commission) (addendum to ch 10, para 11).

Although the ownership of media (newspapers and commercial broadcasting) is subject to the restraints of general competition law, governments have recognised the need for special limitations of media ownership to ensure that 'a significant number of different media voices' can be heard. The Department of Culture, Media and Sport, in a *Consultation on Media Ownership Rules* (2001), para 1.7, set out the case for a plurality of media sources:

> Plurality ensures that no individual or corporation has excessive power in an industry which is central to the democratic process.
>
> A plurality of owners should secure a plurality of sources of news and editorial opinion, which is vital given the position that newspapers and current affairs occupy at the heart of public debate. A healthy democracy depends on a culture of dissent and argument, which would inevitably be diminished if there were only a limited number of providers of news.
>
> At the limit, even though a single source might produce impartial, high-quality content, they would be able to dictate exactly what constituted 'news' itself, and their inclusion or omission of stories could slant the whole news agenda in a particular direction.
>
> Plurality maintains our cultural vitality. Different media companies produce different styles of programming and publishing, which each have a different look and feel to them. A plurality of approaches adds to the breadth and richness of our cultural experience.

Latterly the Government has adopted a 'deregulatory' standpoint, favouring a relaxation of specific controls on media ownership, while insisting that rules are to remain in place when necessary as 'safeguards of democratic debate'. The Government's proposals were incorporated in the Communications Act 2003, establishing a new regulatory body, the Office of Communications (OFCOM), which is invested with general competition powers (exercising a jurisdiction concurrent with that of the Office of Fair Trading). The Act makes changes to the newspaper merger regime. The Secretary of State, advised by OFCOM, is empowered to intervene, with a view to enforcement action, in newspaper mergers on public interest grounds, including the need for a sufficient plurality of views in newspapers. Similarly, the Secretary of State may intervene in cross-media mergers on public interest grounds, including the need for a sufficient plurality of persons with control of media enterprises. OFCOM is required to review media ownership rules at least every three years and may recommend further reforms to the Secretary of State.

Political broadcasts were first transmitted by the BBC in 1924 and ITV began to do so in 1956. Subsequently the holders of licences to provide television and radio services under the Broadcasting Act 1990 were required by the terms of the licences to include party political broadcasts in the licensed service, in accordance with rules made by the regulatory authorities. In a *Review of Party Political Broadcasting* of 2003 the Electoral Commission said that

party political broadcasts (PPBs) offered political parties 'their only opportunity to present an unmediated broadcast message directly to the electorate' and emphasised their effectiveness as direct campaigning tools available to the parties. New arrangements for PPBs were made by the Communications Act 2003. OFCOM must include in the licences for commercial public service broadcasters (channels three, four and five and national radio services) requirements to broadcast PPBs in accordance with rules made by OFCOM having regard to the views of the Electoral Commission. The BBC and (in Wales) Sianel Pedwar Cymru determine their own policies for the allocation of PPBs but must have regard to any views expressed by the Electoral Commission. Consistency in allocation of PPBs is sought through a Broadcasters' Liaison Group which aims to reach consensus on allocation policy, taking into account the views of political parties. Allocations for a forthcoming general election are made to parties (registered with the Electoral Commission) on the basis of the number of candidates being fielded and previous electoral support.

Extensive radio and television coverage of general elections occurs in news programmes, reports from party press conferences, interviews of party leaders, etc. Broadcast programmes relating to the election are exempt from the prohibition of unauthorised expenditure imposed by section 75(1) of the Representation of the People Act 1983 (see above). But section 93(1) formerly provided that a candidate might not take part in a broadcast about his constituency for the purpose of promoting his election unless every other candidate in the constituency consented. This meant that a candidate could (in effect) veto any broadcast in which another candidate in his or her constituency was to take part. This provision was repealed by the Political Parties, Elections and Referendums Act 2000, section 144: instead it is provided that each broadcasting authority is to adopt a code of practice with respect to the participation of candidates in broadcast items about a constituency. In drawing up the code, a broadcasting authority must have regard to any views expressed by the Electoral Commission.

Section 320 of the Communications Act 2003 requires the providers of television and radio services (other than the BBC, see below) to preserve 'due impartiality' in matters of political or industrial controversy or relating to current public policy. OFCOM is required by section 319 of the Act to draw up and keep under review a broadcasting code which is to include provision for ensuring, inter alia, compliance with the impartiality requirements of section 320 and that news is reported with due accuracy. OFCOM investigates breaches of the code and in serious cases may impose sanctions on the broadcaster. The BBC is not subject to a statutory duty of impartiality, but the Framework Agreement between the Secretary of State for Culture, Media and Sport and the BBC (Cm 6872/2006) imposes an obligation on the BBC to 'do all it can to ensure that controversial subjects are treated with due accuracy and impartiality' in the output of news or in dealing with matters of public policy or of political or industrial controversy. (For this purpose 'a series of programmes may be

considered as a whole'.) The BBC Trust (the sovereign body in the BBC) must draw up and keep under review a code of guidance as to the rules to be observed by the BBC in performance of this obligation, and must do all it can to ensure that the code is complied with.

The duty of impartiality is important for it would be rash to deny the possibility of an influence of television, in particular, on political attitudes and the outcome of elections. The formal requirement of impartiality leaves a great deal to the judgement of the broadcasting authorities; the independence of these bodies, in particular their immunity from covert governmental pressure, is something that calls for constant vigilance.

The courts will not intervene in the exercise of judgement by the broadcasting authorities, unless their decision is so unreasonable as to be perverse, or they have acted in breach of their legal obligations (including obligations arising from section 6 of the Human Rights Act 1998): see Attorney General (*ex rel McWhirter) v Independent Broadcasting Authority* [1973] QB 629; *Wilson v Independent Broadcasting Authority* 1979 SC 351; *Wilson v Independent Broadcasting Authority (No 2)* 1988 SLT 276; *R v BBC and ITC, ex p Referendum Party* [1997] COD 459; *R (Prolife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185. (See further Seymour-Ure, 'The media in postwar British politics' (1994) 47 *Parliamentary Affairs* 530.)

A modest but useful reform of electoral law was brought about by the Registration of Political Parties Act 1998 in protecting parties registered under the Act from misuse of their names by persons seeking to mislead the electorate. In *Sanders v Chichester* [1995] 03 LS Gaz R 37 an Election Court of the Queen's Bench Division had held that a candidate in the 1994 European parliamentary election was not prohibited from describing himself as a 'Literal Democrat'. (On other occasions candidates had declared themselves to be standing for the 'Conservatory Party' or the 'New Labour Party'.) A revised scheme of registration was introduced by Part II of the Political Parties, Elections and Referendums Act 2000, obliging every party that wishes to put up candidates at an election to be registered with the Electoral Commission. A party is not permitted to register under a name which is the same as that of a registered party or is likely to lead voters to confuse it with a registered party. Further provision to prevent the registration of party names designed to mislead voters is made by the Electoral Administration Act 2006. (Registration is also the basis for the restrictions on campaign expenditure by political parties (above) and for controls on accounting systems and funding of parties (see below).)

(c) The electoral system

The electoral system in use affects both the 'value' of a vote in terms of its efficacy to secure the election of a preferred representative to Parliament, and also the likelihood that the government elected into power will reflect the interests or policy preferences of the electorate. The system adopted in the United

Kingdom for elections to the House of Commons is that known variously as the 'first past the post' (FPTP), 'plurality', or 'relative majority' system. Some other Commonwealth countries (eg Canada and India) and the United States also make use of this system, but in most democratic countries, in Europe and elsewhere, different systems are preferred.

In the FPTP system, voting takes place in single-member constituencies and the candidate with most votes is elected. It is not the object of this system to produce an elected House which will be a 'mirror of the nation' in the sense that it accurately represents the different parties, interests or viewpoints in society. For many years the system has supported the alternation in government of two main parties, usually assuring to one or other of them an absolute majority in the House of Commons. The tendency of FPTP to disfavour small parties (unless their support is regionally concentrated) and to give a disproportionate benefit in seats won to the party with the largest share of the popular vote, has worked in favour of single-party government. Parties have been able to come forward with policies for government, not for bargaining, and general elections have acquired virtually the character of referendums in which the people have decided which party should form the government. Richard Rose wrote in 1974 (*The Problem of Party Government*, p 115):

> The argument for the existing procedure is simply stated: the British electoral system is intended to manufacture majority government. It does this by giving disproportionately more seats to the most successful party. The element of distortion in the ratio of votes to seats is usually considered a small price to pay for the greater advantage of fixing responsibility for government upon a single party with a majority in the House of Commons. A purely proportional allocation of seats in accordance with votes would result in neither the Conservative nor Labour party gaining a majority in the Commons. The weakest rather than the strongest of the three parties, the Liberals, could decide who governs.

For much of the twentieth century FPTP worked reasonably well, at least in the period from 1931 to 1970 when an overwhelming majority of voters gave their support to the two main parties. In the ten general elections held in that period the two major parties together won an average of 90.74 per cent of the vote (their joint share never falling below 85 per cent). In all but one of those elections the party that formed the government – including the National Governments of 1931 and 1935 dominated by the Conservatives – had won more votes than any other party: the exception was the 1951 election, won by the Conservatives although Labour had a 0.8 per cent larger share of the total vote. Every government in that period had an absolute majority of seats in the House of Commons. Thus the system was manufacturing majority government, and since the great majority of those voting (the turnout of voters then averaging 76.71 per cent) gave their votes to one or other of the two main parties, it seems a reasonable inference that those parties stood for a range of viewpoints that were widely held in the community.

The FPTP system may, then, be credited, no doubt in combination with other factors, with the continuation until the 1970s of stable, single-party government enjoying broad popular support. On the other hand critics of the system observed that parties were not fairly represented in Parliament in proportion to votes cast for them, and that the Liberal Party, with substantial but dispersed support among voters, was invariably excluded from a share in government. A party could achieve power having won less than 50 per cent of the total vote, and indeed this had become the normal case.

In the two general elections of 1974 the distorting effects of FPTP on parliamentary representation became more apparent. In each of these elections the Liberals, with over 18 per cent of the total vote, won only 2 per cent of the seats, and it was observed that more than ten times as many votes were needed to elect a Liberal MP as to elect a Labour or Conservative MP. Mirroring the 1951 result, the February 1974 election was won by the Labour Party with a smaller share of the total vote than the Conservatives, and Labour took office as the first government since the Second World War not to have an absolute majority in the House of Commons.

Since then general elections have again produced majority government, but have also demonstrated the disproportionality that may result from the FPTP system.

The 1992 General Election

Electorate: 43,249,721
Votes cast: 33,612,693 (77.7% turnout)

Party	*Votes*	*% of total vote*	*Seats won*
Conservative	14,092,891	41.9	336
Labour	11,559,735	34.4	271
Liberal Democrats	5,999,384	17.8	20
Welsh and Scottish Nationalists	783,991	2.3	7
Others (Northern Ireland and minor parties)	1,176,692	3.5	17

The 1997 General Election

Electorate: 43,757,478
Votes cast: 31,286,597 (71.5% turnout)

Party	*Votes*	*% of total vote*	*Seats won*
Conservative	9,602,857	30.7	165
Labour	13,516,632	43.2	418
Liberal Democrats	5,242,894	16.8	46
Welsh and Scottish Nationalists	782,570	2.5	10
Others (Northern Ireland and minor parties)	2,141,644	6.8	20

The 2001 General Election

Electorate: 44,403,238
Votes cast: 26,368,798 (59.4% turnout)

Party	*Votes*	*% of total vote*	*Seats won*
Conservative	8,357,622	31.7	166
Labour	10,724,895	40.7	412
Liberal Democrats	4,812,833	18.3	52
Welsh and Scottish Nationalists	660,197	2.5	9
Others (Northern Ireland and minor parties)	1,813,251	6.8	20

The 2005 General Election

Electorate: 44,261,545
Votes cast: 27,123,652 (61.3% turnout)

Party	*Votes*	*% of total vote*	*Seats won*
Conservative	8,772,473	32.3	197
Labour	9,547,944	35.2	356
Liberal Democrats	5,981,847	22.1	62
Welsh and Scottish Nationalists	587,105	2.2	9
Others (Northern Ireland and minor parties)	2,234,256	8.2	22

(Principal sources for the figures are D Kavanagh and D Butler, *The British General Election of 2005* (2005), Appendix 1, Table A1.1 and *The Times Guide to the House of Commons* (2005).)

The Conservative Government elected in 1992, with 42 per cent of the total vote, enjoyed an absolute majority in the House; yet on a principle of strict proportionality the Conservatives would have been entitled to no more than 274 seats (out of 651) – not enough for the formation of a majority government. In 1997, 2001 and 2005 the Labour Party benefited from the 'bonus' that may accrue to the winning party under FPTP and from other distorting features of the electoral system (see further Appendix 2 to Kavanagh and Butler (above, pp 250–2)). In these three elections Labour achieved absolute majorities respectively of 179 (63 per cent of the seats) with 43 per cent of the vote; 166 (again 63 per cent of the seats) with 41 per cent of the vote; and (in 2005) 66 (55 per cent of the seats) with 35 per cent of the vote. Mrs Thatcher's Conservative Party likewise enjoyed three-figure majorities in the House of Commons with about 40 per cent of the votes cast in the general elections of 1983 and 1987.

The Liberal Democrats have been strikingly penalised by the dispersion of their support over the country. In 1992, with 18 per cent of the vote, they won only 3 per cent of the seats. They did somewhat better in subsequent general

elections by concentrating their effort on winnable seats, and in 2005 their 22 per cent of the vote gave them 62 seats (9.6 per cent of the seats). Extreme disproportionality was displayed in the general election of 1983, when the Liberal/SDP Alliance with 25 per cent of the vote won only 23 seats (3.5 per cent), while Labour with 28 per cent of the vote, concentrated to better advantage, won 209 seats (32 per cent). A strictly proportional representation for the Alliance would have been 165 seats and for Labour 179 seats.

These results show that FPTP may discriminate severely against third parties, which naturally regard their underrepresentation in the House of Commons as unfair. It is also objected against this system that a party can be put in power with much less than a majority of votes and may govern without having to accommodate its policies to the interests of a majority of voters represented by the other parties in Parliament (the argument of 'elective dictatorship'). Other questionable features of the FPTP system were demonstrated in the general elections of 1997, 2001 and 2005, in each of which most MPs were elected with the support of a minority of the voters in their constituencies; in extreme instances, in 2001, seats were won with no more than 30 per cent of the vote. General elections have commonly distorted the regional representation of parties, yielding a substantial underrepresentation of Labour voters in southern shires and of Conservative voters in northern cities. In 1997 the Conservatives failed to win any seats in Scotland with 17.5 per cent of the vote or in Wales with 19.6 per cent. An increase in their Welsh vote to 21 per cent in 2001 still brought them no seats there but almost exactly the same share of the Welsh vote in 2005 gave them three seats.

As the disproportionality of the FPTP system became increasingly evident, many advocated its replacement by one or other system of proportional representation (PR). It was argued that FPTP was undemocratic in failing to reflect the preferences of voters and, in effect, disenfranchising the numerous class of voters who, in casting their votes for others than the winning candidate in a constituency, make no contribution to the national election result. (See R Blackburn, *The Electoral System in Britain* (1995), pp 362–4.) Critics of FPTP have often condemned not only what they see as its unfairness, but also the 'adversary politics' of alternating single-party governments which it fosters. Proportional representation would be likely to bring about coalition governments and a more consensual style of politics, parties of the left or right having to temper their policies and reach accommodations with parties of the centre. It is said that a new politics of this kind would accord with a broad consensus which exists in society at large and is artificially polarised by a two-party system. (See, eg, SE Finer (ed), *Adversary Politics and Electoral Reform* (1975), pp 30–31; V Bogdanor, *The People and the Party System* (1981), p 205; and Wright, 'British decline: political or economic?' (1987) 40 *Parliamentary Affairs* 41.)

It must not be supposed that the FPTP or plurality system is universally disfavoured. The rationale for plurality elections, as Sanford Lakoff explains (*Democracy: History, Theory, Practice* (1996), p 178):

> is that voters should be encouraged to form and support large amalgamated parties so as to reduce the prospect that minority parties can exercise vetoes over majorities and to improve the chance that elected governments will not be composed of coalitions not chosen by the voters but arranged among the parties.

Coalition governments resulting from proportional representation are not necessarily more representative of the views and interests of the electorate than a single party government elected by a minority of votes. As JA Chandler remarks, 'it is by no means evident that a coalition will fully represent the interests of all those who voted for one of the members of that coalition' ('The plurality vote: a reappraisal' (1982) 30 *Political Studies* 87, 88; see his development of this argument at pp 88–91). Chandler argues further that the FPTP system is more likely than proportional representation to produce governments that are responsive to public opinion throughout their tenure of office (p 92):

> Within a plurality system a relatively small loss of votes will result in a disproportionately large loss of seats for the largest parliamentary parties and will be likely to threaten their ability to form part of a government. Any party operating under such conditions must take great care not to alienate many of their supporters at the time of the last election unless they can be replaced by new converts to their cause. In comparison a party operating under a system of PR could afford to alienate a much larger number of voters before suffering a correspondingly large loss of seats and a threat to its chances of holding or obtaining power.

The objection to FPTP that it encourages 'adversary politics' is countered by those who say that proportional representation induces a 'coalition politics' which disregards real divisions of interest in society and suppresses the productive confrontation of ideas. It is said too that proportional representation would reduce the power of voters to dismiss governments. As Tony Benn has remarked: 'In countries that have proportional representation the electorate can only stir the mixture of political parties forming the governing coalition, but can rarely get rid of the whole bunch and replace them with others' (*Industry, Technology and Democracy*, IWC Pamphlet No 60 (1978), p 7). Karl Popper, too, has decried the effect of proportional representation on the 'decisive issue' of getting rid of a government by voting it out of office, and sees coalition government as leading to a 'decay of responsibility' ('The open society and its enemies revisited', *The Economist*, 23 April 1988, p 25). In similar vein, the following passage focuses on the role of elections in a democracy.

Michael Pinto-Duschinsky, 'Send the rascals packing' (1999) 36 *Representation* 117, 118

> Elections and representation in the legislature are not ends in themselves. They produce democracy only if they provide the means by which the populace can hope to exercise direct and effective control over the government. Not all elections are 'democratic'. In order to qualify as such, they need to affect the composition of a government. In short, democratic elections are not principally about membership of the legislature. The key condition of people power is that the voters should have a direct effect on the selection and – even more important – on the expulsion of Prime Ministers and cabinets.

In PR systems, it has been noted, 'small parties often have excessive power in creating or dissolving coalitions and/or in making decisions within the legislature or coalition': consequently 'fairness in translating votes to seats may lead to unfairness in translating seats to power' (Adrian Blau, 'Fairness and electoral reform' (2004) 6 *British Journal of Politics and International Relations* 165, 173).

G Bingham Powell, Jr, *Elections as Instruments of Democracy* (2000), p 26

> [T]he majoritarian [eg the present Westminster] and proportional approaches to democracy envision rather different roles for elections in connecting the preferences of citizens and the formation of policy-making coalitions. The majoritarian vision sees elections as enabling citizens directly to choose between alternative governments (incumbent or prospective or both), with the winner taking office and making the policies after the election. The proportional vision sees elections as choosing representatives who can bargain for their voters' interests in postelection policy making. Although all national elections aggregate the desires of thousands of voters into a much smaller number of representative policymakers, the majoritarian view favors much greater aggregation, while the propotional view emphasizes the importance of equitable reflection of all points of view into the legislature.

A powerful defence of plurality voting in a two-party system is presented by Brian Harrison, *The Transformation of British Politics 1860–1995* (1996), pp 212–17; but compare the exposure of its deficiencies by Stuart Weir and David Beetham, *Political Power and Democratic Control in Britain* (1999), ch 3.

The case for FPTP becomes less compelling if support for the two main parties drains away and political debate is transformed by multi-party politics. It is therefore discomforting to defenders of FPTP that in the 2005 general election the two main parties together took less than 70 per cent of the votes cast, while Labour's share at 35.2 per cent was the smallest ever received by a party enabled to form a majority government in the United Kingdom. If a sense of the unfairness of the electoral system should become widespread, with electors retreating into apathy and non-participation, the legitimacy of the whole polity would be impaired. It may be, on the other hand, that with the emergence of

alternative electoral systems (for elections to the Scottish Parliament, the Welsh Assembly, the Greater London Assembly and the European Parliament: see below), the United Kingdom 'is already in the process of a prolonged transition to PR, marked by the "coexistence" of PR and plurality rule elections systems, within which there has been a gradual transition to proportional systems' (Dunleavy and Margetts, 'The impact of UK electoral systems' (2005) 58 *Parliamentary Affairs* 854, 854–5).

For further discussion of the electoral system see G Smyth (ed), *Refreshing the Parts* (1992); Norton, 'Does Britain need proportional representation?' in R Blackburn (ed), *Constitutional Studies* (1992); R Blackburn, *The Electoral System in Britain* (1995); M Dummett, *Principles of Electoral Reform* (1997); V Bogdanor, *Power and the People* (1997), ch 3; *Report of the Independent Commission on the Voting System* (Jenkins Report) (Cm 4090-I/1998) R Johnston *et al, From Votes to Seats* (2001); D Farrell, *Electoral Systems* (2001); Curtice, 'The electoral system' in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003).

(i) Some varieties of proportional representation

The single transferable vote (STV) version of proportional representation has many advocates in the United Kingdom. Although not used on the continent of Europe or in many countries elsewhere, it applies in the Republic of Ireland and for elections to the upper house of the Australian Parliament (the Senate). STV was in use in Northern Ireland from 1920 to 1929 and was re-introduced in 1973 for local government elections in the province and for elections to the Northern Ireland Assembly. The Assembly reconstituted in 1998 following the Belfast Agreement is elected by the single transferable vote in six-member constituencies (see the Northern Ireland (Elections) Act 1998 and the Northern Ireland Act 1998, sections 33–4). STV is also used for the election of Northern Ireland's representatives in the European Parliament and it was introduced for local government elections in Scotland by the Local Governance (Scotland) Act 2004. The Liberal Democrats have favoured the adoption of the single transferable vote in Britain. In recommending the introduction of a new electoral system for the House of Commons, the House of Lords and local government in England and Wales, the Power Report expresses a tentative preference for STV (*Power to the People: the Report of an Independent Inquiry into Britain's Democracy* (2006), pp 189–92).

STV is based on large, multi-member constituencies. If this system were to be introduced in the United Kingdom it is likely that most constituencies would have three, four, five or six members, with the five-member constituency of about 300,000 voters as the norm. The voter indicates an order of preference among the candidates named on the ballot paper. A quota for each constituency is calculated once the total number of votes cast is known: the constituency quota is the minimum number of votes a candidate needs to win a seat (eg in a two-member constituency, the quota would be one vote over 33.33 per cent of

the votes cast). The following is a concise explanation of this system (taken from the Plant Report, *Democracy, Representation and Elections* (1991), p 8):

> Single Transferable Vote: The system and methods of calculation involved are complex; but put simply, voters have to list candidates in order of preference, and candidates have to reach a quota in order to be elected. If a candidate passes this quota, any votes for that candidate in 'excess' of the quota are redistributed according to second preferences. If no candidate reaches the quota, the lowest placed candidate drops out and his/her second preferences are transferred. This process continues down the order until the required number of candidates has been elected – bringing in third, fourth and possibly even fifth preferences, if necessary. The more seats per constituency, the more proportional the overall result is likely to be.

Various methods may be used for transferring surplus votes in accordance with voters' preferences. (For a full account of the system see, eg, V Bogdanor, *What is Proportional Representation*? (1984), ch 5; D Farrell, *Electoral Systems* (2001), ch 6.)

STV achieves a high level of proportionality between the votes cast for each party and the parliamentary seats which each party receives. STV also increases the power of the voter in that he or she can express a preference between candidates who are members of the same party: in this respect a general election also functions as a *primary* election of those who will be a party's representatives in the legislature. The voter can also choose to vote across party lines, giving his or her preferences to candidates, of whatever party, who support a particular cause that he or she favours. The adoption of the system could result in the election of more women and members of ethnic minorities to Parliament.

Some of the merits claimed for STV are speculative in a UK context. The Hansard Society Commission on Electoral Reform in its 1976 Report noted that the system has never been used in a country with a population as large as that of Britain. The Report also said (para 106) that it was uncertain to what extent voters would be able to discriminate between candidates of the same party by reference to their political standpoints: 'The selection of candidates will still be made by the political parties, and certainly in Ireland there is no conscious attempt to produce a slate of candidates across the political spectrum within a party'. STV could have a 'localising' effect on politics and the behaviour of MPs, who would be at risk of displacement by candidates of their own parties and liable to be unseated as a result of second preferences recorded by voters of other parties. The effect might be to weaken the role of parties in the political system.

An alternative form of proportional representation, widely used in Western Europe and elsewhere, is the list system, which is designed to achieve a representation of *political parties* in proportion to votes cast rather than – as with STV – a fair representation of the decisions of *voters*, irrespective of their support for parties. There are several kinds of list system. In some varieties, each party presents regional or local lists of its candidates, placed in an order of the

party's preference, to electors in multi-member constituencies. Votes are cast for parties and seats are distributed between the parties in proportion to their shares of the votes, a party's seats being allotted to its candidates in the listed order. This 'closed list' system gives an influential role to the party leadership which draws up the lists, the voter having no power to modify the party's rank order of candidates. The Power Report (above) comments that closed party lists 'offer party leaderships just the type of top-down power which is proving so alienating to active members of society who might otherwise join or support a party' (p 192). (On the other hand a party may make its own arrangements to enable its members to determine the ranking of party candidates on its lists.) In the more flexible 'open list' systems the voter may express a preference between candidates on the party list, so that the party's order of preference can be varied. There are several different procedures for allocating seats to the parties in proportion to the votes cast for them.

Pure list systems have not been much favoured by those campaigning for proportional representation in the United Kingdom. A closed regional list system was, however, the Government's chosen method to replace FPTP for elections in Great Britain to the European Parliament and was brought into effect by the European Parliamentary Elections Act 1999. (See now the consolidating European Parliamentary Elections Act 2002 as amended.) There are eleven electoral regions in Great Britain, each region returning a number of MEPs related to the size of the regional electorate (ranging in the 2004 election from three MEPs for North East England to ten MEPs for South East England). The voter in a region casts his or her vote for one of the fixed party lists presented by the competing parties or alternatively for an independent candidate standing in the region. (Northern Ireland constitutes a twelfth region, in which STV is the electoral system used.)

The additional member system (AMS) is a mixed system which combines one or other version of the list system with a majoritarian system (such as the 'alternative vote', below) or with FPTP. Each voter has two votes, one to be cast for a constituency candidate and the other for a party list. The disproportionality resulting from the election of the constituency members is corrected by the allocation of additional members from the party lists. (For the operation of this system in elections to the German lower house (the Bundestag), see Jeffery, 'Electoral reform: learning from Germany' (1998) 69 *Political Quarterly* 241.) The additional member system has been adopted for elections to the Scottish Parliament, the Welsh Assembly and the Greater London Assembly (see chapter 4). The resulting 'role differentiation' between elected members in Scotland and Wales is considered by Lundberg, 'Second-class representatives? Mixed-member proportional representation in Britain' (2006) 59 *Parliamentary Affairs* 60. A newly fashioned version of AMS was recommended for UK parliamentary elections by the Jenkins Commission (see below).

A system which does not necessarily ensure proportional representation but allows more voters to influence the result than does FPTP, is the alternative vote

system (AV) (used for elections to the Australian House of Representatives). This system requires the winning candidate to have received more than half of the votes cast. Voters in single-member constituencies list the candidates in order of preference: if no candidate gets an overall majority of first-preference votes, the candidate with fewest first-preference votes is eliminated and his or her supporters' second-preference votes are redistributed among the remaining candidates. A candidate who then achieves over 50 per cent of the votes is elected; otherwise the process is repeated until a candidate obtains an overall majority. The system may be seen as fairer than FPTP in that a candidate must secure an absolute majority of votes to win the seat and it allows a wider choice to voters, with fewer 'wasted' votes. The Labour Party's Working Party on Electoral Systems recommended a variant of AV – the supplementary vote system – for elections to the House of Commons (*Plant Report* (1993)): it has been adopted for the election of the mayor of London and for local authority mayoral elections in England and Wales.

See further P Cowley *et al, What We Already Know: Lessons on Voting Reform from Britain's First PR Elections* (2001); Farrell, 'The United Kingdom comes of age: the British electoral reform "revolution" of the 1990s' in M Shugart and M Wattenberg (eds), *Mixed-Member Electoral Systems* (2001).

(ii) The Jenkins Report

Before the 1997 general election a joint consultative committee of the Labour and Liberal Democrat Parties agreed that a commission on voting systems should be appointed early in the new Parliament to recommend an appropriate proportional alternative to first past the post. The choice between the recommended option and FPTP was then to be submitted to a referendum.

An Independent Commission on the Voting System under the chairmanship of Lord Jenkins of Hillhead was appointed by the Labour Prime Minister, Mr Blair, in December 1997. The Commission's terms of reference were as follows:

> The Commission shall be free to consider and recommend any appropriate system or combination of systems in recommending an alternative to the present system for Parliamentary elections to be put before the people in the Government's referendum.
>
> The Commission shall observe the requirement for broad proportionality, the need for stable government, an extension of voter choice and the maintenance of a link between MPs and geographical constituencies.

The Report of the Jenkins Commission was published eleven months later (Cm 4090-I/1998). The Commission examined the merits and deficiencies of first past the post and, although not required by their terms of reference to come to a view as to whether FPTP should be retained or replaced, were evidently sceptical about the advantages claimed for it. The Commission went on to consider what alternative system to recommend. They were impressed by the case for STV,

especially in its maximisation of voter choice, but were dissuaded from recommending it on the grounds that it was inherently complex, was confusingly different from the systems to be used for the European elections, the Scottish Parliament, the Welsh Assembly and the London Assembly, and was difficult to reconcile with the maintenance of a link between MPs and geographical constituencies.

In the result the Commission decided to recommend a mixed system. While rejecting the AV system on its own as not achieving greater proportionality than FPTP and capable of producing substantially unfair results, the Commission concluded that these demerits could be overcome in an additional member system which it described as 'AV with Top-up Members' (also known as 'AV-plus'). This system, they said, while resembling the German mixed system (see above):

> stems essentially from the British constituency tradition and proceeds by limited modification to render it less haphazard, less unfair to minority parties, and less nationally divisive in the sense of avoiding large areas of electoral desert for each of the two major parties.

The recommended system was described as follows.

> 110. The essence of the system is that the elector would have the opportunity to cast two votes, the first for his choice of constituency MP, the second for an additional or Top-up member who would be elected for the specific and primary purpose of correcting the disproportionality left by the constituency outcomes, and could thus be crucial to determining the political colour of the next government. The second vote can be cast either for individuals or (as in Germany) for a party list without regard to the individuals on it. For reasons we develop in paragraphs 137–9 we greatly prefer an 'open list', giving the voter the ability to discriminate between individuals, to a closed party list. The counting of the second votes must be done in such a way that the central purpose of the 'Top-up', which is leverage towards proportionality, is maintained. This means that account must be taken, not only of how many second votes a party has received, but also of how many constituency seats in the area it has already won. The allocation of Top-up seats would proceed as follows:
>
> (i) After the total number of second votes cast for each party have been counted, these numbers are then divided for each party by the number of constituencies gained in the Top-up area by that party plus one (adding one avoids the impossibility of dividing by zero and ensures that the party with the highest ratio of votes to seats receives the Top-up seat.)
> (ii) A Top-up member is then allocated to the party with the highest adjusted number of votes.
> (iii) Where there remains a further Top-up member to be allocated this process is repeated but taking into account any Top-up members already gained by each party.
>
> Parties should not be eligible for Top-up seats unless they have contested at least 50% of the constituencies in the Top-up area.

The Commission were satisfied that a substantial and sufficient degree of proportionality could be obtained for the country as a whole with a top-up of list members of 15 to 20 per cent. (A 50 per cent top-up as in Germany would have weakened the constituency link and have made coalitions 'if not inevitable very much the norm'.) The lists, put forward by the parties in eighty areas of the United Kingdom, would be open, allowing voters to choose between voting for a party or for an individual candidate in the party lists. The majority of MPs – 80 to 85 per cent – would be elected on an individual constituency basis by the alternative vote. It has since been concluded by two researchers for the Commission that the system as proposed would be unlikely to achieve broad proportionality and that at least 25 per cent top-up seats would be needed (Dunleavy and Margetts, 'The impact of UK electoral systems' (2005) 58 *Parliamentary Affairs* 854, 864).

The Commission saw their recommended system as best reconciling the four requirements of their terms of reference with their view of fairness, 'both of representation and of proportionality of power'. In a note of reservation one Commissioner, Lord Alexander, favoured FPTP rather than AV in an additional member or top-up scheme, observing that AV could operate haphazardly and was illogical in taking account of the second preferences only of voters who supported the least successful candidates.

The Commission believed that their system would minimise 'the prospect of constant coalition', but it has been countered that nine of the previous fourteen general elections would have resulted in a coalition if held under the Jenkins AV with Top-up scheme (Pinto-Duschinsky, *The Times*, 29 October 1998).

The Government undertook to consult the electorate in a referendum presenting voters with a clear choice between FPTP and 'and an alternative, drawn from the recommendations of the [Jenkins] Commission' (HC Deb vol 313, col 190, 2 June 1998). Legislation would be needed to provide for the holding of such a referendum, but is not immediately in prospect. The Government appears to favour a pure AV system, to be put to the voters as an alternative to FPTP in any forthcoming referendum. Meanwhile it 'remains committed to reviewing the experience of the new electoral systems'. The Jenkins plan, it has been said, has 'withered on the vine' (Peter Riddell, *Parliament under Blair* (2000), p 114).

(d) The mandate

'For responsible government to exist some control must be exercisable by the electorate over the actions of government' (Jack Lively, *Democracy* (1975), p 42). Do elections provide a means of such control? Are governments bound, in accordance with a 'doctrine of the mandate', to carry out policies which have received the endorsement of the electorate?

In a system of representative government the question of the mandate becomes a question of the nature of representation. Our constitution does not

embody any one theory of representation, but is not amenable to the notion that a parliamentary representative is a delegate of the electors and bound to act in accordance with their instructions. The words of Edmund Burke are often invoked, in his speech to the electors of Bristol in 1774 (*Works* vol III (new edn 1826), pp 19–20):

> But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience, – these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.

LS Amery expressed a similar idea in a more recent time in saying that our system is one of 'government of the people, for the people, with, but not by, the people' (*Thoughts on the Constitution* (2nd edn 1964), pp 20–1), and the Kilbrandon Commission declared that politicians 'are elected to use their own judgement on behalf of the people' (Cmnd 5460/1973, para 1236). Members of Parliament do not regard themselves as delegates with specific commissions from the voters who elected them or from local party organisations. The Committee of Privileges of the House of Commons repeatedly affirmed the freedom of speech and action of MPs, and in 1947 the House itself resolved (HC Deb vol 440, col 365, 15 July 1947) that:

> it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof.

The resolution was reinforced and amplified in a further resolution of 6 November 1995.

The independence of the member must however be seen in the context of party government. The disciplined party system of our day is based on the loyalty of MPs who have stood before the electors as representatives of parties. (The Representation of the People Act 1969 acknowledged this fact in allowing the party affiliations of candidates to be stated on the ballot paper: see now the Representation of the People Act 1983, Schedule I, rule 19 and Appendix, as amended.) As David Judge remarks, no British MP today 'would claim to act *exclusively* as a trustee, beholden only to his or her own conception of the national interest. Instead, the reality of modern parliamentary politics is that MPs are primarily representatives of their party' (*Representation* (1999), p 59; see generally the author's discussion of 'trustee theory' in ch 3.) Parties declare their policies to the electorate in manifestos and public statements; electors

generally give their votes to parties rather than to candidates distinguished by their personal qualities. David Butler and Donald Stokes observe (*Political Change in Britain* (2nd edn 1974), p 28):

> Before party labels were placed on the ballot paper in 1970, virtually every voter was able to make the link between candidate and party, even though many knew nothing else about him: they perceived that to vote for a candidate was to vote for a government of his party, one which he would sustain in power throughout the life of a Parliament.

An election may be regarded as a choice not only between parties and leaders but between alternative programmes or policies. This provides a justification for a 'principle of the mandate' which all political parties recognise in some degree – the principle that a party, if elected, is both authorised and bound to implement specific commitments included in its election manifesto.

The principle of the mandate can be over-stated and some would deny its validity. Objections to it are influenced by scepticism about the reality of the supposed approval given by the electorate to the policies of the successful party in a general election. It is likely that (as in all general elections since the Second World War) the successful party will have won the votes of only a minority of electors. Besides, the electoral system does not provide for an expression of views on specific policies but only for a choice between entire party programmes. Policies included in a programme are selected by party organisations and do not necessarily reflect the issues of greatest interest or concern to the public. Moreover, there is evidence from empirical research that many voters do not know what are the policies of the different parties, agree with only some of the policies of the party they support, and prefer some policies which are in fact espoused by opposing parties. (See eg, P Pulzer, *Political Representation and Elections in Britain* (3rd edn 1975), pp 122–3.) Manifestos are not widely read and in any case contain many statements of a very general nature, such as promises to 'return more choice to individuals and their families' or to 'make Britain a fairer and freer society'.

But it would be wrong to dismiss the principle of the mandate as wholly unfounded. Party manifestos do also include quite specific undertakings: for example, the 2005 Conservative manifesto promised to recruit 5, 000 new police officers each year and to introduce a bill to overturn the ban on hunting with dogs; the Labour manifesto promised to increase the minimum wage to £5.05 and after a year to £5.35 and not to raise the basic or top rates of income tax in the next Parliament. Manifesto commitments are reinforced in public statements and are the stuff of argument in the election campaign. A party's programme and the terms of its appeal to the electorate help to constitute the character or image which it has in the public view, and to generate expectations about its behaviour in office.

Some studies have discerned an increased importance of political issues and party policies among the factors determining voting behaviour in a more volatile electorate, but the available evidence is problematic and a wide range of views is held as to the relative importance of issues and other factors in the outcome of elections. (See eg, B Särlvik and I Crewe, *Decade of Dealignment* (1983); M Franklin, *The Decline of Class Voting in Britain* (1985); A Heath, R Jowell and J Curtice, *How Britain Votes* (1985); R Rose and I McAllister, *Voters Begin to Choose* (1986); D Denver and G Hands (eds), *Issues and Controversies in British Electoral Behaviour* (1992), ch 5; Denver, 'The British electorate in the 1990s' (1998) 21 *West European Politics* 197; Franklin and Hughes, 'Dynamic representation in Britain', in G Evans and P Norris (eds), *Critical Elections: British Parties and Voters in Long-Term Perspective* (1999); D Denver, *Elections and Voters in Britain* (2003), ch 4.) The following seems still a balanced and compelling view.

Jack Lively, *Democracy* (1975), pp 39–40

> Does the claim that the primary function of the electorate is to produce a government mean then that the consideration of 'issues' never determines the voters' choice? . . . [T]he claim is implausible. A preference for one party rather than another can hardly be divorced from beliefs about what the party stands for or expectations about how it will act if it forms a government. There may be various grounds for these expectations – promises made by the parties, their past performances in office or their general ideological stances. There may be various motives inspiring voters' preferences – self-interest, prejudice or general ideological commitment. Even if a voter's expectations are quite unreal, even if he is unaware in detail of the policy differences between parties, even if he is dominated in his choice by prejudice or impulse, his vote may still be decided by a preference for one sort of government or set of policies rather than another.

Perhaps it is not unreasonable to interpret the result of an election as a demand addressed by the electorate to the winning party to govern broadly in terms of the party programme, as presented in the manifesto and in public declarations by the party leaders. The parties themselves take pains over the drafting of manifestos and evidently believe that they are presenting the electorate with a choice of policies. The principle of the mandate formerly had greater potency in the Labour Party than in other parties, but Conservative Party manifestos now also include many specific policy commitments, and these are not regarded by Conservative Governments as merely rhetorical. In 1984 Mrs Thatcher defended the Government's policy of abolition of the GLC and metropolitan county councils against Tory rebels by an appeal to the mandate (*The Economist*, 14 April 1984, p 32). It was a Tory peer (Lord Salisbury) who enunciated the doctrine that the House of Lords should not exercise its powers of delay in respect of legislation which was part of the electoral programme of the government. Graeme

Moodie summed up in saying (*The Government of Great Britain* (3rd edn 1971), p 211):

> [I]t is clear that a government's electoral program is and should be neither a straitjacket nor even a complete blueprint, and that the idea of a mandate is vague at best and must be handled with extreme caution. It is nonetheless significant. The doctrine reflects a widespread belief that a party program should be reasonably full and that for the successful party subsequently to depart radically from its spirit and intentions is dishonourable. The mere existence of the doctrine, moreover, suggests that, for much of the time, these expectations are satisfied, and emphasizes that the parties normally possess distinctive general approaches of which the parties' programs and behavior are interconnected manifestations.

(See also I Jennings, *Cabinet Government* (3rd edn 1959), pp 503–9; D Judge, *Representation* (1999), ch 4.)

Manifestos do not cover everything: some issues are left vague or unmentioned, and governments have to deal with problems that were not foreseen. The realism of manifesto commitments is put to the test in government, and adjustments may have to be made. But in general governments take their manifestos seriously. This is illustrated by Dennis Kavanagh ('The politics of manifestos' (1981) 34 *Parliamentary Affairs* 7, 14):

> In spite of the charges about broken promises, there is an impressive degree of correspondence between [a] party's election pledges and subsequent performance when in office (in terms of legislation, reviews of policy, committees of inquiry and regulation). In 1964, the Conservatives could boast of having kept 92 of the 93 pledges made in 1959 and by 1974 many of the 1970 manifesto's specific proposals had been acted on. By 1979, in spite of Labour's lack of a clear majority in the Commons for much of the Parliament, more than half of the manifesto pledges had been fulfilled.

More circumspectly, Judith Bara concludes in 'A question of trust: implementing party manifestos' (2005) 58 *Parliamentary Affairs* 585, 597:

> Parties can be said to keep some of their important promises and these are related to the areas regarded as important by the public, notably concerning the economy, public services and law and order, but they make too many promises which cannot easily be traced through to implementation and are open to manipulation and false claims of success. Greater economy and transparency in terms of promises and claims of fulfilment could go some way towards restoring trust.

The courts have had occasion to pronounce on the principle of the mandate in the context of local government. In *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, the principle was summarily dismissed by the Court of Appeal, Oliver LJ saying that 'whatever other considerations may be

taken into account by a statutory body such as the council in exercising its powers, an advance commitment to or so-called mandate from some section of the electors who may be supposed to have considered the matter is not one of them' (at 789–90). In the House of Lords a more measured judgment on the question was given by Lord Diplock in saying (at 829) that members of a local authority must not:

> treat themselves as irrevocably bound to carry out pre-announced policies contained in election manifestos even though, by that time, changes of circumstances have occurred that were unforeseen when those policies were announced and would add significantly to the disadvantages that would result from carrying them out.

A different emphasis was given by the House of Lords to a local mandate in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, in which Lord Wilberforce, referring to the electoral commitment by the Conservative majority on the local council to retain the grammar schools in its area, said (at 1051) that the council was 'entitled – indeed in a sense bound – to carry out the policy on which it was elected'. (See also Lord Dilhorne at 1055 and Lord Salmon at 1067, and the comment by McAuslan, 'Administrative law, collective consumption and judicial policy' (1983) 46 *MLR* 1, 14–17.)

It might be said that a government can claim a mandate only from those who turned out to vote and gave their vote to the winning party. Pippa Norris remarks of the 2001 general election: 'Four out of ten voters stayed home so that any electoral mandate was grudging and tepid' ('Apathetic landslide' (2001) 54 *Parliamentary Affairs* 565, 569). As we saw above, of those voting in the general election of 2005 only 35 per cent cast their votes for the victorious Labour Party.

What would be the role of manifestos in a system of multi-party politics and coalition governments? Richard Holme suggests that 'In a multi-party Parliament the manifesto will have to take on less of the character of a prospectus and more that of a negotiating brief': *The People's Kingdom* (1987), p 121.

3 The people and government

Do the people exercise any influence or control over government *between* general elections? Are governments 'responsive' to the views and demands of the people?

It seems clear enough that governments are not indifferent to public opinion and pay some regard to it in their decision-making. A government is, in a sense, engaged in a continuous election campaign and is influenced, throughout its term of office, by its assessments of electoral consequences. The 'rule of anticipated reactions' (Carl Friedrich, *Constitutional Government and Politics* (1937), pp 16–18) may lead a government to refrain from actions which it is thought

would provoke widespread unpopularity, evasion or non-cooperation among the public. As Jock Bruce-Gardyne and Nigel Lawson say (*The Power Game* (1976), p 184):

> All governments are continuously influenced by *anticipated* public opinion. The act of deference, however, occurs within the secrecy of the Cabinet room, so the people never learn of the triumphs they have won. The people complain that their opinions are ignored, while ministers are frustrated by the constraints of (real or imagined) popular sentiment.

Of course the government may be wrong in its assessment of public opinion. On many specific issues the public will be sharply divided in its opinions, on others it will be generally indifferent, and again a widely held opinion may fail to be publicly expressed, or what is represented as public opinion may be only that of an articulate minority. But this is not to say that public opinion, however crudely expressed or interpreted, has no impact on government.

By-elections may give the government an idea of its standing with the public, and have been known to stimulate policy initiatives or changes of course. The Crowther (afterwards Kilbrandon) Commission on the Constitution was set up (in 1969) at least partly in response to by-election gains by Scottish and Welsh Nationalists in 1966 and 1967. By-election losses in 1990 and 1991 were perceived as attributable to the unpopular poll tax and the decision was taken in the latter year to abolish it.

Lines of communication lead from the constituencies to the government through the party organisation and MPs' post-bags, but a more reliable source of information about public opinion on particular issues is nowadays provided by opinion surveys. Although by no means an exact science, the technique of opinion polling has been greatly refined in recent decades, and political parties commission opinion surveys and make use of polls in planning the tactics of election campaigns. Governments carry out research into public reactions to existing and proposed new policies, employing consultants, setting up citizens' panels, task forces and 'focus groups' or publishing Green Papers. The Home Secretary said on 3 July 1998 (HC Deb vol 315, col 287 WA): 'In line with the practice of successive administrations, the Department routinely consults the public, interested parties and client groups by way of consultation papers and research projects on a wide range of policies and proposed legislation'. Advisory bodies on which outside interests are represented provide further channels of communication.

Ordinary citizens can participate in governmental decision-making in limited ways, using the opportunities provided by land-use planning procedures, or taking part in campaigns against unwanted local development or controversial national legislation (such as the Shops Bill 1986, defeated after 'some of the most extensive and effective lobbying of MPs ever seen in Britain': Peter Riddell, *Financial Times*, 16 April 1986, p 17). It is, however, mainly through political parties and organised interests or pressure groups (see below)

that the citizen can participate in government. Exponents of a 'participatory democracy' envisage a greater role for the individual citizen in workplace, local community and political parties, and a resulting heightened public awareness of national political issues. The democratic principle, as Anthony Arblaster observes, 'could beneficially be applied far more widely in modern societies than it presently is' (*Democracy* (1987), p 105).

(a) Referendums

It is rare for a general election to be fought on a single main issue, and the result of an election indicates, at most, an undifferentiated approval of a whole range of policies. Only a referendum makes it possible for the electorate to give a clear judgement on a single issue of immediate relevance.

Our constitution embodies the principle of representative, not direct, democracy, and the referendum has not in the past been a normal feature of the system, although various statutes provided for local referendums on the promotion of private bills, the Sunday opening of cinemas, the establishment of public libraries and 'local option' for the licensing of public houses. The Local Government Act 2000 now requires the holding of binding local referendums on the adoption of certain forms of executive governance, including a directly elected mayor (see chapter 4).

National referendums have in the past been urged for such contentious issues as Irish home rule (Dicey was among those who argued for a referendum on home rule at the turn of the last century) and food taxes, on which Stanley Baldwin proposed a referendum in 1930. In 1911 the Conservative Opposition made an unsuccessful attempt to amend the Parliament Bill so as to provide for referendums on bills of constitutional importance (eg those affecting the Crown or the franchise or the powers of either House of Parliament). It was not until 1972 that Parliament approved the use of a referendum other than for a local government matter. The Northern Ireland (Border Poll) Act 1972 provided for a referendum in which the electors of Northern Ireland were to vote on the question whether the province should remain part of the United Kingdom or be joined with the Republic of Ireland.

The United Kingdom joined the European Communities in 1972 without the terms of entry being submitted to the people for approval. In its manifesto for the February 1974 general election the Labour Party undertook that it would renegotiate the terms of membership, and that if the negotiations were successful, 'the people should have the right to decide the issue through a General Election or a Consultative Referendum'. This commitment was reaffirmed in the Labour Party's manifesto of October 1974. After the election the Labour Cabinet decided that the question of membership, which divided both the Government and the party, should be resolved in a referendum rather than in another general election. In March 1975 the renegotiations were concluded and the Government announced that it would recommend the British people to vote

in favour of staying in the Community: 'The Government will accept their verdict' (*Report on Renegotiation*, Cmnd 6003, para 153). A Government White Paper on the Referendum (Cmnd 5925/1975) was debated in the House of Commons on 11 March 1975.

House of Commons, HC Deb vol 888, cols 291–3, 11 March 1975

Mr Edward Short (Lord President of the Council and Leader of the House of Commons): . . . Whatever view we may take on Britain's membership of the European Community, I hope that we would all agree that this is much the most important issue that has faced this country for many years. Whether we decide to stay in or to come out, the effects on our economy, on our political and parliamentary systems, on our influence in the world and, indeed, perhaps eventually on our whole way of life will be profound not just for ourselves, but for future generations.

How should a decision of this importance have been taken? The right hon. Member for Sidcup (Mr Heath) had it right when he said that such a decision should be taken only with the full-hearted consent of Parliament and the British people. In our system we accept decisions with which we do not agree, but only if we are satisfied that they have been arrived at fairly and democratically.

Mr Patrick Cormack (Staffordshire, South-West): In Parliament.

Mr Short: Unfortunately, the last Government's handling of the European issue did not match their previous promises. They had no mandate to take us in, merely to negotiate – 'nothing more, nothing less'. The result is that the consent of the British people has not, in fact, been secured. The issue continues to divide the country. The decision to go in has not yet been accepted.

That is the essence of the case for having a referendum. Only by means of a referendum can we find out whether the British people do or do not consent to our continued membership. A General Election could not give us this answer, because this is an issue within the parties, not between them. . . .

I understand and respect the view of those devoted to this House and to the sovereignty of Parliament who argue that a referendum is alien to the principles and practices of parliamentary democracy. I respect their view, but I do not agree with it. I will tell the House why.

This referendum is wholly consistent with parliamentary sovereignty. The Government will be bound by its result, but Parliament, of course, cannot be bound by it. Although one would not expect hon. Members to go against the wishes of the people, they will remain free to do so.

One of the characteristics of this Parliament is that it can never divest itself of its sovereignty. The referendum itself cannot be held without parliamentary approval of the necessary legislation. Nor, if the decision is to come out of the Community, could that decision be made effective without further legislation. I do not, therefore, accept that the sovereignty of Parliament is affected in any way by the referendum. Some argue that decisions on national issues should be taken wholly and exclusively by Members of the two Houses of Parliament. In general, we would all agree with that. But Governments are elected on their whole

programme and it would be neither appropriate nor practicable to have referenda on individual parts of the package. Moreover, if Parliament's decisions are found to be wrong, a subsequent Parliament can reverse them, as we have been doing since February last year. But that surely does not apply to this matter.

Our membership of the European Community is a unique issue because it profoundly affects our relationships with other countries as well as our whole standing and status in the world. It is unique because in time it could become almost irreversible, not for legal reasons but because, as we are already finding, the longer we stay in the harder it will be to come out, and the harder it will be to find any adequate design for living outside.

Legislation was necessary to provide for the first nationwide referendum to be held in the United Kingdom. In the referendum held in accordance with the Referendum Act 1975, the electorate voted on 5 June 1975 on the question, 'Do you think that the United Kingdom should stay in the European Community (the Common Market)?' (This formulation of the question seemed to some observers to 'tilt the balance in favour of the status quo': see Kellas in K Banting and R Simeon (eds), *The Politics of Constitutional Change in Industrial Nations* (1985), p 151.) 67.2 per cent of those voting (in a turnout of 65 per cent of the electorate) voted for staying in the Community. The referendum settled the controversy about membership for a time, but developments in the European Union were again to stimulate demands for a referendum in the 1990s. A backbench MP, fearful of the implications of the Maastricht Treaty, introduced a Referendum Bill in February 1992 to require a national referendum as a precondition for the ratification of treaties which would have the effect of diminishing the powers of Parliament: 'no such profound constitutional change should take place without reference to the people' (Mr Richard Shepherd, HC Deb vol 204, col 581, 21 February 1992; the bill made no headway). Amendments were moved by backbenchers to the European Communities (Amendment) Bill 1993 in both Houses, to provide for a referendum on ratification of the Maastricht Treaty: although lost, they were supported by dissidents in all three main parties. It was argued that since all the main parties were in favour of the Treaty, opponents had had no effective opportunity of putting their case. Subsequently there were demands (and another doomed Referendum Bill) for a referendum on developments in the European Union towards monetary union and a single currency, and a Referendum Party was launched in 1994 with the single object of securing a referendum on 'the future structure of Europe'. (The party attracted a modicum of support in the 1997 general election but won no seats.) See further below as to prospective referendums on European issues.

Arguments for the 1975 referendum had relied on the 'unique significance' of the issue of Community membership. But in 1978 a minority Labour Government was constrained by backbench pressure to provide in bills for devolution to elected assemblies in Scotland and Wales that referendums should

be held in the two countries on the question whether devolution should be implemented. During the passage of the Scotland Bill a Labour backbencher's amendment to the provision for a referendum introduced a threshold requirement of approval by 40 per cent of the Scottish electorate. This was carried against the Government, and section 85(2) of the Scotland Act 1978 accordingly provided:

> If it appears to the Secretary of State that less than 40 per cent of the persons entitled to vote in the referendum have voted 'Yes' in reply to the question posed in the Appendix to Schedule 17 to this Act ['Do you want the provisions of the Scotland Act 1978 to be put into effect?'] or that the majority of the answers given in the referendum have been 'No' he shall lay before Parliament the draft of an Order in Council for the repeal of this Act.

An equivalent amendment was made to the Wales Bill. After the bills had received the Royal Assent they were duly submitted to referendums in Scotland and Wales. In Scotland 52 per cent of those who voted were in favour of devolution and the Scotland Act, but they constituted only 33 per cent of the Scottish electorate. In Wales a mere 20 per cent of those who voted, or 12 per cent of the Welsh electorate, voted 'Yes'. Since the 40 per cent threshold had not been reached in either country, Orders were laid before Parliament (by the new Conservative Government) for the repeal of the two Acts and were duly approved.

The Labour Government elected in 1997, in resuming the devolution project, said that it would proceed with legislation to establish a Scottish Parliament and a Welsh Assembly only with the support of the relevant electorates. (See HC Deb vol 294, col 720, 21 May 1997; HL Deb vol 580, col 1113, 17 June 1997.) Provision for referendums in the two countries was made by the Referendums (Scotland and Wales) Act 1997. In the Scottish referendum voters were to be asked to choose between the two propositions: 'I agree that there should be a Scottish Parliament' and 'I do not agree that there should be a Scottish Parliament'. A second ballot paper offered a further choice between alternatives: 'I agree that a Scottish Parliament should have tax-varying powers' and 'I do not agree that a Scottish Parliament should have tax-varying powers'. In the Welsh referendum there was only one pair of alternatives, voters being asked whether they agreed or disagreed 'that there should be a Welsh Assembly'. In the subsequent referendums, in Scotland on 11 September 1997 and in Wales a week later, the affirmative proposition was carried in each case. (See chapter 4 and see further Munro [1997] *PL* 579.)

The Government's proposals for the establishment of a Greater London Authority with an elected assembly and mayor were submitted on 7 May 1998 to an electorate consisting of local government electors in London boroughs and City of London wards. In accordance with the Greater London Authority (Referendum) Act 1998 a single question was presented to the voters: 'Are you in favour of the Government's proposals for a Greater London Authority, made

up of an elected mayor and a separately elected assembly?' In a turnout of 34 per cent a majority of 72 per cent voted 'Yes'.

A referendum was once again held in Northern Ireland, in accordance with the Northern Ireland Negotiations (Referendum) Order 1998, SI 1998/1126, after the multi-party political agreement concluded in Belfast on Good Friday 1998. Voters in Northern Ireland were asked: 'Do you support the agreement reached at the multi-party talks on Northern Ireland as set out in Command Paper 3883?' Of the 81 per cent of electors who voted on 22 May 1998, 71 per cent supported the agreement. (See further chapter 4.)

The Labour Government undertook to hold a national referendum before taking any decision to adopt the single European currency or to ratify the Treaty establishing a Constitution for Europe. A draft Single European Currency (Referendum) Bill was published in 2003, which specified the question to be asked as: 'Should the United Kingdom adopt the euro as its currency?' A bill in these terms is to be introduced in Parliament if the Government decides that its criteria for adopting the single European currency have been met. A European Union Bill was introduced in the House of Commons in May 2005. It provided for a referendum to be held on the question, 'Should the United Kingdom approve the Treaty establishing a Constitution for the European Union?' After electors in France and the Netherlands voted in referendums to reject the Treaty the Government decided against taking the European Union Bill through its remaining parliamentary stages and it has accordingly lapsed.

Is it true to say that 'the arguments against the referendum are also arguments against democracy'? (V Bogdanor, *The People and the Party System* (1981), p 93.) Or, on the other hand, are referendums incompatible with the principle of representative parliamentary democracy and with the authority of an elected Parliament? (Compare the views expressed in the Lords' debate on an abortive Parliamentary Referendum Bill on 31 January 2001: HL Deb vol 621, cols 763 *et seq.*) At all events it can no longer be said that the referendum is something alien to the British constitution. Dicey's view that proposals for major constitutional change should be subject to 'the people's veto' in a referendum (see V Bogdanor, 'Dicey and the reform of the constitution' [1985] *PL* 652) has won renewed support in our day, although there may be disagreement as to which issues qualify for submission to the people under this head. Brian Harrison remarks that the referendum 'has been an instrument used by politicians for their own purposes, not a restraint upon them'. He adds, however: 'If the issue is important it compels politicians, at the least, to make sure that the voters are fully informed' (*The Transformation of British Politics 1860–1995* (1996), p 225).

Before any referendum is held, questions of principle and procedure have to be settled – for example, whether the referendum is to be binding on the government or only advisory, how the referendum question is to be worded, and whether a majority of votes in favour of a proposal is to be sufficient, or is to be effective, say, only if it constitutes a specified percentage of the electorate. If referendums are becoming a normal part of constitutional practice, it is

essential that they 'should be conducted in a manner that is regarded by all sides as efficient and fair' (*Constitution Unit Briefing*, November 1996). An independent Commission on the Conduct of Referendums, established jointly by the Electoral Reform Society and the Constitution Unit, recommended (Nairne Report (1996)) that guidance should be put in place to provide 'a practical basis on which to develop an enduring framework for the conduct of referendums' (para 40):

> Guidance should be drawn up dealing with organisational, administrative and procedural matters associated with holding a referendum. Established guidelines should include fixed rules for some matters (for example, the organisation of the poll, the election machinery and the count). For other matters, on which it is impossible to determine rules in advance (for example, wording the question), the guidance should state how a decision should be reached.

The Report itself included a set of twenty proposed guidelines. The Commission saw a strong case for the establishment of an independent statutory commission to be responsible for the conduct of referendums, so as to ensure public confidence in the neutrality of the procedure and the legitimacy of the result. (See also, Committee on Standards in Public Life, *Fifth Report*, Cm 4057-I/1998, ch 12.)

The Political Parties, Elections and Referendums Act 2000 made general provision for the conduct of major referendums in the United Kingdom, with the object of ensuring that each side in a referendum campaign should have a fair opportunity of presenting its case to the electorate. The Act provides for a system of controls administered by the Electoral Commission. Individuals, political parties or other organisations taking part in a referendum campaign must register with the Commission. As 'permitted participants' they are subject to expenditure controls which in respect of registered political parties are based on the percentage of the vote secured by the party at the previous general election. For instance, a party with more than a 30 per cent share of the vote – attained by both the Conservative Party and the Labour Party in the 2005 election – would be limited to £5 million; for the Liberal Democrats, with 22 per cent of the vote in 2005, the limit would be £4 million. For permitted participants other than political parties there is a fixed limit of £500,000. Special arrangements apply to 'umbrella organisations' designated by the Electoral Commission as representing those campaigning on each side of the question. An umbrella organisation is eligible for a grant from the Commission of up to £600,000, the level of grant to be the same for each. The expenditure limit for an umbrella organisation is £5 million.

The government, local authorities and other publicly funded bodies are prohibited from publishing promotional material in relation to a referendum in the twenty-eight days before the poll. The Secretary of State must consult the Electoral Commission before making Orders regulating the conduct of

referendums. The formulation of the question to be put to the voters is determined by the legislation providing for a referendum. The Electoral Commission considers the proposed wording as specified in the bill or draft statutory instrument and declares its view of the intelligibility of the question (see section 104 of the Act). The Commission takes considerations of fairness into account – for instance, that the words and phrases used in the question should not be intentionally 'leading' and should not have positive or negative connotations. (See the question assessment guidelines on the Commission's website, www.electoralcommission.gov.uk.) The Commission is required to publish reports on the administration of referendums.

See further I Budge, *The New Challenge of Direct Democracy* (1996); M Mendelsohn and A Parkin (eds), *Referendum Democracy* (2001); M Qvortrup, *A Comparative Study of Referendums* (2002).

4 Political parties

The system of parliamentary government in the United Kingdom is one of party government. Yet Jean Blondel noted in 1963 (*Voters, Parties and Leaders*, p 87), that political parties in Britain were 'private associations to which the law does not give more rights and duties than to other private organisations'. The law of the constitution did not, until recently, regulate political parties and indeed barely acknowledged their existence. But the working of the constitution depends on parties, which are 'the chief motivating force of our main governmental institutions' (Memorandum of Dissent to the Kilbrandon Report, Cmnd 5460-I/1973, para 311. The authors of the Memorandum considered that any scheme for constitutional reform must concern itself with the political parties.)

Report of the Committee on Financial Aid to Political Parties (Cmnd 6601/1976), para 9.1

> Effective political parties are the crux of democratic government. Without them democracy withers and decays. Their role is all pervasive. They provide the men and women, and the policies for all levels of government – from the parish council to the European Parliament. The parties in opposition have the responsibility of scrutinising and checking all the actions of the Executive. Parties are the people's watchdog, the guardian of our liberties. At election times it is they who run the campaigns and whose job it is to give the voters a clear-cut choice between different men and different measures. At all times they are the vital link between the government and the governed. Their function is to maximise the participation of the people in decision-making at all levels of government. In short they are the mainspring of all the processes of democracy. If parties fail, whether from lack of resources or vision, democracy itself will fail.

Parties are important in a study of the constitution because they engage individuals in the political process, bring about the election of MPs (and also

members of the devolved legislatures and UK members of the European Parliament), provide governments and opposition to governments, and are engines (although not the only ones) for the creation of government policies. Any consideration of the extent to which the constitutional system provides for 'government by the people' must take account of the organisation and functioning of political parties.

(a) Selection of candidates

Since independent members are rarely elected to the House of Commons (none was elected in 1983, 1987 or 1992, one in 1997 and 2001, and two in 2005), the selection of candidates by the political parties is a crucial factor in determining the membership of the House. Selection in a safe seat is virtually equivalent to election, and many of those selected will serve for long periods in Parliament. Among them will be future holders of ministerial office and Prime Ministers. The selection procedures used by the parties are therefore a matter affecting the public interest. The parties' rules for the selection of candidates differ, but in each case selection is a function of the local party organisation, subject to a degree of central control.

In the Conservative Party an approved list of candidates is maintained by the central Committee on Candidates, a sub-committee of the National Board of Management of the party. The procedure for the selection of candidates to be included in the list is determined by the Committee on Candidates subject to approval by the Board. In the constituencies, a local selection committee draws up a shortlist of not fewer than three candidates on the approved list for consideration by the executive council of the constituency association. The executive council nominates at least two candidates for consideration by a general meeting of the association, where the selection is made by ballot. A sitting MP who does not secure the assent of the executive council to his re-adoption has the right to request a postal ballot of the full membership of the association, or instead may, at his option, have his name added to the final list to be considered by the general meeting.

In the Labour Party the National Executive Committee (NEC) approves a 'parliamentary panel' of prospective candidates, although constituency parties are not obliged to select from this list. Nominations are made by local branch parties and affiliated organisations and from these a shortlist, including an equal number of men and women, is drawn up by the constituency party's shortlisting committee. The candidate is chosen by ballot of individual party members on the basis of one member, one vote. The constituency's choice must be endorsed by the NEC. A sitting MP wishing to stand for re-election may on certain conditions be endorsed as a candidate without having to submit to a ballot of party members.

The Labour Party introduced all-women shortlists in selected constituencies in 1993, but in 1996 this practice was held by an industrial tribunal to be contrary

to the Sex Discrimination Act 1975. That Act was amended by the Sex Discrimination (Election Candidates) Act 2002 so as to allow political parties to adopt measures for reducing inequality in the numbers of men and women elected as their candidates. The Labour Party was accordingly again able to adopt all-women shortlists for the 2005 general election (with a resulting increase in the proportion of female Labour MPs), but neither the Conservatives nor the Liberal Democrats opted for this course.

The Liberal Democrat Party is a federal structure of 'State Parties' for England, Scotland and Wales. Local parties, each normally embracing one parliamentary constituency, are set up in accordance with the constitutions of the state parties. Lists of approved parliamentary (and European parliamentary) candidates are drawn up and maintained by a 'candidates committee' of each state party. Only approved candidates can apply for selection, and shortlisting is carried out by the executive committee of the local party or by a shortlisting sub-committee appointed by it. The Party Constitution provides that 'subject to there being a sufficient number of applicants of each sex, short lists of two to four must include at least one member of each sex and short lists of five or more must include at least two members of each sex; there must also be due regard for the representation of ethnic minorities'. The selection is made by ballot of local party members. A sitting MP wishing to stand at the next general election requires endorsement by the majority at a general meeting of the local party; if not so endorsed, the MP may request a ballot of all local members.

(b) Party policy

Political parties are all engaged to some degree in formulating policies. Parties that aim to take office, whether alone or as part of a coalition, will devise a comprehensive range of policies for government. Some minor parties have more limited objectives which they hope to achieve through pressure and bargaining. The parties have their own procedures and conventions for the making of policy.

In the Labour Party the party conference has the 'direction and control' of the work of the party, and is the sovereign policy-making body. The conference is a body on which affiliated trade unions, other affiliated organisations (eg cooperative and socialist societies) and constituency parties are represented. Members of the NEC, the Parliamentary Labour Party and the European Parliamentary Labour Party as well as parliamentary Labour candidates are among the *ex officio* members. The former block votes of the trade unions, which until 1993 amounted to something between 80 and 90 per cent of the conference votes, have been abolished, trade union delegates now voting on an individual basis (though they may be mandated by their unions) and commanding (together with the other affiliated organisations) 50 per cent of conference votes.

Responsibility for the development of policy rests mainly with the National Policy Forum, elected from all sections of the party, which is guided by a steering group (the Joint Policy Committee) headed by the leader of the party

and consisting of members of the Cabinet (or the shadow Cabinet), the NEC and the National Policy Forum. Policy commissions are established on particular subjects. These policy-formulating bodies produce annual work programmes for policy development, identifying topical issues for consultation, and draw up policy reports for discussion by the Joint Policy Committee and the National Policy Forum. The latter body submits reports and policy documents to the party conference. A programme ('Partnership in Power') for engaging local parties, trade unions and party members in the development of party policy was initiated in 1997 and is claimed to have had success in widening discussion and consultation with the party membership. It remains true that in the process of consultation and debate through which policies are filtered to the party conference, the leadership has a commanding role.

Clause V of the Labour Party's constitution provides:

> 1. Party conference shall decide from time to time what specific proposals of legislative, financial or administrative reform shall be included in the party programme. This shall be based on the rolling programme presented to conference by the National Policy Forum as approved by conference. No proposal shall be included in the party programme unless it has been adopted by conference by a majority of not less than two-thirds of the votes recorded on a card vote.

Clause V.2 provides for a joint meeting to settle the general election manifesto. When the party is in government, the meeting is to consist of the NEC and the Cabinet, with an admixture of other party members. When not in government, the NEC and the shadow Cabinet, again with some others, constitute the meeting. In either event the joint meeting:

> shall decide which items from the party programme shall be included in the manifesto which shall be issued by the NEC prior to every general election. The joint meeting shall also define the attitude of the party to the principal issues raised by the election which are not covered by the manifesto.

The Conservative Party has traditionally placed a higher value upon authority and leadership than upon ideology or programmes, with policy-making under the tight control of the leader of the party, supported by his or her colleagues in the Cabinet or shadow Cabinet. The annual conference has no responsibility for the formation of policies. A package of reforms introduced in 1998 included the establishment of the Conservative Policy Forum, of which the principal functions are defined in the constitution of the party as:

> - to encourage and co-ordinate the formulation and development of policy ideas and initiatives within the Party, particularly the Constituency Associations;
> - to establish a process for receiving such policy ideas and initiatives and ensuring a response is made to them;

- to consult by such means as it sees fit on such policy ideas and initiatives;
- to facilitate the development and organisation of high quality specialist input on important policy Areas at a national level;
- to assist in the organisation of Party Conferences;
- to advise the Leader and the Board [of the Conservative Party] of any policy ideas and initiatives so formulated and developed.

The constitution provides that the Leader 'shall determine the political direction of the Party having regard to the views of Party Members and the Conservative Policy Forum'. Stimulated by successive electoral defeats, the party has introduced a measure of democratic empowerment of its members, giving them a role in the choice of the party leader and holding membership ballots on certain policy matters. (See Lees-Marshment and Quayle, 'Empowering the members or marketing the party? The Conservative reforms of 1998' (2001) 72 *Political Quarterly* 204; see also Kelly, 'The making of Labour and Tory policy' (2001) 72 *Political Quarterly* 329.)

In the Liberal Democrat Party, policies on issues affecting the United Kingdom as a whole are determined by the Federal Party, while the making of policies on all other issues is the responsibility of the relevant state party. (Regional parties in England make policies on issues relating exclusively to regions and may seek recognition as state parties.) The sovereign representative body of the party is the Federal Conference, consisting of representatives of local parties, Liberal Democrat MPs, peers and members of the European Parliament, Liberal Democrat Members of the Scottish Parliament and the National Assembly for Wales, prospective parliamentary (and European parliamentary) candidates and certain *ex officio* members. A Federal Policy Committee (elected, as to a majority, by the Federal Conference) has responsibility for researching and developing policy, but power to determine the definitive policy of the Federal Party is vested in the Conference. Specific policies for England, Scotland, Wales and English regions are developed by the policy-making bodies of the relevant state and regional parties. The party's general election manifesto for the United Kingdom is prepared by the Federal Policy Committee in consultation with the parliamentary party in the House of Commons and with the parliamentary party in the European Parliament; manifestos are also published by state and regional parties. A Federal Executive directs, coordinates and implements the work of the federal party. It is empowered to organise consultative ballots of party members on fundamental questions of policy.

A stimulus to the development of party policies is provided by non-party organisations (or 'think tanks') of the right, left or centre. These include: on the right, the Institute of Economic Affairs, Civitas, the Centre for Policy Studies and the Adam Smith Institute; on the left, the Fabian Society and the Institute for Public Policy Research (the latter founded 'to provide an alternative to the free market think tanks'). CentreForum, founded (as the Centre for Reform) in

1998, is close to the Liberal Democrats. There are other organisations which campaign or stimulate discussion on constitutional reform, among them Charter 88, the Constitution Unit, Democratic Audit and DEMOS.

Not all party policies find their way into manifestos and not all manifesto commitments are carried out. When a party's leaders take office as the government, it usually happens that some party policies are abandoned as unworkable or are modified under the pressure of events. Other influences than party, some of them powerful, are brought to bear on the government, and other agencies, such as the European Union, pressure groups and the civil service, generate policies which the government may find itself constrained to adopt. The party leadership acquires an increased autonomy in office, and may not be unwilling to jettison items of party policy that it dislikes. In these circumstances some members of the party may believe that they have been betrayed: this was the complaint of the Labour left against Labour Governments in the 1960s and 1970s. (See B Hindess, *Parliamentary Democracy and Socialist Politics* (1983), pp 107–13.) The third term of the Blair premiership has been marked by disaffection from 'New Labour' on the left of the party and stirrings of dissent from government policies among Labour backbenchers and in the broader party.

(c) Financial resources

Party government depends on strong and well-organised political parties, capable of carrying out the study and research necessary for the formulation of realistic policies, and able to present them effectively to the public. These things cannot be done without adequate financial resources. The two main parties derive their income in part from individual contributions and local fund-raising efforts and in part from corporate contributions. The Conservative Party benefits from company donations and the Labour Party from trade union subventions; both parties have also been helped by substantial donations from wealthy business magnates. In the election year of 2005 the Electoral Commission reported (cash and non-cash) donations from 1 January to 30 June (the election was held on 5 May) to the Conservative Party totalling £14,122,344 and to the Labour Party totalling £14,948,117. The Liberal Democrats have much weaker resources at their disposal, with a lower membership and less access to institutional contributions, but large donations in the first quarter of 2005 enabled them to spend liberally before and during the election campaign. The Electoral Commission's figures for donations to the Liberal Democrats from 1 January to 30 June 2005 totalled £5,357,162.

There has been growing concern in recent decades about the sufficiency of resources for a vigorous party system and a like concern about donations from individuals attempting to buy political influence or to secure decisions from government favourable to their commercial interests.

The Houghton Committee recommended in 1976 that a system of state aid for political parties should be introduced to maintain the level of activity and

efficiency required if the parties were to fulfil effectively their role in the working of democracy. (See the *Report of the Committee on Financial Aid to Political Parties*, Cmnd 6601/1976.) A few years later the Hansard Society's Commission on the Financing of Political Parties proposed a scheme by which the parties would be able to claim state aid related to their popular support, measured by individual contributions of money to the parties (*Paying for Politics* (1981)).

In 1997 the Prime Minister asked the Committee on Standards in Public Life 'to review issues in relation to the funding of political parties and recommend any changes in present arrangements'. In their *Fifth Report* (Cm 4057-I/1998), the committee rehearsed the arguments for and against state aid for political parties and found them to be finely balanced (paras 7.14–7.23). They were not persuaded that the state should provide funding for political parties' general activities, but recognised that the parties had been obliged 'to concentrate their resources on campaigning and routine administration at the expense of long-term policy development'. To help the parties to put more effort into the development of policies the committee proposed that a modest policy development fund (initially of about £2 million per annum) should be established 'to enable the parties represented in the House of Commons to fulfil better what is, after all, one of their most vital functions'. The committee also proposed that donations to political parties of £5,000 or more should be publicly disclosed and that foreign donations should not be permitted.

The Government brought forward legislation to implement the main recommendations of the committee and provision was made by the Political Parties, Elections and Referendums Act 2000 for the registration of political parties as the basis for the control of donations (and of election expenditure, on which see above). A party proposing to field candidates in elections must be registered with the Electoral Commission. (There is a separate registration scheme for Northern Ireland.) A registered political party is required to report to the Electoral Commission donations of above £5,000 to the central organisation or above £1,000 at the local level. The Commission maintains a public register of reported donations. It is unlawful for a party to receive 'foreign' donations, from individuals not registered to vote in the United Kingdom or companies that are not incorporated in the European Union or do not carry on business in the United Kingdom. Anonymous donations are not permitted.

A registered party must adopt a scheme, to be approved by the Electoral Commission, for regulating its financial affairs and is required to publish its annual accounts.

The Act does not provide for full state funding of political parties, the Home Secretary remarking in the second reading debate on the bill that 'an over-reliance on state funding could absorb parties into the fabric of the state' (HC Deb vol 342, col 34, 10 January 2000). The Electoral Commission may, however, develop a scheme, to be approved by the Secretary of State, for the payment of 'policy development grants' to registered political parties represented by at least two MPs, to a total amount of £2 million in any year. The grants are intended

to assist the parties 'with the development of policies for inclusion in their election manifestos': details of the current scheme are contained in the Elections (Policy Development Grants Scheme) Order 2006, SI 2006/602.

There has been an increasing realisation that overreliance by the parties on wealthy benefactors is harmful to the political process, in that donors may hope for favourable treatment (for instance concessions in the development of policy, or the award of contracts) from the recipient party when in government. Allegations that peerages have been 'bought' with cash donations (in some instances disguised as 'loans') led the Public Administration Committee of the House of Commons to conduct an inquiry into the scrutiny of political honours: see its interim report, *Propriety and Honours*, HC 1119 of 2005–06. The Metropolitan Police undertook a concurrent inquiry into possible offences under the Honours (Prevention of Abuses) Act 1925. Events such as these have given a stimulus to the campaign for state funding of political parties, but a report by the Electoral Commission in 2004 noted that there was 'a lack of consensus among political parties and the public about the extent to which funding should come from the state and/or private donations and whether private donations should be capped' (Electoral Commission news release, 16 December 2004). In March 2006 Sir Hayden Phillips was appointed to conduct a review of the funding of political parties and in particular to examine the case for state funding and whether there should be a cap on the size of donations. Sir Hayden Phillips will look for agreement between the political parties in deciding on his recommendations and is to report by the end of 2006. Meanwhile the Electoral Commission has begun its own review of the openness, accountability and regulation of political party financing.

Parties are the motor of our system of government. Membership of the main parties has fallen steeply in recent decades, and fewer than 2 per cent of the electorate are now members of a political party. Is this decline a threat to the working of democracy in our country? (See further Parvin and McHugh, 'Defending representative democracy: parties and the future of political engagement in Britain' (2005) 58 *Parliamentary Affairs* 632.)

See generally P Webb, *The Modern British Party System* (2000); V Bogdanor, 'The constitution and the party system in the twentieth century' (2004) 57 *Parliamentary Affairs* 717; McHugh and Needham (eds), 'The future of parties' (2005) 58 *Parliamentary Affairs* 499 (Special Issue).

5 Pressure groups

'Every modern country', said Duguit in the early part of the twentieth century, 'is a mass of groups' (*Law in the Modern State* (tr F and H Laski, 1921), p 116). Pressure groups are bodies of persons organised to exert influence or pressure upon government without themselves seeking, through the electoral process, to assume governmental responsibility. In general they are clearly distinguishable from political parties, which hope to enter government, or at least to establish

for themselves a strong base in Parliament by fielding candidates in elections. The distinction becomes blurred when single-issue parties, such as the Legalise Cannabis Alliance, are formed to contest elections.

It is aptly said by Bill Jones (in B Jones *et al, Politics UK* (5th edn 2004), p 235) that 'The ability to form organisations independent of the state is one of the hallmarks and, indeed, preconditions of a democratic society'. Pressure groups have grown in number and following in the United Kingdom while the membership of political parties has declined. Dennis Kavanagh, *British Politics: Continuities and Change* (4th edn 2000), p 178, comments as follows:

> More than half the adult population are subscribing members of at least one organization (such as a trade union) and many belong to a number of groups. (The Royal Society for the Protection of Birds has more members than all of the British political parties put together!)

Individuals may find that their views on specific issues are more likely to have an impact via pressure-group activity than through membership of a political party, or that their particular interests are better defended by a group set up with the protection of those interests as its object. RT McKenzie (in R Kimber and J Richardson (eds), *Pressure Groups in Britain* (1974), p 280) was in no doubt:

> that pressure groups, taken together, are a far more important channel of communication than parties for the transmission of political ideas from the mass of the citizenry to their rulers.

Pressure groups are like political parties in expressing the demands of sections of the public, but unlike most parties they campaign for a specific interest or cause rather than for a wide range of policies. It is usual to distinguish two kinds of pressure groups. 'Interest' or 'sectional' groups represent people with social, occupational or economic interests in common, and their main purpose is to protect and further those interests. Among them are professional bodies, producers' groups such as trade unions, industrial and commercial associations, the National Farmers' Union – and the two 'peak' organisations, the Confederation of British Industry and the Trades Union Congress. Some other organisations in the numerous and varied class of sectional groups are:

the Association of British Insurers
the Automobile Association
the British Medical Association
the Consumers' Association
the Country Land and Business Association
the Engineering Employers' Federation
the Federation of Small Businesses
the Institute of Directors
the Law Society

the Methodist Conference
the Police Federation
the Ramblers' Association
the Royal Institute of British Architects.

The main concern of many sectional organisations is to provide services to their members, and some also control entry to a trade or profession and seek to maintain standards of competence: it may be only occasionally that they resort to lobbying and the tactics of pressure. But some sectional groups are engaged in a continuous dialogue with government, and many try to maintain a constant moderating influence upon the government departments whose policies may affect their interests.

The other kind of pressure group is the 'promotional' or 'cause' group, which is an organisation of persons for the promotion of a cause which its members support. (The cause may embrace the interests of others.) Cause groups too are of great number and variety. Some examples are:

Amnesty International
the Campaign for Freedom of Information
the Child Poverty Action Group
the Campaign to Protect Rural England
Friends of the Earth
Greenpeace
the Howard League for Penal Reform
the Joint Council for the Welfare of Immigrants
the League Against Cruel Sports
Liberty (the National Council for Civil Liberties)
the National Assembly Against Racism
the National Society for the Prevention of Cruelty to Children
Shelter.

Many of the cause groups put much of their effort into giving assistance to people in need, but all seek by publishing information, mounting public campaigns, or exerting direct pressure on government, to achieve legal reforms or the expenditure of public money or other favourable official response to the cause advocated. Some cause groups have only a brief life, campaigning on transitory issues such as a road-building scheme or the closure of a hospital, but others continue for many years, like the needs or injustices which give rise to them.

Pressure groups sometimes work through or in alliance with a political party, hoping in this way to influence the policies of an existing or future government. This strategy was formerly followed by the Campaign for Nuclear Disarmament (CND) in relation to the Labour Party. It achieved a notable success in 1980 when a resolution drafted jointly by CND and the Bertrand Russell Peace Foundation, demanding that the next Labour manifesto should include a

commitment against a nuclear defence policy and a pledge to close down nuclear bases in Britain, was approved by the Annual Conference of the party. (See B Pimlott and C Cook (eds), *Trade Unions in British Politics* (1982), p 230.) The League Against Cruel Sports, too, has concentrated its efforts on the Labour Party, and was at the forefront of the campaign which led to enactment of the Protection of Wild Mammals (Scotland) Act 2002 and the Hunting Act 2004. On the other hand Mediawatch-UK (formerly the National Viewers' and Listeners' Association) and the Country Land and Business Association have had more influence in the Conservative Party.

Ernest Bevin remarked that the Labour Party had grown out of the bowels of the trade union movement, and the trade unions have been closely linked with the Labour Party throughout its history. Latterly the bond has loosened, but it has not been severed. The unions affiliated to the party provide a substantial part of its income, have 50 per cent of the votes in the party conference and elect twelve of the thirty-two members of the party's National Executive Committee. The leader and deputy leader of the Labour Party are chosen by an electoral college voting in three sections – Members of the Commons and European Parliamentary Labour Parties; individual members of the party; members of affiliated trade unions and other affiliated organisations – each section having one-third of the votes. In former years the affiliated unions and the TUC had a significant influence on the making of Labour Party policies on issues affecting their interests, and on occasion they were able to stifle unwelcome legislative proposals of a Labour Government. After a period of some disharmony between the unions and the Blair Government, a renewal of good relations was reflected in the 'Warwick Agreement' of July 2004 between the Government and affiliated trade unions. In return for trade union support for Labour's forthcoming election campaign, the Government agreed to a large number of policy commitments such as protection of the pensions of workers transferring to a new employer, the uprating of redundancy payments, rights for migrant workers and legislation on corporate manslaughter.

Sectional groups do not enjoy a similar organic relationship with the other political parties, but business interest groups, while not affiliated to the Conservative Party, have traditionally been informally linked with it and have been able to influence party policy in economic and industrial matters. The Institute of Directors, for instance, has had close links with the Conservative leadership, and was considered to have made a significant contribution to the Thatcher Government's measures to limit trade union power and immunities (see W Grant and J Sargent, *Business and Politics in Britain* (1987), pp 127–8). While generally approving of conservative economic policies, the Confederation of British Industry does not give invariable or uncritical support to the Conservative Party and is willing to engage in dialogue with Labour governments.

Apart from groups like council tenants' associations which are concerned with local government, pressure groups concentrate their efforts on the centres

of decision-making in Westminster and Whitehall. Drawn to the substance of power, they cluster most densely about the departments and agencies of central government, where some of them achieve a particular legitimacy and consultative status. As WJM Mackenzie says, every public body 'has its penumbra of organized groups which form its particular public' ((1955) 6 *British Journal of Sociology* 133, 138). The pressure groups admitted to this favoured role are those able to offer the administration something in return. Many groups have specialised information and expertise which the administration lacks. Some government policies cannot be implemented without the cooperation of representative organisations and their members so that the government, accustomed to rule, is compelled to bargain. (The administration of the National Health Service, for example, needs the cooperation of the medical profession, represented in particular by the British Medical Association.)

Between the 'insider' groups and government there are channels for regular, informal consultation. In addition, client groups are often represented on committees of inquiry, task forces or working parties set up by government departments, or on the numerous advisory bodies, many of them created by statute, which give advice on specific areas of policy – on food standards, it might be, or building regulations, or waste management, or support for exporters.

Government legislation often bears the stamp of successful pressure by outside interests and is sometimes virtually the product of negotiation with affected groups. (As to prelegislative consultation see chapter 7.) Some policies are not so much influenced by *pressure* as produced in a joint effort by a government department and one or more groups with which it shares a common interest. For example, a continuous dialogue takes place between the Department for Environment, Food and Rural Affairs and the National Farmers' Union on questions of agricultural policy. (Retiring Presidents of the NFU have an excellent prospect of being awarded knighthoods.) The close relationships between departments and pressure groups have led observers to speak of a 'colonisation' of government by groups, or of 'policy communities' composed of government departments and insider groups.

Economic policy-making was for some years characterised by discussions in a 'policy community' consisting of government and the two sides of industry. The two peak producers' organisations, the Confederation of British Industry (CBI) and the Trades Union Congress, were granted a privileged association with government involving regular and wide-ranging consultations. The relationship was institutionalised, notably in the establishment in 1961 of the National Economic Development Council (NEDC), a non-statutory tripartite body which was expected to reach agreement on plans for economic growth. It was composed of ministers, representatives of private industry nominated by the CBI, and union representatives nominated by the TUC. Representatives of employers and unions also took their places on a number of other public bodies, such as the Health and Safety Commission and the Advisory, Conciliation and Arbitration Service.

In the continuous discussion with pressure groups, and more especially in the institutionalised arrangements with organised capital and labour, some discerned a 'bias towards corporatism', or a 'sharing of the state' between elected governments and the governing institutions of the two sides of industry. This was the thesis of Keith Middlemass, who concluded (*Politics in Industrial Society* (1979), p 460) that 'the nineteenth-century concept of the state is wholly outdated':

> The modern state is composed not only of government and the state apparatus but includes the governing institutions; the degree of their inclusion serves as a means of distinguishing them from other institutions and interest groups merely contiguous to the state.

From 1979, Conservative Governments showed a marked disinclination for the 'politics of pressure', expressed, for instance, in a lecture by a government minister (Mr Douglas Hurd) to the Royal Institute of Public Administration in saying that ministers 'need to shake themselves free to some extent from the embrace of pressure groups and interest groups' (*The Times*, 20 September 1986). There was, in particular, an abandonment of the tripartism of government, business and trade unions in economic policy-making and a distancing of the relationship between the Government and the Trades Union Congress. The main tripartite organisation, the NEDC, was abolished in 1992, the Chancellor of the Exchequer saying that 'the era of corporatism is long passed': HC Deb vol 209, col 777, 16 June 1992. (See further M Harrison (ed), *Corporatism and the Welfare State* (1984); Casels, 'Reflections on tripartism' (1989) 9(3) *Policy Studies* 6; P Williamson, *Corporatism in Perspective* (1989).) There has been no revival of institutional tripartism under Labour governments since 1997, but the trade unions have still a (somewhat diminished) consultative role and the Government has nurtured its contacts with the business community. Under all governments, the Department of Trade and Industry is in continuous consultation with business interests.

Pressure groups may fail to attain a favoured, consultative relationship with the government because they are not considered sufficiently representative or sufficiently 'responsible'. Again, as we have seen, a group may have objectives which are more congenial to a government of the left than of the right, or vice versa. A group is best placed to exert influence if by withholding its cooperation it can inflict a political cost on the government and if, in addition, it respects the confidentiality of discussions, shows willingness to compromise, and is assured of the support of its members for any bargain struck. While groups – especially 'outsider' groups – sometimes adopt a confrontational style and mount public campaigns of opposition to government policies, or resort to direct action, the more characteristic mode of pressure politics is the continuous, close, hidden exchange between group representatives and civil servants from which both sides reap benefits.

Pressure groups also look for support in Parliament and have done so increasingly in recent decades (see Norton (1997) 50 *Parliamentary Affairs* 357, 360). Besides lobbying MPs and briefing them with information and arguments, pressure groups instigate parliamentary questions, draft suggested amendments to bills and give evidence to select committees. (A great part of the evidence received by select committees is provided by pressure groups.) Opposition frontbenchers, lacking the resources of the civil service, often depend on groups to provide them with the expertise and information needed for the effective scrutiny of government bills. Many MPs act as parliamentary advisers or consultants to companies, trade unions or other outside bodies such as the Countryside Alliance or the Caravan Club. Pressure groups often have links with all-party groups in the House of Commons through which they seek to further their interests or causes – for instance, the all-party groups on disability, food and health, homelessness and housing need, nuclear energy, refugees and the retail industry. All-party groups engage the active interest of MPs in a great variety of policy questions, drawing on the experience and specialised knowledge of the outside groups. On the other hand, funding or other support received by all-party groups from outside interests may compromise their objectivity: the House of Commons has adopted rules requiring all-party groups to notify the Parliamentary Commissioner for Standards of financial and other material benefits (eg secretarial services) received by them.

Public campaigns and parliamentary pressure organised by groups have induced governments to legislate, and have succeeded in putting on the statute book such measures as the Television Act 1954 (providing for commercial television) and the Vaccine Damage Payments Act 1979. Groups have often made a significant contribution to the content of government legislation, as was seen, for instance, in the role of the disability organisations in helping to shape the Disability Discrimination Act 1995. Interest groups were acknowledged by the Government to be 'active participants in the policy-making process' that led to the enactment of the Food Standards Act 1999: the Government 'placed a very strong emphasis on consulting affected interests throughout all stages' (W Grant, *Pressure Groups and British Politics* (2000), pp 70–6). The Campaign for Freedom of Information can take much of the credit for the enactment of the Freedom of Information Act 2000 (considered below). Pressure groups have also played an important part in the enactment of private members' legislation, such as the Abortion Act 1967, the Unsolicited Goods and Services Act 1971, the Protection of Children Act 1978, the Environment and Safety Information Act 1988 and the Copyright (Visually Impaired Persons) Act 2002. Sometimes, on the other hand, pressure groups have campaigned successfully against governmental initiatives, such as the proposed imposition of VAT on books and newspapers in 1985 and the Shops Bill in 1986.

Interest and cause groups are an important part of the machinery by which government is controlled in the modern democratic state. They are a means by

which citizens can express their demands upon government between elections and they help to make government responsive to bodies of opinion and interests which it might otherwise disregard. They contribute, therefore, to a more *participatory* democracy and to better-informed government. An ideal may, indeed, be constructed of a representative democracy in which the periodic assertion of the full power of the people in general elections is supplemented by a continuous interchange between government and a multiplicity of groups which aggregate and articulate the demands of individuals. In this way the power to influence government is diffused and government itself, encompassed by assertive and competing groups, proceeds by bargaining instead of coercion. This *pluralist* vision of society does not, however, correspond with reality. For one thing, not all interests have a representative organisation, and organised groups are markedly unequal in resources and influence. Those which express the values and objectives of 'the establishment' may be readily embraced by government, while the claims of the deprived and vulnerable go unheard. Then again, the processes of bargaining with interest groups are for the most part unstructured and secret; groups may advance their sectional interests by 'whispering into important ears rather than proclaiming their arguments in public debate' (Frank Bealey, *Democracy in the Contemporary State* (1988), p 174) and in so doing may misrepresent the majority will.

Sanford Lakoff (*Democracy: History, Theory, Practice* (1996), p 295) observes in this connection:

> So long as the interest groups are not so dominant as to dictate outcomes, and so long as they are pluralized enough to exercise countervailing power against each other, the public interest is well served by lobbying. Where the public interest is inarticulate and undefined, or where particular lobbies are effective in gaining control over the direction of public policy, abuses occur.

In urging their own narrow, sectional interests, interest groups may disregard and obscure the wider issues of policy involved. Wyn Grant remarks (in 'Pressure politics: a politics of collective consumption?' (2005) 58 *Parliamentary Affairs* 366, 367–8) that 'NIMBY' ('not in my back yard') protesters:

> often deploy broader environmental or health arguments, but this should not conceal their main purpose which is to protect their own particular interests. They rarely argue, for example, that air traffic in general should be restrained, only that planes should not fly over their house. They do not usually offer constructive alternatives: the phone mast should be removed, but they rarely suggest where it might go.

Government may be assailed by the contrary demands of opposed pressure groups and, as Wyn Grant shows, a government faced with such conflicting claims may itself be divided, different departments responding according to their own policy preoccupations.

Not all groups are truly representative of those on whose behalf they claim to act; some, as Wyn Grant observes, may be run by 'a self-perpetuating oligarchy' whose supporters have little opportunity to influence the policies or strategies adopted by the leadership ('Pressure Politics' (2001) 54 *Parliamentary Affairs* 337, 345).

It became apparent in the early 1990s that some outside bodies were by-passing the normal channels of communication with government departments in seeking particular favours from MPs or ministers, sometimes employing consultants claiming to provide a privileged access to government and sometimes endeavouring to purchase information or influence for cash (eg payments to MPs for asking parliamentary questions). Following the first report of the Committee on Standards in Public Life (Cm 2850/1995), which censured these abuses, the House of Commons amplified its resolution of 15 July 1947 (above, p 527) with a strong admonition to Members not to pursue initiatives in Parliament in return for remuneration or favours from outside bodies, strengthened the rules on disclosure of financial interests and approved a Code of Conduct for MPs (revised in 2005: HC 351 of 2005–06). The Code prohibits paid advocacy by MPs on behalf of any outside body, and agreements and remuneration for parliamentary services must be disclosed. The House also established an independent Parliamentary Commissioner for Standards who monitors the operation of the Code, maintains the register of members' interests, advises on questions of conduct of MPs and investigates allegations of misconduct. The Commissioner is supported by the Committee on Standards and Privileges, which considers any complaints against MPs referred to it by the Commissioner for further investigation. The machinery for maintaining standards has been strengthened and clarified in the light of experience and in response to reports of the Committee on Standards in Public Life (in particular its *Eighth Report*, Cm 5663/2002).

Some pressure groups have adopted a 'test case strategy', assisting individuals to bring cases in courts or tribunals with the object of establishing precedents which will result in changes in administrative practice favourable to the interests of a whole class of persons. The Child Poverty Action Group (CPAG) has pursued this strategy with the objectives and mixed results described by Carol Harlow and Richard Rawlings, *Law and Administration* (2nd edn 1997), pp 545–6, 570. The courts have recognised the representative capacity of the CPAG in acknowledging its standing (*locus standi*) to bring proceedings on behalf of unidentified claimants of social security benefits. (See eg, *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540, 556.) Pressure groups may also be given leave to intervene in proceedings to which they are not parties, so as to present oral or written arguments to the court on aspects of the public interest (or the interests of those whom they represent) that are affected by the litigation. (The organisation Liberty has been allowed to intervene in a number of cases, eg recently in *R (Laporte) v Chief*

Constable of Gloucestershire [2004] EWCA Civ 1639, [2005] QB 678.) This recent development is discussed by Arshi and O'Cinneide, 'Third-party interventions: the public interest reaffirmed' [2004] *PL* 69, who remark that 'third-party intervention can inject otherwise marginalised or absent perspectives, expertise and data into the decision-making process and this appears to be enriching and enabling the work of the courts'.

Some groups have adopted tactics of 'direct action' to press their demands, their protests sometimes involving breaches of the law. Lord Hoffmann referred in *R v Jones* [2006] UKHL 16, [2006] 2 WLR 772 at [89] to the 'long and honourable history' of civil disobedience on conscientious grounds, and continued:

> People who break the law to affirm their belief in the injustice of a law or government actions are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account. The conditional discharges ordered by the magistrates in the cases which came before them exemplifies their sensitivity to these conventions.

(Note Lord Hoffmann's qualification of these remarks in paras [90]–[94] and see further on this case, chapter 11.)

All in all we may say with Sanford Lakoff (above, p 170) that pressure groups, together with other institutions of civil society, 'act as a buffer against the expansion of the state's power and sphere of action'. More positively, they can provide experience, expertise and a measure of popular participation in the making and implementation of public policy. We may also note, as does Brian Harrison, *The Transformation of British Politics 1860–1995* (1996), p 178, that 'without the enterprise, the impatience, the energy, and the dedication cause groups evoke, democracies would lose much of their vitality, and might not survive at all'. What we still seem to lack, as the authors of a leading study have said, 'is a means of reconciling the empirical world of government-group relations with traditional notions of democracy, accountability, and parliamentary sovereignty' (A Jordan and J Richardson, *Government and Pressure Groups in Britain* (1987), pp 287–8).

(See further I Harden and N Lewis, *The Noble Lie* (1986), ch 6; P Hirst, *Representative Democracy and its Limits* (1990); C Harlow and R Rawlings, *Pressure Through Law* (1992); W Grant, *Pressure Groups and British Politics* (2000); B Coxall, *Pressure Groups in British Politics* (2001).)

6 Open government

If the principle of responsible government is to be maintained, there must be sufficient public access to information about governmental activities and decisions. Openness in government is necessary if Parliament, groups and the public are to be able to contribute to the making of policy, and if the actions of government are to be properly scrutinised and evaluated, and the decision-makers held accountable.

R v Shayler [2002] UKHL 11, [2003] 1 AC 247

Lord Bingham of Cornhill: . . . Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant. Where abuses are exposed, they can be remedied. Even where abuses have already been remedied, the public may be entitled to know that they occurred.

Without openness and a 'right to know', ministerial responsibility to Parliament is enfeebled, opposition to governments disarmed and democracy undermined. The effective use of parliamentary questions, the work of select committees, political campaigning by opposition parties or pressure groups, all depend on the availability of information. Secrecy, on the other hand, begets arbitrariness and misgovernment. In the words of Lord Jenkins of Putney, it is wrong to deprive the electorate of information about the processes of government, 'for where they are bad they remain bad and get worse in the dark' (HL Deb vol 483, col 175, 17 December 1986). 'The first task of the opposition in Parliament', say JAG Griffith and Michael Ryle, 'is to minimise secrecy in government' (*Parliament* (2nd edn 2003), p 477).

British governments have traditionally maintained a high degree of secrecy about their operations. The political culture has not in the past included any idea of 'participatory democracy' which could have supported claims by individuals or groups to be provided with information about government. The assumption discerned by Nevil Johnson in a Note issued by the Head of the Civil

Service in 1985 that 'in some sense all information gained in the course of duty is the private property of the Government of the day and, therefore, to be disclosed only if its disclosure is regarded as desirable and duly authorised' (Memorandum to the Treasury and Civil Service Committee, *Seventh Report*, HC 92-II of 1985–96, p 172) seemed to reflect a persisting ethos of British governments. Governmental secrecy was for many years fortified by the draconian section 2 of the Official Secrets Act 1911. The all-embracing section 2 was repealed by the Official Secrets Act 1989 but this Act, although limited to specified categories of information, is still wide-ranging in its application of criminal sanctions to unauthorised disclosures of official information and it admits no defence of the public interest in proceedings for contravention of its provisions: see *R v Shayler* (above) and see further chapter 11. Civil servants remain in any event subject to disciplinary proceedings for disclosures of information in breach of internal civil service rules and instructions.

Some of the principal conventions of the constitution – in particular those of collective and individual ministerial responsibility – have contributed to the maintenance of governmental secrecy, by enforcing an internal governmental discipline in the control of information. The courts admit no right at common law to obtain information about the processes of government. In *R v Secretary of State for Defence, ex p Sancto* (1992) 5 Admin LR 673, the court was of the opinion that a minister's refusal to disclose to the parents of a soldier the report of a board of inquiry into his accidental death was, in the particular circumstances, 'outrageous', but could give no remedy because there was no public 'right to know' and no legal duty to disclose the report. A party to litigation may be able to obtain an order for the production of official information needed to prove his or her case – but only if the court is not persuaded that the public interest precludes disclosure of the information. Indeed, some judges formerly took the view that a valid ground of objection to the disclosure of information in legal proceedings was 'to protect from inspection by possible critics the inner working of government while forming important governmental policy' (Lord Wilberforce in *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090, 1112. Today an argument of this kind would not prevail against the right to a fair trial assured by the Human Rights Act 1998.)

British governments have in the past held it to be entirely a matter for their discretion whether and to what extent official information should be made available to the public or to interested organisations. It has been a perennial concern that governments are unduly restrictive in withholding information from the public (and from Parliament) and that secrecy is sometimes maintained, not for reasons of the public interest, but to protect the government from criticism or embarrassment.

In 1968 the Fulton Committee on the Civil Service observed that the administrative process was 'surrounded by too much secrecy' and that 'the public interest would be better served if there were a greater amount of openness' (Cmnd 3638, para 278). The Government in its response drew attention to

measures already taken to disclose more information (*Information and the Public Interest*, Cmnd 4089/1969). Among these was the practice, begun in 1967, of issuing 'Green Papers' setting out policy proposals and inviting public comment and discussion before decisions were taken. In 1976 the Prime Minister, Mr Callaghan, announced in Parliament that in future more background information on major policies would be published. This undertaking was followed by the 'Croham Directive', an instruction to official heads of departments circulated by Sir Douglas Allen (afterwards Lord Croham), Head of the Home Civil Service. In terms of the Directive, departments were to publish 'as much as possible of the factual and analytical material used as the background to major policy studies'.

While initiatives such as these increased the flow of information to some extent, they had only a modest effect in opening the processes of government to public scrutiny. Moreover they depended upon a liberal exercise by the government of its discretion to make information available to the public, whereas experience has taught that in the provision of information, administrative convenience too often prevails over public benefit. Nor can ministers be relied upon to make an objective judgement, unsullied by considerations of party advantage or personal reputation, of what should, in the public interest, be disclosed or withheld. The Australian Senate Standing Committee on Constitutional and Legal Affairs concluded in 1979 (*Freedom of Information*, para 3.7):

> The essence of democratic government lies in the ability of people to make choices: about who shall govern; or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is to be regarded as adequate.

If the government controls access to information, it may use its power – and indeed has done so – to 'manage' the release of news and information in its political interest by selective 'leaking', non-attributable briefings to Lobby journalists, the manipulation of statistics (eg on hospital waiting lists or levels of crime) and like expedients (see Daintith [2002] *PL* 13). The question of misuse or 'spinning' of information so as to delude the public was highlighted in 2002–03, when it was alleged that the Blair Government had made unfounded assertions about Iraq's possession of weapons of mass destruction so as to justify the decision to go to war. On this sorry episode and the wider issues raised see the Intelligence and Security Committee, *Iraqi Weapons of Mass Destruction: Intelligence and Assessments* (Cm 5972/2003) and *Government Response* (Cm 6118/2004); Foreign Affairs Committee, *Ninth Report*, HC 813 of 2002–03 and *Government Responses* (Cm 6062/2003 and 6123/2004); W Runciman (ed), *Hutton and Butler: Lifting the Lid on the Workings of Power* (2004); Kuhn, 'Media management', in A Seldon and D Kavanagh, *The Blair Effect 2001–05* (2005); Yeung, 'Regulating government communications' [2006] *CLJ* 53.

(a) Code of Practice

In 1993 the Conservative Government issued a White Paper on *Open Government* (Cm 2290) which expressed its commitment 'to make government in the United Kingdom more open and accountable' and proposed the introduction of a non-statutory code of practice on public access to government information. The code was not to be legally enforceable but compliance would be supervised by the Parliamentary Ombudsman. *The Code of Practice on Access to Government Information* came into effect in April 1994 and a revised edition was published in 1997. The Code committed departments and public bodies within the jurisdiction of the Parliamentary Ombudsman (or of the Northern Ireland Ombudsman) to publish background facts and analysis relevant to major policy decisions, explanatory material about dealings with the public, information about how public services were run and procedures for complaints. The Code also committed governmental bodies to release, in response to specific requests from members of the public, 'information relating to their policies, actions and decisions and other matters related to their areas of responsibility'. Certain categories of information were exempted from this requirement and the Code did not confer an *entitlement* to information; nor did it provide for access to *documents* held by the public body.

A complaint that information had been improperly withheld could be taken (through an MP) to the Parliamentary Ombudsman who might, at his or her discretion, investigate the complaint and recommend (but not order) that information should be made available.

The Code of Practice was not sufficiently publicised and public recourse to its provisions was at a low level. Nonetheless, it scored a number of successes in terms of open government (see A Tomkins, *The Constitution after Scott* (1998), ch 3). A number of advocates of open government argued that nothing less than a statutory right of access to official information would be effective, and cited the beneficial results of freedom of information legislation in other countries (see eg, Hazell, 'Freedom of information in Australia, Canada and New Zealand' (1989) 67 *Pub Adm* 189).

In December 1997 the Labour Government published proposals for a Freedom of Information Act in a White Paper, *Your Right to Know* (Cm 3818), which declared the aim of the proposed legislation to be 'to encourage more open and accountable government by establishing a general statutory right of access to official records and information'. In May 1999 the Government published a draft Freedom of Information Bill for further consultation and for prelegislative scrutiny by the House of Commons Select Committee on Public Administration and the House of Lords Delegated Powers and Deregulation Committee: *Freedom of Information: Consultation on Draft Legislation* (Cm 4355/1999).

The draft bill met with widespread criticism. It was seen by the organisation Liberty as 'deeply flawed', by the Campaign for Freedom of Information as

weaker than the Code of Practice it was to replace, and was generally regarded as falling well short of the principles of openness affirmed in the Government's White Paper. In response to the criticisms some changes were made to the bill before its introduction in the House of Commons on 18 November 1999, but the Public Administration Committee expressed its disappointment that the Government had not modified the basic structure and scheme of the draft bill (*Fifth Report*, HC 925 of 1998–99) and pressed for a number of amendments to strengthen the bill in its passage through Parliament (*First Report*, HC 78 of 1999–2000). (See also the report of the House of Lords Select Committee on the draft bill, HL 97 of 1998–99.) In the face of continuing criticism in both Houses some significant improvements were made to the bill. In the third reading debate in the House of Lords a Liberal Democrat peer (Lord McNally) remarked that while the bill still had shortcomings and the White Paper, *Your Right to Know*, remained as 'a benchmark yet to be attained', the bill was nevertheless 'a Bill worth having' (HL Deb vol 619, col 851, 22 November 2000). It received the royal assent on 30 November 2000.

(b) Freedom of Information Act 2000

The Freedom of Information Act 2000 is comprehensive in its application to 'public authorities', including government departments, the National Assembly for Wales, the Northern Ireland Assembly, National Health Service bodies, publicly owned companies, local authorities, educational establishments, non-departmental public bodies, the armed forces and the police (see Schedule 1). Further bodies and offices may be included by orders made by the Secretary of State (ss 4 and 5): these may include private bodies that have functions of a public nature or provide services under contract with a public authority. In all, some 115,000 bodies are covered by the Act, far more than had been subject to the Code of Practice on Access to Government Information. The security and intelligence services are excluded from the Act's provisions.

The Act allows any person, whether or not a citizen of the United Kingdom or resident in this country, to request the disclosure of information from a public authority to which the Act applies. The authority is then, in general, obliged to inform the applicant whether it holds information of the description requested (the duty to 'confirm or deny'), and if the information is held, to communicate it to the applicant promptly and in any event within twenty working days. (Information known to officials but *unrecorded* is not covered by the Act.) So far as reasonably practicable, the information is to be provided by the means requested – as by supplying a copy of written information, allowing inspection of a record or providing a summary of the information held. An authority will not be obliged to comply with a request if the cost of doing so exceeds the 'appropriate limit' fixed by regulations: for government departments the present limit is £600 and for other public authorities it is £450. If the cost is estimated to be above the limit, the authority may refuse the request or require

payment of the whole or part of the cost. The Secretary of State for Constitutional Affairs issues a code of practice, under section 45 of the Act, giving guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in discharging their functions under the Act. (Of course, the guidance must be consistent with the duties placed on public authorities by the Act's provisions.) The code, and revisions made to it from time to time, must be laid before Parliament.

All freedom of information laws exempt some categories of information from disclosure. The 1997 White Paper, *Your Right to Know* (Cm 3818), proposed that requests for disclosure should in each case be assessed by reference to a test of harm: in general, disclosure would be denied only if it would cause 'substantial' harm to one of a limited number of protected interests. The Act takes a different approach, dispensing with a general test of this kind. It provides for twenty-three exemptions from the obligations of disclosure. Most of these are 'class' exemptions, applicable without the need to satisfy a test of harm or prejudice. Information relating to national security is exempted on this basis (a minister's certificate providing conclusive evidence that the exemption is required for safeguarding national security). There is also, for instance, a class exemption for information held by an authority for the purposes of criminal investigations or certain other investigations or proceedings conducted by the authority. Another broad class exemption covers information relating to the formulation or development of government policy, communications between ministers, advice by Law Officers and the operations of any ministerial private office. Some of these classes are of wide scope and, none being subject to a harm test, may allow public authorities to withhold much information of a factual nature not manifestly requiring to be kept secret in the public interest. Personal information and information supplied in confidence are also protected on a class basis, as is information intended for future publication (it may be at some undetermined date).

Besides the class exemptions there is a set of exemptions – such as those relating to defence, international relations, the economy, commercial interests and law enforcement – which apply if disclosure of the information would be likely, by reason of its contents, to prejudice the interest in question. A requirement of (the probability of) 'prejudice' seems to be a weaker test than that of 'substantial harm' proposed in *Your Right to Know*. What has been criticised as a 'catch-all' provision allows the withholding of information if in 'the reasonable opinion of a qualified person' (eg a minister of the Crown) it would be likely to prejudice the maintenance of the convention of collective responsibility of ministers, inhibit the free and frank provision of advice or exchange of views or otherwise prejudice the effective conduct of public affairs.

Some of the exemptions are expressed as being *absolute*, so that the duty to disclose (or to confirm or deny that the information exists) can have no application: these include, for instance, the exemptions for court records relating to particular proceedings, information provided in confidence and information

supplied by or relating to the security and intelligence services. Most of the exemptions are not absolute and in these cases the public authority must disclose the information unless 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information'. (See section 2.) This applies, for instance, to the exemption for information relating to the formulation or development of government policy, and in this case it is further provided (s 35(4)) that 'regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking'. The effect is that material such as internal reports, the evaluation of policy options and inter-departmental communications in the course of formulating policy are protected from disclosure, subject to the balancing test, while factual and background information used in the policy-making process is not only subject to balancing but (in the words of a government minister) is given 'a strong steer towards disclosure' (Lord Falconer of Thoroton, HL Deb vol 612, col 827, 20 April 2000).

The expression 'public interest' in section 2 is not defined. How is it to be understood? Is it in the public interest that the government or public authority should not be exposed to embarrassment or mistrust or ill-informed criticism?

If a public authority refuses to disclose the information requested, it must give reasons for doing so. An applicant who complains of a refusal to disclose information (or to confirm or deny its existence) must first seek internal review by the public authority concerned in accordance with its complaints procedure. If not satisfied with the result the complainant may bring the matter before the Information Commissioner, as explained below.

The Act confers supervisory and enforcement powers on the independent Information Commissioner, whose office subsumes that of the Data Protection Commissioner appointed under the Data Protection Act 1998. The Commissioner has responsibility for the administration of both Acts; he or she is to promote good practice by public authorities and their observance of the statutory requirements, and gives guidance to individuals and organisations about their rights and obligations under the law. A complainant against a refusal to disclose information (or to confirm or deny) may apply to the Information Commissioner for a decision whether the public authority has complied with the requirements of the Act. Unless the Commissioner makes no decision on the application (giving reasons for not doing so), he or she notifies the complainant and the public authority of the decision reached in a formal 'decision notice'. If the Commissioner has found that the authority is in breach of its obligation to make disclosure – whether in having wrongly concluded that the information sought was exempt from disclosure, or that (in the case of a 'contents' exemption) disclosure would cause prejudice, or that (in the case of any non-absolute exemption) the public interest in disclosing the information was outweighed by the public interest in maintaining the exemption – the Commissioner can overrule the authority's decision and specify in the decision notice the steps it must take to comply with the Act. Either the complainant or the public authority may

appeal to the Information Tribunal against a decision notice, and either party may appeal against the decision of the Tribunal to the High Court on a point of law. (The Tribunal also hears appeals against notices issued under the Data Protection Act 1998 and the Environmental Information Regulations 2004.)

Some decisions of the Information Commissioner can be overridden by executive order under section 53 of the Act. This 'executive override' applies to a decision of the Commissioner that a public authority must disclose information on the ground that the public interest in disclosure prevails over the public interest in maintaining the exemption. A Cabinet minister or the Attorney General may *in this case only* give the Commissioner a certificate that 'he has on reasonable grounds formed the opinion' that the authority was not in breach of its obligation to make disclosure. Reasons for the opinion must be given. A copy of the certificate must be laid before each House of Parliament, and the Government has given assurances that any decision to issue an overriding certificate will be considered by ministers collectively. (See HL Deb vol 618, cols 441–3, 25 October 2000.) The issue of an overriding certificate is in principle open to judicial review.

The Commissioner may investigate a public authority's compliance with the Act on his or her own initiative and issue an 'enforcement notice' if the authority is found to be in breach of its obligations. The authority may appeal to the Tribunal against such a notice and it is subject to the executive override on the question of public interest (as above).

As well as providing a right to information for individual applicants, the Act requires public authorities to adopt and publish schemes for the publication of information as a matter of course. A publication scheme must specify the classes of information which the authority intends to publish, the manner of publication and whether fees are payable. In adopting (or reviewing) a scheme, an authority is to have particular regard to the public interest in allowing public access to information that it holds as well as the public interest in the publication of reasons for decisions made by it. It was envisaged that publication schemes would 'encourage public authorities to release information automatically and to make disclosure a natural part of their working routine' (*Annual Report of the Information Commissioner*, HC 2 of 2000–01, p 17). Schemes have to be approved by the Information Commissioner.

Despite its limitations, the Freedom of Information Act has provided a modest reinforcement of governmental accountability and a worthwhile extension of the rights of the individual. The Select Committee on Constitutional Affairs said in its *Seventh Report* (HC 991 of 2005–06, para 13):

> It is clear to us that the implementation of the FOI Act has already brought about significant and new releases of information and that this information is being used in a constructive and positive way by a range of different individuals and organisations. We have seen many examples of the benefits resulting from this legislation and are impressed with the efforts made by public authorities to meet the demands of the Act. This is a significant success.

On the other hand it was noted that compliance had been variable and that delay was a particular problem, both in responses by public authorities to requests for information and in the investigation of complaints by the Office of the Information Commissioner. Some uncertainty prevails about the scope of the exemptions under the Act. The workload for authorities and the Information Commissioner has been considerable, with well over 100,000 requests for information in 2005 (about 38,000 to government departments, 70,000 to local authorities and 21,000 to the police service), while 2,385 cases reached the Office of the Information Commissioner in that year. The report of an independent Review of Government Communications (the Phillis Report (2004)) urged that a liberal approach should be taken in the administration of the Act, to overcome the reservations of those in the public service who 'look on the Act as an administrative burden and a source of potential embarrassment, rather than an important foundation of a healthier political system'.

Section 75 of the Freedom of Information Act empowers the Secretary of State to make orders repealing or amending prohibitions of the release of information contained in other enactments. A series of orders has been made under this provision; in addition the Enterprise Act 2002 repealed or amended a large number of prohibitions and provided a distinct access regime for consumer information. A separate access regime for information about environmental matters was established by the Environmental Information Regulations 2004, SI 2004/3391, implementing a European Union Directive.

Access to information is a matter devolved to the Scottish Parliament, which has enacted the Freedom of Information (Scotland) Act 2002, broadly similar to (but in some respects less restrictive than) the UK statute.

It has yet to be seen whether the legislation on freedom of information will bring about an invigorating 'culture of openness' in British government. A marked scepticism as to the objectives and effectiveness of the Freedom of Information Act is expressed by Rodney Austin, 'The Freedom of Information Act 2000: a sheep in wolf's clothing?', in J Jowell and D Oliver (eds), *The Changing Constitution* (5th edn 2004).

(See generally P Birkinshaw, *Government and Information: the Law relating to Access, Disclosure and their Regulation* (3rd edn 2005); J Wadham and J Griffiths, *Blackstone's Guide to the Freedom of Information Act* (2nd edn 2005).)

9

Parliament and the responsibility of government

Contents

1 Introduction: responsible government

Our constitutional system is one of 'responsible government'. The idea of political (or constitutional) responsibility is wide enough to include a number of values (no fewer than twelve are identified by Gilbert, 'The framework of administrative responsibility' (1959) 21 *The Journal of Politics* 373), but in the present context two are of particular importance. The first is indicated by AH Birch, *Representative and Responsible Government* (1964), pp 17–18, in saying that 'the term "responsible" is commonly used to describe a system of government in which the administration is responsive to public demands and movements of public opinion'. The responsibility of government in this sense implies that it is responsive to (takes heed of, defers to) demands, pressure or influence exerted by the public, or on its behalf by institutions or organisations that have an acknowledged place in the constitutional system. We may take the correlative of 'responsiveness' to be 'control', so that a responsive

government is one that submits to control by the public or by representative bodies. 'Control' is a central concept of constitutional thought and practice, and it needs some elucidation.

A dictionary definition of control gives as synonyms 'command', 'restraint' and 'a check', and it is evident that the word may be used in strong or weak senses. Even mere influence can be thought of as a relative power, or control in a weak sense, so that control extends in a series from a power of direction at one extreme to inducement or influence at the other. It is helpful for our purposes to retain the full range of meaning. If control were to be restricted to the power of directing the actions of subordinates, the usefulness of this term in describing the working of the constitution would be very limited, and in practice it is not so restricted. The weaker forms of control are of great importance in our system of government. Carl Friedrich has written that, apart from power, 'influence is probably the most important basic concept of political science' (*Constitutional Government and Politics* (1937), pp 16–17). Control in whatever degree is exercised *a priori*, before the relevant action or decision is taken. (For a useful analysis of the nature and forms of control, see Dunsire, 'Control over government' (1984) 26 *Malaya Law Review* 79.)

The second concept embodied in the idea of political responsibility is that of accountability (or 'responsibility' in a narrow sense). Accountability implies obligations: in the first place, an obligation to *give account* – to answer, disclose, explain or justify – which may be called 'explanatory accountability'. Next to it is 'amendatory' or 'remedial' accountability, the obligation to *account for* action or inaction – to 'answer for' whatever has been revealed of error or misgovernment, and correct or make due reparation for it. It is this sense of accountability that is meant in phrases such as 'held accountable for', with its connotations of blame and penalty. Amendatory accountability is evidently retrospective or *a posteriori*. (See Mulgan, ' "Accountability": an ever-expanding concept?' (2000) 78 *Pub Adm* 555.)

Like control, accountability (of either kind) may be strong or weak. There may be a strict legal liability to account, or an obligation founded on established convention, or a merely voluntary – and perhaps limited – acceptance of the demands of accountability. Accountability complements control. A fully responsible government is responsive, submitting to constitutional controls, and is subject to accountability in both the explanatory and the amendatory forms. In an ideal system the machinery of control prescribes or indicates limits, guidelines or policies for government; explanatory accountability provides a flow of information before, during and after the exercise of control; and amendatory accountability enables blame to be attached to government for failure of policy or abuse of power, and redress or amendment to be exacted.

As we consider the various institutions and structures through which political control and accountability are made effective against the government, we need to be aware that these organisations are themselves possessors of power

and may have their own interests and objectives. As MJC Vile observes (*Constitutionalism and the Separation of Powers* (1967), p 333):

> There have grown up new and powerful means of controlling government, but like the earlier mechanisms of control they are not neutral instruments, but organisations which must themselves be subject to control. Indeed, there can *never* be a 'neutral' control system, for we must never lose sight of the fact that these 'controls' are not pieces of machinery in the mechanical sense. The mechanical analogy is a dangerous one. They are all, without exception, patterns of behaviour, they are all procedures operated by human beings, and they can never be neutral.

We should also be aware that control and accountability function as restraints upon government and make demands on public resources. These must be accepted in a system of responsible government and indeed such restraints can contribute to the rationality (prudence, consistency and competence) of government. But there is a balance to be struck between their claims and the need for governmental effectiveness, because after all, as LJ Sharpe tells us (in JAG Griffith (ed), *From Policy to Administration* (1976), p 132):

> government in a democracy must possess the capacity to govern; that is to say, it must have that functional effectiveness that makes a reality [of] the choice between alternative policies that democracy claims to offer the electorate.

In the description of the British constitutional system as one of responsible government, what is primarily meant is that the government is responsible to Parliament, and more precisely to the House of Commons. In other words ours is a system of parliamentary government in which the government's authority depends upon its having the confidence of the elected House. (As we saw in chapter 4, this model also applies, albeit with a number of variations, to the devolved institutions in Scotland, Wales and Northern Ireland.) The aspect of responsibility which is emphasised in this description is the liability of the government to be dismissed by a vote of the Commons (subject to an appeal to the electorate). Dorothy Pickles has written (*Democracy* (1970), p 148): 'The essential requirement in a parliamentary democracy is that Parliament shall retain the power to dismiss Governments.' In practice such dismissals have been a rarity in Britain. Governments were defeated on votes of confidence only three times in the twentieth century – in 1924 (twice) and 1979 – but the requirement that the government must retain the confidence of the House of Commons is still a fundamental principle of the constitution. In the last resort it is sustained by the government's dependence on the House of Commons for 'supply' (finance) and the passing of legislation.

In practice the power of Parliament to dismiss the government is a contingent power, which can be asserted only in circumstances of minority government or breakdown of party solidarity. In normal circumstances, as John Mackintosh

says, 'the House of Commons is enmeshed with and supports the government of the day' (J Mackintosh (ed), *People and Parliament* (1978), p 210). It is, indeed, a paradoxical feature of the modern constitution that for the control and accountability of government we rely mainly upon an elected House in which a majority see it as their principal function to maintain the government in power. But the ultimate, collective responsibility of the government to Parliament is not without meaning. The need to retain the confidence of the House imposes restraints. It compels governments to explain, justify, bargain and concede.

John Stuart Mill, *Considerations on Representative Government* (1861), p 104

> Instead of the function of governing, for which it is radically unfit, the proper office of a representative assembly is to watch and control the government: to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable; to censure them if found condemnable, and, if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors.

It was not true when Mill was writing, but over the course of the twentieth century it became the case that, ordinarily, a government with an absolute majority in the House of Commons can rely on party cohesion and discipline to assure it of the confidence of the House. Defeats in the House, even on important issues, are not considered to require resignation or a dissolution, unless the House has been expressly invited to treat the issue as one of confidence in the government. (The classic statement of parliamentary government in the era of John Stuart Mill remains W Bagehot, *The English Constitution* (1867).)

In the Parliament of March-September 1974 a minority Labour Government faced a House of Commons in which supporters of opposition parties outnumbered Labour MPs by over thirty. The Prime Minister explained the Government's position to the House.

House of Commons, HC Deb vol 870, cols 70–1, 12 March 1974

> **The Prime Minister (Mr Harold Wilson):** . . . The Government intend to treat with suitable respect, but not with exaggerated respect, the results of any snap vote or any snap Division . . .
>
> In case of a Government defeat, either in such circumstances or in a more clear expression of opinion, the Government will consider their position and make a definitive statement after due consideration. But the Government will not be forced to go to the country except in a situation in which every hon. Member in the House was voting knowing the full consequences of his vote.

> . . . I am saying that if there were to be anything put to the House which could have those consequences, every hon. Member would have it explained to him in the House by the Government before he voted.

(A similar statement was made by Ramsay Macdonald as head of a minority government in 1924: see I Jennings, *Cabinet Government* (3rd edn 1959), p 494.)

A Prime Minister may announce that an issue will be treated as one of confidence with the object of overcoming dissidence in the ranks of his or her parliamentary party by the threat of a general election. Mr Major as Prime Minister resorted to this expedient on several occasions in relation to policy on the European Union, as in November 1992 on a motion to proceed with the European Communities (Amendment) Bill, and again in the following year in moving 'that this House has confidence in the policy of Her Majesty's Government on the adoption of the Protocol on Social Policy' (HC Deb vol 229, col 625, 23 July 1993: see also col 627). Rebels on the Conservative back benches were once more coerced during the passage of the European Communities (Finance) Bill, the Prime Minister saying that the passage of the bill 'in all its essentials is inescapably a matter of confidence' (HC Deb vol 250, col 30, 16 November 1994).

Defeats in the House of Commons do not ordinarily put the government in jeopardy. The 1974 Labour Government suffered seventeen defeats in the House of Commons in that year. In the 1974–79 Parliament, the Labour Government – again without an overall majority from 1976 – suffered forty-two defeats before being obliged to appeal to the electorate. (See P Norton, *Dissension in the House of Commons 1974–1979* (1980), p 441.)

Philip Norton, 'The House of Commons and the Constitution: the Challenges of the 1970s' (1981) 34 *Parliamentary Affairs* 253, 254–5, 266–7

As a result of the political developments of the nineteenth century, the House of Commons became the dominant element of the triumvirate of the Queen-in-Parliament, but these very developments (the introduction of near-universal male suffrage and the resulting party government) served to move the House from an important position in the decision-making process to a somewhat ambivalent one related to, yet not part of, the main decision-making machinery. The outputs of the Queen-in-Parliament continued to be legally omnipotent as a result of the judicially self-imposed if not universally revered doctrine of 'parliamentary sovereignty', but those outputs were the results of decisions taken elsewhere. To adapt the House of Commons to the changed political circumstances, and especially to the new relationship between it and the government, its functions were variously redefined. These functions find no delineation in one formal, binding document. There does appear, though, to be some general if at times tenuous agreement on the main functions of the post-1867 House [following the extension of voting rights by the Representation of the People Act 1867]: To

provide, by convention, the personnel of government (a function shared with the Lords); to constitute a 'representative' assembly, members being returned to defend and pursue the interest of their constituents and de facto of wider interests (which may be categorised as the specific and general functions of representation); in pursuance of the representative function, to legitimise the actions and the legislative measures advanced by Her Majesty's government, and prior to giving legitimisation to subject the government and its measures to a process of scrutiny and influence. The House fulfils a number of other functions, including a minor shared legislative role, but the foregoing constitute the most important.

In fulfilling the function of scrutiny and influence, MPs found themselves faced with a serious limitation. To be effective, scrutiny rested primarily on the existence of the House's sanction of defeating the government in the division lobbies – its ability to deny legitimisation to a measure or part of it – but the MPs in the government party proved unwilling to utilise this power. Much of this refusal was for political reasons: members of the governing party wanted to support the government and normally approved of its measures. On those occasions when they were inclined to vote with the opposition, they were restrained from doing so by what they perceived to be a constitutional convention: that a government defeat in the division lobbies would necessitate the government either resigning or requesting a dissolution. As Arthur Balfour commented in 1905, it appeared to be assumed in various parts of the House 'that the accepted constitutional principle is that, when a government suffers defeat, either in supply or on any other subject, the proper course for His Majesty's responsible advisers is either to ask His Majesty to relieve them of their office or to ask His Majesty to dissolve parliament'. This view remained current until at least the 1970s . . . A consequence was cohesion in the division lobbies. Sustenance of the government in office was equated with sustaining the government in every division. The greater the degree of cohesion (or at least the fewer the defeats), the more this appeared to be borne out in practice. The result was an apparent paradox. On the one hand, the power of the House to ensure effective scrutiny and influence of government, to determine the boundaries in which it could operate, was based upon its power to defeat the government, to deny assent to its measures. On the other hand, given the assumption that a defeat would bring the government down, a majority of the House was not prepared to use it. Hence the ease with which government measures went through and the criticisms levelled at the Commons for failing to fulfil effectively the tasks expected of it. The events of the 1970s served to resolve this paradox.

The belief that a defeat in the division lobbies necessitated the government's resignation or an election was based on no authoritative source nor upon any continuous basis of practice. In that sense, the belief could be described as constituting a constitutional 'myth'. Nevertheless, so long as members continued in this belief, it influenced their behaviour. It took the defeats of the 1970s to make members realise that defeats could be imposed upon the government without there necessarily being any wider constitutional implications. The constitutional reality, as it had been since 1841, was that a government was required by convention to resign (or dissolve) in the event only of losing a vote of confidence; in the event of losing a division on an item central to its policy, it had the discretion as to whether to resign (or request a dissolution) or seek a vote of confidence from the House; in the event of defeat on any other matter, it had to consider only whether to accept the defeat or seek its reversal at a later stage. This distinction was given clear recognition by Stanley Baldwin

in the House of Commons in April 1936. The response of the governments of the 1970s to the defeats suffered was in line with precedent. The popular view that there was a deviation from previous practice is incorrect. What changed was not the basis of the government's response but the number of defeats. Whereas previous defeats had been few and far between, and did not impact themselves upon members' consciousness, the defeats of the 1970s were too numerous to be ignored. Members began to realise the implications of their own actions and to realise that they could effect changes in the measures of government without necessarily threatening its life. This was to generate a change in attitude and to resolve the paradox of the House depending upon a power it was not willing to use. Members proved willing to overcome the constraints of party to employ the power that resided with them. Government could no longer rely upon the loyalty of its own backbenchers to see all its measures through in the form desired. (Nor upon the electorate and the electoral system to provide it with an overall majority.) In consequence, members restored to themselves the means by which they could achieve more effectively their function of scrutiny and influence.

The revived independence of backbench MPs and their willingness to vote against their own government did not evaporate after 1979, but the substantial overall majorities enjoyed by Conservative Governments from 1979 to 1992 reduced the incidence of government defeats in the House. After the 1992 election Mr Major's Government had a less secure and diminishing majority and was more vulnerable to backbench rebellion. (Mutinousness among 'Eurosceptic' Conservative backbenchers led to the withdrawal of the whip from eight of their number in November 1994, for five months.) The Labour Government which came to power in 1997 with a majority of 179 and was returned to office in 2001 with a majority of 167 and again in 2005 with a reduced but still seemingly safe majority of 66, has not been immune from backbench rebellion and, on occasion, defeat in the House, as will be seen later. (See further P Norton (ed), *Parliament in the 1980s* (1985), ch 2 and P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005); see further below.)

Influence and scrutiny – or 'controlling' and 'calling to account' – are functions of Parliament which depend largely on the acceptance by ministers of the Crown of their collective and individual responsibility to Parliament. The responsibility of ministers is the mainspring of the working relationship between Parliament and government. As Michael Rush remarks, it 'underpins all debates, all parliamentary questions, all committee activity – the means by which Parliament seeks to exercise its scrutiny' (R Pyper and L Robins (eds), *Governing the UK in the 1990s* (1995), p 109).

2 Individual ministerial responsibility

'One of the fundamentals of our system of Government', wrote Lord Morrison (*Government and Parliament* (3rd edn 1964), p 332), 'is that some Minister of the Crown is responsible to Parliament, and through Parliament to the public, for every act of the Executive'. According to this convention, every minister is

responsible to Parliament for his or her own official conduct, and a minister who heads a department also has ultimate responsibility for everything done by the department. This is known as the convention of individual ministerial responsibility. (For the collective responsibility of ministers, see chapter 6.)

A convention in these terms is necessary, first, to enable Parliament to make good the 'explanatory accountability' of government: for every branch of the government's business there must be an identifiable minister who has an obligation to answer and explain to Parliament. The performance by Parliament of its functions of controlling the executive and holding it accountable for errors and malpractice depends on getting from ministers the relevant facts and explanations. This is underlined in the Scott Report on arms to Iraq (HC 115 of 1995–96), para K8.2:

> The obligation of Ministers to give information about the activities of their departments and to give information and explanations for the actions and omissions of their civil servants, lies at the heart of Ministerial accountability.

The Scott Report revealed, however, that the Government had failed lamentably in its observance of this obligation in pursuing its policies on defence sales to Iran and Iraq between 1984 and 1990. Sir Richard Scott found that there had been 'a consistent undervaluing by Government of the public interest that full information should be made available to Parliament' (para D1.165) and observed that 'the withholding of information by an accountable Minister should never be based on reasons of convenience or for the avoidance of political embarrassment, but should always require special and carefully considered justification' (para K8.5).

The Ministerial Code (2005) enjoins ministers to be 'as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest' and declares it to be 'of paramount importance that Ministers give accurate and truthful information to Parliament, correcting any inadvertent error at the earliest opportunity'. (See further above, p 374.) These statements of principle first appeared in the 1997 edition of the Ministerial Code in response to an important initiative taken by both Houses of Parliament in that year, following a recommendation of the Public Service Committee of the House of Commons (*Second Report*, HC 313-I of 1995–96, para 55, the committee's recommendation itself coming as a direct consequence of the findings of the Scott Report (above)). Each House passed a resolution on ministerial accountability to Parliament in terms which were subsequently incorporated in the Ministerial Code. (See HC Deb vol 292, cols 1046–7, 19 March 1997 and HL Deb vol 579, cols 1055–62, 20 March 1997.) These resolutions translate the formerly unwritten convention of ministerial responsibility into a clear parliamentary rule, no longer unilaterally alterable by government. (See A Tomkins, *The Constitution After Scott* (1998), p 62; although cf Woodhouse, 'Ministerial responsibility: something old, something new' [1997] *PL* 262.)

Secondly, the convention of individual ministerial responsibility is traditionally supposed to fix the blame on the minister heading a department for every failure of departmental policy or administration, whether it is the minister himself who was at fault, or a civil servant, or if the failure resulted from a defect of departmental organisation. The minister must, in this orthodox version, submit to the judgement of Parliament and, if the failure is a serious one, should resign from office without waiting for a vote of censure.

Crichel Down

The traditional view of ministerial responsibility seemed to be vindicated by the resignation in 1954 of the Minister of Agriculture, Sir Thomas Dugdale, following the notorious episode of Crichel Down. In 1938 some land in Dorset had been acquired by the Air Ministry from its owners, for use as a bombing range. (Powers of compulsory acquisition were available, but it had not proved necessary to resort to them.) After the war the land was no longer needed for the purpose for which it had been acquired, and it was transferred to the Ministry of Agriculture and by them to the Commissioners for Crown Lands, who let it to a tenant of their choice. A request by one of the former owners to buy back his land was refused, and neighbouring landowners who had been given to understand that they would be able to bid for tenancies of the land were denied the opportunity to do so. These events led to an official inquiry which came to the conclusion (since criticised for its partiality: see I Nicolson, *The Mystery of Crichel Down* (1986)) that civil servants in the Ministry of Agriculture had acted in a high-handed and deceitful manner: *Report of the Public Inquiry into the Disposal of Land at Crichel Down* (Cmd 9176/1954). In consequence of this report and of widespread criticism, in Parliament and outside, of the conduct of his department, the minister resigned. He said in the House (HC Deb vol 530, col 1186, 20 July 1954):

> I, as Minister, must accept full responsibility to Parliament for any mistakes and inefficiency of officials in my Department, just as, when my officials bring off any successes on my behalf, I take full credit for them.

But this seemingly unequivocal demonstration of individual ministerial responsibility in its traditional sense was in fact blurred by some of the attendant circumstances. First, civil servants concerned in the case had been named and criticised in the report of the Inquiry: it was not only the minister who had to take the blame. Secondly, the minister himself (and two junior ministers) had taken a personal part in the transactions relating to Crichel Down, and the minister was to admit to the House that his decisions had been taken with knowledge of the main facts of the case. (See Nicolson, above, pp 54–5, 61, 76–7, 90–1.) In reality, it seems that, notwithstanding its iconic status as the leading example of a minister falling on his sword because of mistakes made by others and where he himself had done nothing wrong, Sir Thomas Dugdale's

resignation actually owed more to the fact that his policies had fallen out of favour with both the Cabinet and the Conservative backbenchers, who had begun to lose confidence in him (see A Tomkins, *The Constitution after Scott* (1998), p 56). In the Crichel Down debate on 20 July 1954 the Home Secretary attempted to clarify the convention.

House of Commons, HC Deb vol 530, cols 1285–7, 20 July 1954

The Home Secretary (Sir David Maxwell Fyfe): . . . There has been criticism that the principle operates so as to oblige Ministers to extend total protection to their officials and to endorse their acts, and to cause the position that civil servants cannot be called to account and are effectively responsible to no one. That is a position which I believe is quite wrong, and I think it is the cardinal error that has crept into the appreciation of this situation. It is quite untrue that well-justified public criticism of the actions of civil servants cannot be made on a suitable occasion. The position of the civil servant is that he is wholly and directly responsible to his Minister. It is worth stating again that he holds his office 'at pleasure' and can be dismissed at any time by the Minister; and that power is none the less real because it is seldom used. . . .

I would like to put the different categories where different considerations apply. I am in agreement with the right hon. Gentleman who has just spoken, that in the case where there is an explicit order by a Minister, the Minister must protect the civil servant who has carried out his order. Equally, where the civil servant acts properly in accordance with the policy laid down by the Minister, the Minister must protect and defend him.

I come to the third category, which is different. . . . Where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the Minister acknowledges the mistake and he accepts the responsibility, although he is not personally involved. He states that he will take corrective action in the Department. I agree with the right hon. Gentleman that he would not, in those circumstances, expose the official to public criticism. . . .

But when one comes to the fourth category, where action has been taken by a civil servant of which the Minister disapproves and has no prior knowledge, and the conduct of the official is reprehensible, then there is no obligation on the part of the Minister to endorse what he believes to be wrong, or to defend what are clearly shown to be errors of his officers. The Minister is not bound to defend action of which he did not know, or of which he disapproves. But, of course, he remains constitutionally responsible to Parliament for the fact that something has gone wrong, and he alone can tell Parliament what has occurred and render an account of his stewardship.

(See further the discussion of the Crichel Down affair by J Jacob, *The Republican Crown* (1996), pp 168–74.)

(a) A convention of resignation?

The traditional view that a minister is bound to resign in atonement for departmental misconduct does not take account of the great increase in the work of government departments in modern times, which has made it impossible for

ministers to supervise directly or even know about the bulk of their departments' everyday business, including decisions taken by officials in the minister's name. It has also been shown that the traditional view, with its emphasis on the sanction of ministerial resignation, does not accord with the facts of political life. Professor SE Finer looked for ministerial resignations in the period 1855–1955 that had been 'forced by overt criticism from the House of Commons' and so might be attributed to the convention of ministerial responsibility. He found that there had been only twenty such resignations in the century, 'a tiny number', as he wrote, 'compared with the known instances of mismanagement and blunderings'. The following passage gives his conclusions.

SE Finer, 'The Individual Responsibility of Ministers' (1956) 34 *Pub Adm* 377, 393–4

The convention implies a form of punishment for a delinquent Minister. That punishment is no longer an act of attainder, or an impeachment, but simply loss of office.

If each, or even very many charges of incompetence were habitually followed by the punishment, the remedy would be a very real one: its deterrent effect would be extremely great. In fact, that sequence is not only exceedingly rare, but arbitrary and unpredictable. Most charges never reach the stage of individualisation at all: they are stifled under the blanket of party solidarity. Only when there is a minority Government, or in the infrequent cases where the Minister seriously alienates his own back benchers, does the issue of the individual culpability of the Minister even arise. Even there it is subject to hazards: the punishment may be avoided if the Prime Minister, whether on his own or on the Minister's initiative, makes a timely re-shuffle. Even when some charges get through the now finely woven net, and are laid at the door of a Minister, much depends on his nicety, and much on the character of the Prime Minister. Brazen tenacity of office can still win a reprieve. And, in the last resort – though this happens infrequently – the resignation of the Minister may be made purely formal by reappointment to another post soon afterwards.

We may put the matter in this way: whether a Minister is forced to resign depends on three factors, on himself, his Prime Minister and his party . . . For a resignation to occur all three factors have to be just so: the Minister compliant, the Prime Minister firm, the party clamorous. This conjuncture is rare, and is in fact fortuitous. Above all, it is indiscriminate – which Ministers escape and which do not is decided neither by the circumstances of the offence nor its gravity. A Wyndham and a Chamberlain go for a peccadillo, a Kitchener will remain despite major blunders.

A remedy ought to be certain. A punishment, to be deterrent, ought to be certain. But whether the Minister should resign is simply the (necessarily) haphazard consequence of a fortuitous concomitance of personal, party and political temper.

Is there then a 'convention' of resignation at all?

A convention, in Dicey's sense, is a rule which is not enforced by the Courts. The important word is 'rule'. 'Rule' does not mean merely an observed uniformity in the past; the notion includes the expectation that the uniformity will continue in the future. It is not simply a description; it is a prescription. It has a compulsive force.

> Now in its first sense, that the Minister alone *speaks* for his Civil Servants to the House and to his Civil Servants for the House, the convention of ministerial responsibility has both the proleptic and the compulsive features of a 'rule'. But in the sense in which we have been considering it, that the Minister *may be punished, through loss of office* for all the misdeeds and neglects of his Civil Servants which he cannot prove to have been outside all possibility of his cognisance and control, the proposition does not seem to be a rule at all.
>
> What is the compulsive element in such a 'rule'? All it says (on examination) is that if the Minister is yielding, his Prime Minister unbending and his party out for blood – no matter how serious or trivial the reason – the Minister will find himself without Parliamentary support. This is a statement of fact, not a code. What is more, as a statement of fact it comes very close to being a truism: that a Minister entrusted by his Prime Minister with certain duties must needs resign if he loses the support of his majority. The only compulsive element in the proposition is that if and when a Minister loses his majority he ought to get out rather than be kicked out.
>
> Moreover, even as a simple generalisation, an observed uniformity, the 'convention' is, surely, highly misleading? It takes the wrong cases: it generalises from the exceptions and neglects the common run. There are four categories of delinquent Ministers: the fortunate, the less fortunate, the unfortunate, and the plain unlucky. After sinning, the first go to other Ministries; the second to Another Place [ie to the House of Lords]; the third just go. Of the fourth there are but twenty examples in a century: indeed, if one omits Neville Chamberlain (an anomaly) and the 'personal' cases . . ., there are but sixteen. Not for these sixteen the honourable exchange of offices, or the silent and not dishonourable exit. Their lot is public penance in the white sheet of a resignation speech or letter . . . It is on some sixteen or at most nineteen penitents and one anomaly that the generalisation has been based.

The resignation of Sir Thomas Dugdale in the Crichel Down affair (above) was in accord with Finer's thesis: the minister had lost the confidence of MPs of his own party, and the Cabinet did not find it expedient to outface its backbench supporters.

Between 1955 and 1982 there were only two resignations of senior ministers (Profumo and Jellicoe) that can be put down to an acknowledgement by the ministers concerned of their responsibility to Parliament (the resignation of Maudling in 1972 would not seem to fall into this category) and in each case the resignation was connected with the minister's own conduct, not the actions of his department. In 1982 the unexpected Argentine invasion of the Falkland Islands and public and parliamentary criticism of the role of the Foreign and Commonwealth Office was followed by the resignations of the Foreign Secretary (Lord Carrington), the Lord Privy Seal (Mr Humphrey Atkins), who had been the spokesman for the Foreign Office in the House of Commons, and a Minister of State who had conducted the negotiations with Argentina on the Falkland Islands question. The ministers in resigning accepted responsibility to Parliament for a failure of policy, afterwards attributed in part to defects in

the machinery of government, misjudgements by ministers and officials of Argentine intentions and faulty decisions by ministers. (See *Falkland Islands Review*, Cmnd 8787/1983.)

Letter of Resignation from Lord Carrington, Secretary of State for Foreign and Commonwealth Affairs, to the Prime Minister, Mrs Margaret Thatcher, 5 April 1982

Dear Margaret

The Argentine invasion of the Falkland Islands has led to strong criticism in Parliament and in the press on the Government's policy. In my view, much of the criticism is unfounded. But I have been responsible for the conduct of that policy and I think it right that I should resign. As you know, I have given long and careful thought to this. I warmly appreciate the kindness and support which you showed me when we discussed this matter on Saturday. But the fact remains that the invasion of the Falkland Islands has been a humiliating affront to this country.

We must now, as you said in the House of Commons, do everything we can to uphold the right of the islanders to live in peace, to choose their own way of life and to determine their own allegiance. I am sure that this is the right course, and one which deserves the undivided support of Parliament and of the country. But I have concluded with regret that this support will more easily be maintained if the Foreign Office is entrusted to someone else.

I have been privileged to be a member of this Government and to be associated with its achievements over the past three years. I need hardly say that the Government will continue to have my active support. I am most grateful to you personally for the unfailing confidence you have shown in me.

Yours ever, Peter

(The Minister of State who resigned – Mr Richard Luce – was reappointed to the same office fifteen months later.)

It has been remarked that the resignation of Lord Carrington and his colleagues 'continues to shine like a beacon of honour in an era when most ministers in trouble appear to hang on to their office as if it were a personal freehold rather than a Crown possession' (P Hennessy, *The Prime Minister* (2000), p 415). The invasion of the Falklands had caused a loss of confidence among parliamentarians – not least those of the government party – and the public in the organisation and leadership of the Foreign Office, and the ministers concerned rightly concluded that their resignations were required for a restoration of that confidence. But the circumstances were unusual, and most administrative failures are of a more limited kind which do not bring into question the whole departmental organisation or the leadership of ministers. It is not likely that a minister's head will be demanded or proffered in such cases. But if the error is serious and has grave consequences, critical attention

may be focused on the minister. His or her response will depend on the factors of personality, party and politics indicated by Professor Finer (above).

The Maze break-out

In September 1983 there was a mass break-out of republican prisoners from the Maze prison in Belfast, an event described in a leading article in *The Times* (8 February 1984) as 'a fearful blow to the authority of the state in Northern Ireland'. It was serious enough to raise the question of the responsibility of ministers. Those concerned were the Secretary of State in charge of the Northern Ireland Office, Mr James Prior, and the Under Secretary of State responsible for the prison service, Mr Nicholas Scott, who had been in office for only three months at the time of the break-out. His predecessor, Lord Gowrie, had moved to the Privy Council Office as Minister for the Arts.

A report by Sir James Hennessy on security arrangements at the Maze prison (HC 203 of 1983–84) found that there had been deficiencies in the management and physical security of the prison, and that faulty procedures and laxity and negligence of staff had facilitated the escape. For this state of affairs the report held the prison governor to be primarily responsible; there was also some criticism of the prison department of the Northern Ireland Office for its oversight of security at the prison. The Government accepted the report and its recommendations. The prison governor resigned, but no ministers did so. For reasons which may be surmised, the Prime Minister was not disposed to press for Mr Prior's resignation; neither did the Labour Opposition wish to see him replaced at the Northern Ireland Office by any other Tory minister.

House of Commons, HC Deb vol 53, cols 1042, 1055–6, 1060–1, 1108, 9 February 1984

The Secretary of State for Northern Ireland (Mr James Prior): . . . There are those who, while they accept this policy [of treating IRA prisoners like all other prisoners] have nevertheless suggested that the circumstances of the escape demand ministerial resignation. I take that view seriously and have given it the most careful consideration. I share hon. Members' concern about the honour of public life and the maintenance of the highest standards. I said at the time of my statement to the House on 24 October, without any pre-knowledge of what Hennessy would find:

> 'It would be a matter for resignation if the report of the Hennessy inquiry showed that what happened was the result of some act of policy that was my responsibility, or that I failed to implement something that I had been asked to implement, or should have implemented. In that case, I should resign.'

In putting the emphasis that I did on the issue of 'policy', I was not seeking to map out some new doctrine of ministerial responsibility. I was responding to the accusations made

at that time that it was policy decisions, reached at the end of the hunger strike, that made the escape possible.

Since the report was published, the nature of the charges levelled at my hon. Friend and myself has changed. It is now argued in some quarters that Ministers are responsible for everything that happens in their Departments and should resign if anything goes wrong . . . I want to make it quite clear that if there were any evidence in the Hennessy report that Ministers were to blame for the escape, I would not hesitate to accept that blame and act accordingly, and so I know, would my hon. Friend [Mr Nicholas Scott]. However, I do not accept – and I do not think it right for the House to accept – that there is any constitutional or other principle that requires ministerial resignations in the face of failure, either by others to carry out orders or procedures or by their supervisors to ensure that staff carried out those orders. Let the House be clear: the Hennessy report finds that the escape would not have succeeded if orders and procedures had been properly carried out that Sunday afternoon . . .

Whatever some may wish, there is no clear rule and no established convention. Rightly, it is a matter of judgement in the light of individual circumstances. I do not . . . seek to justify my decision on the ground that there are many difficulties in Northern Ireland. There are, but that adds to rather than subtracts from the argument. The question that I have asked myself is whether . . . I was to blame for those prisoners escaping. The Hennessy report is quite explicit in its conclusion that, although there may have been weaknesses in the physical security of the prison and in the Prisons Department, the escape could not have taken place if the procedures laid down for the running of the prison had been followed . . .

Mr Peter Archer (Opposition spokesman on Northern Ireland): . . . The purpose of the debate is not to ask for resignations . . . We must consider whether Northern Ireland would benefit if a particular Minister resigned. I should not think it right to call for the resignation of the Secretary of State. First, I do not think that he could reasonably have been expected, personally, to have read the minutes [relating to the appointment of dangerous republican prisoners as orderlies]. I believe that he was badly served. Secondly, the right hon. Gentleman may be embarrassed at this; but I cannot envisage him being replaced from among members of the present Administration by anyone more compassionate or more politically sensitive . . .

The hon. Member for Chelsea [Mr Nicholas Scott] . . . had held responsibility for only three months prior to the breakout. We can see today what a difficult and complicated situation existed . . . I do not seek to convict him. Lord Gowrie is in a different position. In the absence of any explanations today, it is difficult to see how he could justify remaining a member of the Government . . .

Mr J Enoch Powell: The Secretary of State, from the beginning of his speech, recognised the central issue in this debate, that of ministerial responsibility, without which the House scarcely has a real function or any real service that it can perform for the people whom it represents. We are concerned with the nature of the responsibility, the ministerial responsibility, for an event which, even in isolation from its actual context, was a major disaster.

I want to begin by eliminating from this consideration the Under-Secretary of State for Northern Ireland . . . [Mr Scott], because references to him in this context have shown a gross misconception . . . The fact is that the entire responsibility, whether or not it is delegated to a junior Minister, rests with the Secretary of State . . .

As the Secretary of State reminded us this afternoon, even before the publication of the report he drew a distinction, which I believe to be invalid, between responsibility for policy and responsibility for administration. I believe that this is a wholly fallacious view of the nature of ministerial responsibility . . . [E]ven if all considerations of policy could be eliminated, the responsibility for the administration of a Department remains irrevocably with the Minister in charge. It is impossible for him to say to the House or to the country, 'The policy was excellent and that was mine, but the execution was defective or disastrous and that has nothing to do with me'. If that were to be the accepted position, there would be no political source to which the public could complain about administration or from which it could seek redress for failings of administration.

What happened was an immense administrative disaster. It was . . . a disaster that occurred in an area which was quite clearly central to the Department's responsibilities. If the responsibility for administration so central to a Department can be abjured by a Minister, a great deal of our proceedings in the House is a beating of the air because we are talking to people who, in the last resort, disclaim the responsibility for the administration. . . .

The Under-Secretary of State for Northern Ireland (Mr Nicholas Scott): . . . The right hon. Member for Down, South [Mr Powell] . . . outlined a constitutional convention which he might wish existed, which perhaps once did exist, but which, frankly, has not existed in politics in this country for many years . . .

Shifts in the understanding of ministerial responsibility prompted the Treasury and Civil Service Committee to remark: 'If Crichel Down is dead and Ministers are not accountable to Parliament for some actions of their officials, then who is?' (*Seventh Report*, HC 92-I of 1985–86, para 3.17).

Resignations of ministers as a result of sexual escapades, imprudent remarks, questionable financial transactions, acceptance of payment for asking parliamentary questions and other instances of personal default or misjudgement occurred with unwonted frequency in the 1980s and 1990s. Not all such resignations can be seen as arising from the minister's responsibility to Parliament, and will often have been precipitated by public opinion, or a press campaign, or the concerns of ministerial colleagues and government backbenchers for the political fortunes of the party (or by a combination of these factors). Such was the resignation in 2001 of Mr Peter Mandelson, Secretary of State for Northern Ireland, whose position had become untenable following allegations that he had been less than candid and had misled ministerial colleagues and the public about his involvement in a passport application by a businessman with whom he was associated. (The former minister was afterwards acquitted of any improper conduct in an independent inquiry by Sir Anthony

Hammond: *Review of the Circumstances Surrounding an Application for Naturalisation by Mr S P Hinduja in 1998*, HC 287 of 2000–01).

The Blair Government's second term of office (2001–05) yielded a crop of senior ministerial resignations. First there was the resignation of Stephen Byers as Secretary of State for Transport, Local Government and the Regions in 2002 after extensive criticism, by opposition MPs and in the media, of certain of his decisions said to show inept judgement and of his deficient management of his department. In resigning Mr Byers acknowledged errors of judgement and said that he had become 'a distraction from what the government is achieving'. Later in that year Estelle Morris resigned as Secretary of State for Education and Skills, following criticism of her handling of problems connected with checks on the background of teachers and procedures for the determination of 'A' level grades, as well as failure to meet literacy and numeracy targets set by her predecessor. In resigning she admitted to weaknesses in her strategic management of her department and in her dealings with the media.

Neither of these resignations can be attributed to errors or maladministration by departmental officials. Both ministers resigned on the ground of deficiencies, admitted by them, in their official conduct as ministers and in the running of their departments, not for misconduct in their personal lives. Each resignation followed sustained criticism of the minister from opposition MPs and in the media. Diana Woodhouse concludes ('UK ministerial responsibility in 2002: the tale of two resignations' (2004) 82 *Pub Adm* 1, 6): 'Whatever the reasons for the resignations of Morris and Byers, they provide additional precedents for a resigning convention within the departmental context'. She sees these resignations as vindicating a 'role responsibility' of ministers – a minister's obligation to provide effective leadership and supervision of his or her department and to account to Parliament for the proper performance of this role, with resignation as the ultimate sanction for failure. Woodhouse also draws attention to the significant part played by media criticism in these resignations, asking whether 'there has been a shift in the location of accountability, away from politicians, and particularly Parliament, to the media'.

A third resignation was that of David Blunkett as Home Secretary in December 2004 after his private office had intervened with the Immigration and Nationality Directorate regarding an application by his lover's nanny for indefinite leave to remain in the United Kingdom. Mr Blunkett at first publicly denied any intervention by his office but when presented with contradictory evidence he resigned, saying that he would not hide behind or blame his officials and took responsibility for what had occurred. Nicholas Bamforth has commented that as Blunkett's initial (inadvertently false) denial was made to the media and not to Parliament, his resignation evidences a broadening of ministerial responsibility to Parliament so as to embrace ministerial statements made outside the House ('Political accountability in play' [2005] *PL* 229). Mr Blunkett re-entered the Cabinet as Secretary of State for Work and Pensions after the general election of May 2005, but his renewed tenure of office was short-lived.

In October 2005 it came to light that, after leaving his previous office, he had failed to inform the Advisory Committee on Business Appointments about paid posts taken up by him, as required of ex-ministers by the Ministerial Code. Mr Blunkett acknowledged his mistake and resigned. Here we see the convention of ministerial responsibility extending to a minister's former actions when not in office, although the obligation in which he had defaulted arose from his tenure of his previous office, in which he had become bound by the provisions of the Code.

On the other hand we find ministers continuing, in cases of departmental failure, blunders or misconduct, to invoke the distinctions formulated in the Crichel Down and Maze Prison cases, disclaiming any obligation to resign for errors of subordinates. On the occasion of another prison escape – of IRA prisoners from Brixton in 1991 – the Home Secretary, Mr Kenneth Baker, declined to resign for what he described as 'operational failures' by officers of the prison department. Even for action in which he had himself taken a part and for which he was held to have been guilty, in his official capacity as Secretary of State for the Home Department, of contempt of court (see *M v Home Office*, above, p 89), the same Mr Baker did not contemplate resignation.

After further escapes from prison an inquiry into prison security (Learmont Report, Cm 3020/1995) found serious management failures and inefficiency in the Prison Service (an executive agency of the Home Office): the Director-General of the Service (Mr Lewis) was dismissed as bearing 'operational' responsibility while the Home Secretary, Mr Michael Howard, survived. (See Barker, 'Political responsibility for UK prison security: ministers escape again' (1998) 76 *Pub Adm* 1; Polidano, 'The bureaucrat who fell under a bus: ministerial responsibility, executive agencies and the Derek Lewis affair in Britain' (1999) 12 *Governance* 201.) The tally of non-resignations was added to when criticism of ministers in the Scott Report on arms to Iraq (HC 115 of 1995–96) were brazened out, the government taking refuge in Sir Richard Scott's finding that, although ministers had misled Parliament, they had done so without 'duplicitous intention' (see A Tomkins, *The Constitution after Scott* (1998), ch 1).

The case of Charles Clarke, Home Secretary from 2004 to 2006, raises points of interest. It was disclosed in April 2006 that about 1,000 foreign criminals, who should have been considered for deportation or removal, had completed their prison sentences and been released without any consideration by the Immigration and Nationality Directorate of the Home Office of deportation or removal action. For this failure in the Home Office, Mr Clarke offered his resignation to the Prime Minister who declined to accept it, and he remained in office. In a statement in the House of Commons (HC Deb vol 445, col 573, 26 April 2006), Mr Clarke apologised for what had occurred, saying that he took responsibility for what he acknowledged to be a systemic failure in the department and promising to take action to put things right. Some days later

the Prime Minister, in carrying out a Cabinet 'reshuffle', decided to remove Mr Clarke from office as Home Secretary. Dissatisfied with this decision Mr Clarke declined other Cabinet posts which were offered to him and resigned from the Government. Mr Clarke was an able minister who was well placed to correct deficiencies in the Home Office, but the fiasco of the foreign criminals left at large had caused considerable embarrassment to the Government. What does this episode reveal about the working of the doctrine of ministerial responsibility?

While not able to supervise in detail all that is done by a department, the departmental minister has nevertheless a responsibility for ensuring that the department is efficiently organised and has effective systems for delivering its services, appropriate rules of conduct for its staff and controls in place for preventing error or malpractice. There should be a limit to the ability of ministers to escape responsibility by attributing blame to their officials.

If resignations in deference to ministerial responsibility are rare – it would perhaps reflect badly on the quality of British government if they were frequent – the power of the House of Commons to censure and dismiss individual ministers hardly exists except on the plane of theory. Motions of censure can always be defeated by a majority government. They are in any event likely to be treated as putting in issue the House's confidence in the government as a whole, and therefore its survival. (See eg, HC Deb vol 951, col 1129, 14 June 1978.) A minister threatened with a motion of censure who believed that he or she had lost the support of party and colleagues would be unlikely to await the formal vote. Nevertheless the power remains in reserve and awareness of it underlies much that is said and done in Parliament; it is one of the conditioning elements in the behaviour of MPs and ministers. This idea was expressed in elevated terms by an MP and former minister in the course of committee proceedings on a government bill:

House of Commons Standing Committee F (British Nationality Bill) vol V of 1980–81, cols 1916–17, 12 May 1981

Mr J Enoch Powell: Where an Act of Parliament gives discretion to a Minister, it gives him that discretion as a person responsible in all his actions to Parliament. The discretion of a Minister under this Bill or any similar Act is not arbitrary in the sense that it is an irresponsible discretion. He exercises all such discretions in the light of his answerability to Parliament, and any such cases and any such decision can be raised, and theoretically could be made the subject of a vote of censure upon the Minister, in either House of Parliament. . . .

We . . . take it for granted that if in the opinion of Parliament, as the supreme protection of the body of citizens and of every citizen individually, that discretion is exercised unjustly, improperly or unwisely in any way, Parliament is capable of bringing that Minister to account, and willing to do so.

The ultimate sanction of ministerial resignation continues to have constitutional validity. As Peter Barberis says, 'the bottom line of sacrifice must, in principle, remain visible and generally understood in order to give guts to the other dimensions of accountability' (*The Civil Service in an Era of Change* (1997), p 141). The Public Service Committee of the House of Commons (*Second Report*, HC 313-I of 1995–96, para 33) also stands firm on this point:

> [T]he attempt to ensure Ministers are accountable by seeking their resignation may be an informal and highly political affair. It cannot be reduced to firm rules and conventions. Nevertheless . . . it remains an essential component of the control of government. It is, in effect, the final stage in a process of accountability.

Yet there are, as Barberis notes (above), other dimensions of accountability and the principle of ministerial responsibility is not exhausted by its potentiality for inducing resignations. It supports and gives focus to all the available instruments for the scrutiny of the executive, such as parliamentary questions, debates and select committee inquiries. Even if, as in the usual case, a minister is able to disclaim personal responsibility for departmental errors or failures, he or she is still expected to 'accept responsibility' in the sense of having to give an account to Parliament of the circumstances, take into consideration views expressed in the House and inform it of disciplinary or remedial action taken. 'Where things go wrong, the Minister is responsible for putting them right and for telling Parliament how he has done so' (Mr Roger Freeman, Chancellor of the Duchy of Lancaster, Public Service Committee, *First Special Report*, HC 67 of 1996–97, Annex A, para 11). In July 1998 the Legg inquiry into the 'Sandline affair' (breaches of an embargo on the supply of arms to Sierra Leone) revealed failures of communication in the Foreign Office and errors of judgement by officials such that (as *The Economist* commented on 1 August 1998) 'one part of the Foreign Office knew about the breach of an arms embargo that another part of the Foreign Office had gone to some trouble to impose'. (See *Report of the Sierra Leone Arms Investigation*, HC 1016 of 1997–98.) The Foreign Secretary (Mr Robin Cook), in making a statement in the House on the Legg Report, drew attention to its finding that 'most of the trouble originated from systemic and cultural factors' in the Foreign Office. Acknowledging his responsibility for the department, he announced 'a programme of 60 different measures to improve the management of the Foreign Office' (HC Deb vol 317, cols 19 *et seq*, 27 July 1998).

(b) Responsibility of civil servants

In constitutional theory the responsibility of civil servants is absorbed by the responsibility of ministers to Parliament, with its corollary of the anonymity and exclusively internal (departmental) responsibility of officials. In replying to

a report of the Expenditure Committee on the civil service, the Government declared (Cmnd 7117/1978, para 3):

> their belief that the interests of the country will continue to be best served by a non-political, permanent Civil Service working under the close policy supervision of the Government of the day. They distinguish between the responsibility of the Civil Service to the Government and the responsibility of the Government to Parliament. Ministers alone are responsible to Parliament for policy, and any extension of the accountability of civil servants must recognise the overriding responsibility of the Departmental Minister for the work and efficiency of his department. The Government do not therefore favour developments which would detract from the principle that the advice tendered to Ministers by civil servants should be confidential and objective. . . .

The traditional view of the constitutional position of civil servants was restated in 1985, in a Note by Sir Robert Armstrong, Head of the Home Civil Service, issued after consultation with the Permanent Secretaries of government departments. The Note, as revised in 1987 (HC Deb vol 123, cols 572–5w, 2 December 1987), declared:

> The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted government of the day. It is there to provide the Government of the day with advice on the formulation of the policies of the Government, to assist in carrying out the decisions of the Government, and to manage and deliver the services for which the Government is responsible. . . . In the determination of policy the civil servant has no constitutional responsibility or role distinct from that of the Minister.

Professor Vernon Bogdanor said of the Armstrong Code that it 'failed . . . to take account of the fact that the role of the civil servant was changing with the establishment of agencies [above, p 409] and other developments requiring officials to be far more involved in policy initiatives than traditional doctrines would allow' (Memorandum to the Select Committee on the Public Service: *Special Report*, HL 68 of 1996–97, p 36, para 10). Although the Armstrong Memorandum has been superseded by the Civil Service Code (above, p 419), it has been declared by the Cabinet Office to be still 'a valuable statement of constitutional principles' (Public Service Committee, *Second Report*, HC 313-I of 1995–96, p xiii, note 13). Governments have continued to insist that civil servants owe their loyalty to the duly constituted Government and are accountable to the minister in charge of their department and not to Parliament. 'The way in which our constitution works', said Sir Robin Butler to the Public Administration Committee in 1997, 'is that the Minister accounts to Parliament and the civil servants account to the Minister' (Minutes of Evidence, HC 285 of 1997–98, Q70).

The absence of direct constitutional responsibility of civil servants to Parliament is, however, not total and has been qualified by recent changes in the machinery of government.

A direct personal responsibility of officials to Parliament has for many years been formally acknowledged in one instance: the Accounting Officer of a department, who is usually the Permanent Secretary, is responsible for the departmental accounts and answers to the Public Accounts Committee of the House of Commons for the regularity and propriety of departmental expenditure and the observance of proper economy. This responsibility qualifies the Accounting Officer's duty to the minister. If the Accounting Officer believes that any projected departmental expenditure would be irregular or improper, it is his or her duty to make a formal objection to it. The minister may override the objection by giving the officer a written direction, but the matter is then reported to the Comptroller and Auditor General and the Treasury. A similar procedure applies if the Accounting Officer is concerned that proposed action may not achieve value for money. (See the Ministerial Code (2005), paras 3.2–3.3.) In 1991 a departmental Accounting Officer submitted a memorandum of dissent to the Minister for Overseas Development, objecting that expenditure on the Pergau hydro-electric scheme in Malaysia would not be a prudent and economic use of aid funds. He was overruled by the minister. Afterwards the Accounting Officer appeared before the Public Accounts Committee to give a full account of the circumstances: Public Accounts Committee, *Seventeenth Report*, HC 155 of 1993–94. (For the subsequent judicial review of the minister's decision see below, p 662.)

Senior civil servants are frequently called upon to appear before other parliamentary select committees, in particular the 'departmentally related' committees, and may be questioned about the work of their respective departments. Their evidence is constrained by ministerial responsibility and is subject to limits established by the government, as we shall see, but the Ministerial Code (2005) says that ministers should 'require civil servants who give evidence before Parliamentary Committees on their behalf and under their direction to be as helpful as possible in providing accurate, truthful and full information' to the committees. A considerable amount of information about the detail of departmental administration is provided to the committees by officials. 'In practice', as Peter Barberis observes, 'civil servants do answer to Parliament, most visibly through select committees', and he adds that the load of explanatory accountability 'is now borne by civil servants as well as by ministers' (*The Civil Service in an Era of Change* (1997), p 144). Government, however, withholds formal recognition from this development: 'The Government's commitment to a permanent, non-political civil service means that there can be no question of apportioning between the Minister and his civil servants part or parallel shares in a single line of accountability to Parliament' (Public Service Committee, *First Special Report* (Government Response), HC 67 of 1996–97, p vi).

A direct responsibility of civil servants has from time to time been exacted by committees or tribunals of inquiry which have identified civil servants as being to blame for administrative failures. The Scott Report on arms to Iraq

(HC 115 of 1995–96) made numerous criticisms of individual civil servants for errors of judgement, neglect of duty, want of frankness and other 'thoroughly reprehensible' conduct. (Disciplinary action was subsequently taken against two officials in the Foreign and Commonwealth Office: Public Service Committee, *Minutes of Evidence*, HC 285 of 1997–98, Appendix 2.) In 1999 the Foreign Affairs Committee in its report on the 'Sandline' affair (above, p 584: *Second Report*, HC 116-I of 1998–99) concluded that certain named officials had 'failed in their duty' in not keeping ministers informed of events – a judgement not accepted by the Government (see its Response to the Committee, Cm 4325/1999). Subsequently the Inquiry into the Conservative Government's handling of the BSE epidemic found that there had been 'institutional and political failure up to the highest levels', naming and criticising both senior civil servants and ministers (*Report of the BSE Inquiry*, HC 887-I of 1999–00). The conduct of officials came under scrutiny in both the Hutton and Butler reports in 2004 consequent upon the invasion of Iraq (HC 247 and HC 898 of 2003–04). No individual official was found to have been seriously culpable: in particular, the misleading dossier of September 2002 on Iraqi weapons of mass destruction, drawn up by the Joint Intelligence Committee under the chairmanship of John Scarlett, was said by Butler to be the result of collective failures, such that Scarlett should not be expected to resign as head of the Secret Intelligence Service.

The establishment of executive agencies under the 'Next Steps' programme (above, p 409) has given civil service managers or 'chief executives' of the agencies an enhanced responsibility and independence in carrying out their tasks. The Treasury and Civil Service Committee perceived the implications of this development for democratic control and accountability, saying in its *Eighth Report* for 1987–88 (HC 494-I, paras 46–7):

> The traditional system of accountability does not seem to us to be entirely consistent with the increased delegation of responsibility to individual civil servants. . . . [T]hose who are to make the decisions should be publicly answerable for them. . . . We certainly do not advocate abandoning the principle of ministerial accountability, but modifying it so that the Chief Executive who has actually taken the decisions can explain them, in the first instance. In the last resort the Minister will bear the responsibility if things go badly wrong and Parliament will expect him or her to put things right, but the process of Parliamentary accountability should allow issues to be settled at lower levels, wherever possible.

The Government agreed to the Committee's recommendation that chief executives of agencies should be appointed as Accounting Officers, with direct, personal responsibility to the Public Accounts Committee for the use of public money (see above) and that they should appear and give evidence before other parliamentary select committees (albeit 'on behalf of ministers') on the matters delegated to them (*Civil Service Management Reform: The Next Steps*, Cm 524/1988, p 9).

Executive agencies operate under published framework documents describing their organisation and responsibilities and they publish annual reports and accounts as well as three-year business plans which set out their objectives, related to three-year funding agreements with their departments. Chief executives are set publicly announced performance targets and are responsible to ministers for achieving them and generally for the management of the agencies. Ministers remain responsible for the broad issues of policy relating to agencies, the targets set for them and the resources provided. Correspondence from MPs and written parliamentary questions which bear on the functions delegated to agencies are referred by ministers to the chief executives for reply. (Their replies to referred parliamentary questions are published in the *Official Report* (Hansard).) An MP who is dissatisfied with a chief executive's response can raise the matter with the minister, as being ultimately accountable.

These extensive delegations to agency chief executives have intensified debate about the location of responsibility to Parliament. Governments remain firm in their insistence on the traditional doctrine and have refused to accept arguments that chief executives should be personally and directly accountable to Parliament for the matters assigned to them. (See *Taking Forward Continuity and Change*, Cm 2748/1995, p 31; *Government Response to House of Lords Select Committee on the Public Service*, Cm 4000/1998, paras 14, 44–6.) Perhaps Lord Mackay of Ardbrecknish, a minister of state, was not mindful of the government's official standpoint in saying to the Public Service Committee of the House of Lords: 'We [ministers] are accountable to Parliament. And the Chief Executives themselves, perhaps at a non-policy level, at the administration level, are also accountable to Parliament' (Public Service Committee, *Special Report*, HL 68 of 1996–97, Ev, Q 885). Official doctrine and reality seem to diverge in the evolving relations of ministers and their agencies to Parliament.

The division of responsibilities between ministers and their agencies is expressed in official pronouncements in terms that responsibility for *policy* is owed by the minister to Parliament, while *operational* responsibility is delegated to the chief executive and is owed to the minister. But the distinction between 'policy' and 'operations' is problematic and becomes blurred in practice, since ministers have authority to intervene in operational matters and have sometimes done so frequently and in detail. The formula does nothing to illuminate the shadowy contours of ministerial responsibility. Christopher Foster remarks that the diffusion of power in government, of which executive agencies are an instance, 'has diffused responsibility and made it harder to apportion blame fairly' (*British Government in Crisis* (2005), p 153). A report by the Institute for Public Policy Research (*Whitehall's Black Box: Accountability and Performance in the Senior Civil Service* (2006)) argues for a reformulation of the convention of ministerial responsibility, to be incorporated in a Civil Service Act, which would provide for a clearer division of responsibilities between ministers and civil servants. The accountability of civil servants would

be assured by new governing arrangements for the civil service, the permanent secretaries of departments being held personally accountable for departmental operations to a new Head of the Civil Service.

The actions of civil servants may be the subject of investigation by the Parliamentary Commissioner for Administration (Ombudsman) (see further below). The Ombudsman's inquiries into maladministration by government departments may lead to findings that particular civil servants have been at fault, but those concerned are not usually named in the resulting report to Parliament.

(See generally D Woodhouse, *Ministers and Parliament: Accountability in Theory and Practice* (1994); P Giddings (ed), *Parliamentary Accountability: A Study of Parliament and Executive Agencies* (1995); A Tomkins, *The Constitution After Scott* (1998); Barberis, 'The new public management and the new accountability' (1998) 76 *Pub Adm* 451; P Riddell, *Parliament under Blair* (2000), ch 4; Hogwood, Judge and McVicar, 'Agencies and accountability', in RAW Rhodes (ed), *Transforming British Government* (2000); Elder and Page, 'Accountability and control in next steps agencies', in Rhodes, *ibid*; Hansard Society Commission, *The Challenge for Parliament: Making Government Accountable* (2001); Woodhouse, 'Ministerial responsibility', in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003).

3 The power of Parliament

We are not now concerned with the 'sovereignty' of Parliament, or that supreme law-making power which belongs not to Parliament alone but to the Queen in Parliament, and which in reality is mainly at the disposal of the government. Our present interest is in the power of Parliament, in particular the House of Commons, to perform its functions of controlling and scrutinising the executive – these terms being taken in a wide sense: 'controlling' to include influencing or restraining, and 'scrutinising' (or calling to account) to include extracting information, criticising and procuring reparation or redress. In carrying out these tasks, Parliament relies less on its formal powers (eg to enforce the production of papers or punish for contempt) than on the conventional responsibility owed to it by ministers, and the practices and procedures that have crystallised about this convention.

Bernard Crick, *The Reform of Parliament* (rev 2nd edn 1970), pp 79–81

Politics, not law, must explain the concept and practice of Parliamentary control of the Executive. In modern conditions any such control can only be something that does not threaten the day-to-day political control of Parliament by the Executive. The hope for any worth-while function of control by Parliament would be grim indeed if it depended on the

ultimate deterrent of the vote: the undoubted Constitutional right of Parliament to vote against the Queen's Ministers and the Convention by which they would then resign. But control, on both sides, is indeed political. Governments respond to proceedings in Parliament if the publicity given to them is likely to affect public confidence in the Government, or even if the weakness with which the Government puts up its case, even in purely Parliamentary terms, begins to affect the morale of its own supporters (though it takes a very long succession of bleak days for the Government in the House before the country begins to be affected).

The only meanings of Parliamentary control worth considering, and worth the House spending much of its time on, are those which do *not* threaten the Parliamentary defeat of a government, but which help to keep it responsive to the underlying currents and the more important drifts of public opinion. All others are purely antiquarian shufflings. It is wholly legitimate for any modern government to do what it needs to guard against Parliamentary defeat; but it is not legitimate for it to hinder Parliament, particularly the Opposition, from reaching the public ear as effectively as it can. Governments must govern in the expectation that they can serve out their statutory period of office, that they can plan – if they choose – at least that far ahead, but that everything they do may be exposed to the light of day and that everything they say may be challenged in circumstances designed to make criticism as authoritative, informed and as public as possible.

Thus the phrase 'Parliamentary control', and talk about the 'decline of Parliamentary control', should not mislead anyone into asking for a situation in which governments can have their legislation changed or defeated, or their life terminated (except in the most desperate emergency when normal politics will in any case break down, as in Chamberlain's 'defeat' in 1940). Control means *influence*, not direct power; *advice*, not command; *criticism*, not obstruction; *scrutiny*, not initiation; and *publicity*, not secrecy. Here is a very realistic sense of Parliamentary control which *does* affect any government. The Government will make decisions, whether by existing powers or by bringing in new legislation, in the knowledge that these decisions, sooner or later, will find their way to debate on the Floor of one of the Houses of Parliament. The type of scrutiny they will get will obviously affect, in purely political terms, the type of actions undertaken. And the civil service will administer with the knowledge that it too may be called upon to justify perhaps even the most minute actions . . .

Governments deserve praise in so far as they expose themselves, willingly and helpfully, to influence, advice, criticism, scrutiny, and publicity; and they deserve blame in so far as they try to hide from unpleasant discussions and to keep their reasons and actions secret. Parliaments deserve praise or blame as to whether or not they can develop institutions whose control is powerful in terms of general elections and not of governmental instability. This 'praise' and 'blame' is not moralistic: it is prudential . . . So Parliamentary control is not the stop switch, it is the tuning, the tone and the amplifier of a system of communication which tells governments what the electorate want (rightly or wrongly) and what they will stand for (rightly or wrongly); and tells the electorate what is possible within the resources available (however much opinions will vary on what is possible) and – on occasion – what is expected of them.

Ours is a system of *party* government in which political parties present themselves and their programmes to the electorate, with the object of winning a parliamentary majority and forming a government committed to the implementation of party policies. In this system it is an essential function of Parliament to sustain the government. Parliament is quite different in this respect from the United States Congress which is established, on the principle of the separation of powers, as a separate branch of government with independent powers enabling it to check the executive branch. Ronald Butt has written (*The Times*, 18 May 1978, p 18):

> The essence of effective parliamentary control over government is not simply that the House of Commons should stop a government from doing things. It is that the Commons should positively support and sustain the government of the day – and preferably from the position in which a clear majority of MPs has been elected by the people to do just that.

In practice it is the majority party in the House of Commons which, in speech and vote, performs the function of sustaining the government. This underlines the fact that when we speak of Parliament or the House of Commons doing things, it is often only a part of the House that is meant. Besides being an institution, Parliament is a place in which different political forces, in competition or in combination, pursue a variety of objectives.

So also when we consider Parliament's functions of controlling and scrutinising the executive, we have to distinguish between the House of Commons as an institution and the forces within it. Generally when the House seems to assert itself as a body against the executive we find only that intra-party disagreement on a specific issue of policy has resulted in temporary defections or an ad hoc combination of members. The select committees which seem to speak for Parliament in a dialogue with government are only groups of party members who have temporarily vacated their embattled positions to find common ground in scrutinising parts of the administration. Parliament, as Ian Gilmour says (*The Body Politic* (2nd edn 1971), p 246), is 'rather a place than a body of persons' – a place in which backbenchers and opposition parties (sometimes in strange alliances) can be seen to do the work that, as by a metaphor, is described as the work of Parliament.

This is not to deny Parliament its institutional character, which it possesses in law, as an inheritance of history, and in the convictions of some, at least, of its members who have a sense of being parliamentarians as well as party men or women. It is important to maintain the idea of a shared duty to 'watch and control' the executive, of whatever party.

(a) Opposition

In the words of the Houghton Report on *Financial Aid to Political Parties* (Cmnd 6601/1976), para 9.1: 'The parties in opposition have the responsibility of

scrutinising and checking all the actions of the Executive'. Brian Harrison remarks more trenchantly that 'the British two-party adversarial system is designed . . . to subject government to a continuous barrage of criticism' (*The Transformation of British Politics 1860–1995* (1996), p 422).

The legitimacy of opposition parties is confirmed by law, convention and the political culture of the United Kingdom. The opposition is recognised as having rights and is part of the constitutional system – as much part of it as is the government.

Ivor Jennings, *Cabinet Government* (3rd edn 1959), pp 15–16

> Democratic government . . . demands not only a parliamentary majority but also a parliamentary minority. The minority attacks the Government because it denies the principles of its policy. The Opposition will, almost certainly, be defeated in the House of Commons because it is a minority. Its appeals are to the electorate. It will, at the next election, ask the people to condemn the government, and, as a consequence, to give a majority to the Opposition. Because the Government is criticised it has to meet criticism. Because it must in course of time defend itself in the constituencies it must persuade public opinion to move with it. The Opposition is at once the alternative to the Government and a focus for the discontent of the people. Its function is almost as important as that of the Government. If there be no Opposition there is no democracy. 'Her Majesty's Opposition' is no idle phrase. Her Majesty needs an Opposition as well as a Government.

When this passage was written, the 'two-party system' – in which a single-party majority government faced an opposition dominated by the other major party – appeared to be firmly established. A system of adversary politics offered the electorate a clear-cut choice between party programmes. Since the 1950s the two major parties have seen a decline in their combined share of the total vote at general elections, and in 1976–79 the smaller parties were able to bargain for concessions from a minority Labour Government. Although majority government has been restored since 1979, the challenge to the two-party system has not faded away; a reconstituted third force, the Liberal Democrats, repudiate the model of adversary politics and have campaigned for a new political system based on proportional representation (in the form of the single transferable vote). As we saw in the previous chapter, the Jenkins Commission on the Voting System recommended a 'broadly proportional' system, which would have a tendency to result in coalition governments. The Scottish Executive has been a coalition (between the Labour and Liberal Democrat parties) since it came to power in 1999. In the Scottish Parliament no fewer than four parties line up in opposition to the Executive: the Scottish National Party, the Conservatives, the Greens and the Scottish Socialists. Any future devolved administration in Northern Ireland will have to be a multi-party affair. Even at Westminster, and even under the current electoral system, we may yet see the emergence of a genuinely multi-party politics.

Vernon Bogdanor, *Multi-party Politics and the Constitution* (1983), p 167

> [I]f hung Parliaments were to persist and the strength of minority parties continued to increase, this . . . would undermine the special status of the Opposition and of its Leader. The Opposition would lose the privileges which it enjoyed *vis-à-vis* the minority parties, and the Leader of the Opposition would become merely the leader of one of the Opposition parties. The Commons would cease to be a forum in which the allocation of time was determined bilaterally between government and Opposition; instead the time of the House would come to be allocated on a more proportional basis. Thus not only would a minority government lose its ability to control the Commons timetable, but the opposition would no longer enjoy a near-monopoly of the debating time of the House. Instead, the Commons would be organised by a number of political groups of roughly equal status. It would come to resemble a Continental legislature, since it would comprise a number of mutually competing political groups. Parliamentary politics would be coalitional rather than adversary.

At the present time the constitution accords a special status to the official Opposition which, as Nevil Johnson has written, is to be seen as an institution, having been 'institutionalised for the modern electorate as the standing possibility of an alternative government to replace the one in power' ('Opposition in the British political system' (1997) 32 *Government and Opposition* 487). Since 1937 there has been statutory provision for the payment of a salary to the Leader of the Opposition. By the Ministerial and other Salaries Act 1975, section 1(1)(b) and Schedule 2, salaries are now paid to the Leader of the Opposition, the Chief Opposition Whip and not more than two Assistant Opposition Whips in the Commons, and to the Leader of the Opposition and the Chief Opposition Whip in the Lords. The Leader of the Opposition is defined by section 2(1) of the Act as follows:

> In this Act 'Leader of the Opposition' means, in relation to either House of Parliament, that Member of that House who is for the time being the Leader in that House of the party in opposition to Her Majesty's Government having the greatest numerical strength in the House of Commons.

Thus it is by reference to party strengths in the Commons that the Leaders of the Opposition in both Houses are designated. Any doubt as to the identity of the Leader of the Opposition in either House is settled conclusively by the decision of the Speaker of that House (s 2(2), (3)).

The constitutional status of the Opposition also has statutory recognition in the Intelligence Services Act 1994, section 10, which requires the Prime Minister to consult the Leader of the Opposition before appointing members of the Intelligence and Security Committee constituted by the Act.

The status and privileges of the official Opposition and its leader in the House of Commons are supported by rules, conventions and practices of the House.

The Leader of the Opposition is normally consulted by the Prime Minister in the event of a national emergency. He or she and other members of the Opposition front bench (those who are Privy Councillors) may be informed of confidential matters of state 'on Privy Council terms'. It is customary for Opposition members to chair a proportion of the select committees of the House and in particular to take the chair of the Public Accounts Committee and of the Joint Committee on Statutory Instruments.

Conventions known as the Douglas-Home Rules (which had their genesis in 1964 in the last year of the Douglas-Home premiership) allow confidential pre-election contacts between senior civil servants and Opposition leaders on machinery of government questions, in preparation for a possible change of government. (See *Civil Service Guidance*, vol 2, no 5, available at www.cabinetoffice.gov.uk/guidance/two/contents.htm.)

A number of 'Opposition days' are set aside in the House of Commons for debates on subjects chosen by opposition parties. Standing Order 14(2) provides:

> Twenty days shall be allotted in each session for proceedings on opposition business, seventeen of which shall be at the disposal of the Leader of the Opposition and three of which shall be at the disposal of the leader of the second largest opposition party; and matters selected on those days shall have precedence over government business.

Smaller parties are, from time to time, allowed an Opposition day by agreement with one of the two principal Opposition parties. Apart from the formal allocation of Opposition days, the Address in reply to the Queen's speech at the beginning of a session allows for debate on Opposition amendments, and time is always made available for official Opposition motions of censure.

Discussions continually take place between government and Opposition 'through the usual channels' on the arrangement of parliamentary business.

Robert Blackburn and Andrew Kennon (eds), *Griffith and Ryle on Parliament: Functions, Practice and Procedures* (2nd edn 2003), pp 409–11

> Supplementing the necessary measure of agreement between the parties on how business shall be conducted, day-to-day contact is needed. The programme for the next week is announced by the Leader of the House each Thursday, but is discussed with opposition spokesmen before its announcement. Amongst other matters on which agreement is normally come to, after discussion between government and opposition, are the length of debate on a motion, and whether a bill is to be debated in committee on the floor of the House or in standing committee. A particularly important area of agreement relates to the timetabling of bills as they progress through the House, especially in standing committee when, more often than not, the two sides agree on the number of sittings that will be needed . . . [On timetabling see above, p 441.]

> Important and sometimes controversial discussions take place through the usual channels on how many chairs of select committees shall be held by the opposition and, particularly, which chairs. Agreement through the usual channels will also be come to on how long the respective last speakers (the 'winders-up') in an important debate will need. The whips will consult front-bench Members, and also those on the back benches with a special interest in the proceedings, and the Speaker will be informed accordingly.
>
> All this does not mean that what takes place on the floor of the House or in committee is ritualised and wholly predictable. The plans may be interrupted and set aside by some unexpected event in the House or in the world outside. Back-benchers on either side of the House may rebel against the arrangements agreed by their leaders and quite frequently do. Chief whips on both sides of the House have a common interest in limiting such back-bench unrest and may work together to this end.
>
> The principal actors in the discussions that take place between the two sides in the House are the Leader of the House and the shadow Leader, and the government chief whip and the opposition chief whip. These are 'the usual channels'. The government chief whip, together with the Leader of the House, is responsible for seeing that the government's timetable runs smoothly at all levels: sessionally, weekly and daily. It requires good judgment and careful execution to ensure that government bills make their way through the Commons and the Lords to emerge as Acts of Parliament in accordance with the government's timetable . . .
>
> On a day-to-day basis, there has to be a considerable flow of information between the parties through the medium of the whips' offices. The nature of parliamentary business is such that only seldom is anything to be gained by one side keeping its intentions secret from the other side. It is in the interests of neither side to surprise the other . . .
>
> . . . Occasionally co-operation between the parliamentary parties breaks down and the 'usual channels' are closed for a time . . . Such occasions are short-lived, however. Business is delayed, pairing ceases, votes are called on trivial matters and everyone's personal convenience suffers. For different reasons, therefore, it suits both sides to come to agreements and there is sufficient strength on both sides for genuine compromises to be reached.

Matters that are settled through the usual channels to the mutual satisfaction of government and opposition may be unwelcome to independently minded back-benchers: Mr Tony Benn once caustically described the usual channels as 'the most polluted waterways in the world' (HC Deb vol 207, col 6, 27 April 1992).

On the Opposition front bench in the House of Commons there is a 'shadow Cabinet' which directs the strategy of the Opposition and organises its tactical response to forthcoming government business in the House. (There will also be one or more shadow Cabinet members in the House of Lords, one of them the Leader of the Opposition in the Lords.) Members of the shadow Cabinet hold 'portfolios' corresponding to those of ministers of the Crown. A Conservative shadow Cabinet (or Consultative Committee) is appointed by the party leader. A Labour shadow Cabinet is formed by the Parliamentary Committee, consisting of eighteen members elected by Labour MPs together with the Leader, Deputy Leader, Chief Whip in the Commons and chairman of the Parliamentary Labour Party, *ex officio*, as well as the Leader, Chief Whip and one

other member in the House of Lords. An Opposition front bench will also include other MPs and peers who are appointed by the Leader of the Opposition as official or junior spokespersons on specific areas of policy.

The frontbench team speaks for the official Opposition and its members are expected to observe a convention of collective responsibility and refrain from public dissent from party policies. Compliance with this convention may be enforced by the Leader of the Opposition, as happened when Mr Enoch Powell was dismissed from the Conservative shadow Cabinet in 1968 after a speech on immigration which was considered by Mr Heath to be damaging to the Conservative position on race relations. In 1982 the Labour Opposition Leader dismissed three frontbench spokesmen for voting contrary to a shadow Cabinet injunction in a debate on the Falklands crisis. (See further R Brazier, *Ministers of the Crown* (1997), pp 52–4.)

The Opposition is under certain disadvantages in delivering its challenge to the government in the House of Commons. The government controls the parliamentary timetable and commands, in the guillotine, a powerful weapon of last resort for restricting debate. The Opposition, however, has its own weapons. A minister of the Crown once conceded that 'delaying tactics of a strenuous nature' are a legitimate weapon of opposition (Mr Iain Macleod, HC Deb vol 655, col 432, 7 March 1962), and it is one that can be used to considerable effect. If the Opposition considers itself unfairly treated it may withhold cooperation from the government in the conduct of parliamentary business, shutting off 'the usual channels'. It was no idle threat when, the Government having decided to guillotine a strongly contested Social Security Bill, an Opposition spokesman said in the House on 6 May 1980 (HC Deb vol 984, col 114):

> [T]he Opposition will not counsel Labour Members to co-operate in the normal running of business in the House. The Government have a large majority but it will not be possible on many days for them to do what they want when they want to do it.

In 1993–94 the Labour Opposition, affronted by the drastic guillotining of two social security bills, withheld cooperation with the Government for four months. As a last resort, opposition may be carried to the point of deliberate obstruction: filibustering, contrived points of order, repeated interventions in speeches and other time-wasting devices can be used by an Opposition which considers its rights to have been violated. (See eg, HC Deb vol 990, cols 522–50, 6 August 1980). But the confrontation between the parties is seldom taken to these lengths, and in general the government remains in effective control of the proceedings of the House.

The Opposition is unable to match the government in information and resources. An attempt to redress the balance was made on 20 March 1975 when the House of Commons resolved (HC Deb vol 888, cols 1933–4) that provision should be made 'for financial assistance to any Opposition party in this House to assist that party in carrying out its Parliamentary business'. In accordance with a formula then laid down, and revised in subsequent resolutions, opposition

parties have been able to claim payments towards expenditure on their parliamentary work, the amounts being related to a party's numerical strength in the House and its electoral support. The money may be used, for example, for the employment of research assistants to frontbenchers and for expenses of the party leader's and Whips' offices. (An additional sum is made available for the travelling expenses of opposition spokespersons.) The original scheme was proposed by the then Leader of the House, Mr Edward Short, and the finance provided became known as 'Short money'. A scheme known as 'Cranborne money' (from Viscount Cranborne, then leader of the House of Lords) was introduced in 1996 to provide funding for the first and second opposition parties in the House of Lords.

The Short and Cranborne money schemes were considered by the Committee on Standards in Public Life (*Fifth Report*, Cm 4057-I/1998) which declared its belief that:

> the Short money scheme is founded on the sound principle that, in a parliamentary democracy, the party in government should be held to account and kept in check by a vigorous and well-prepared opposition.

The Committee proposed that the levels of Short and Cranborne funding should be reviewed by the political parties in the respective Houses of Parliament with a view to increasing them and that a portion of Short money should be earmarked for funding the office of the Leader of the Opposition in the House of Commons. The Government having approved these recommendations, resolutions of both Houses provided for substantial increases respectively in Short and Cranborne money, the former including a sum specifically identified for the office of the Leader of the Opposition (HC Deb vol 332, cols 427 *et seq*, 26 May 1999). The House of Lords resolution provides also for financial assistance for the parliamentary work of cross-bench peers (HL Deb vol 638, cols 817 *et seq*, 30 July 2002). The party forming the government does not qualify for financial assistance under the Short and Cranborne schemes. (See further chapter 8 as to funding of non-parliamentary activities of political parties.)

The Opposition performs a dual role: it both opposes the government, functioning as 'an orchestration of all discontents' (Bernard Crick, *New Statesman*, 18 June 1960, p 883), and presents itself to the electorate as an alternative government. It is the latter role which is said to make for 'responsible Opposition', meaning an Opposition which accepts the basic political structure and obeys the rules of the parliamentary game. Acceptance of parliamentary democracy is not, however, incompatible with radical policies for institutional change.

A 'responsible' Opposition, aspiring to power, will criticise the government and expose its weaknesses. It will use whatever strength it has to exact concessions from the government. Continuous scrutiny by opposition parties in a public arena compels governments to defend, to explain and sometimes to moderate their policies.

Ronald Butt, *The Power of Parliament* (2nd edn 1969), pp 317–18

Just as a Government must anticipate the reactions of its backbenchers and prepare to meet them, so it must do the same in relation to the Opposition. Of course, an Opposition attack is much less menacing than a widespread tide of rebellion within the governing party. Nevertheless, although a Cabinet, to satisfy a particular demand inside its own party, may be prepared to brave the Opposition storm, in many other cases it will modify its policies in the light of what it expects the Opposition case to be. If it suspects that the Opposition will have an attractive case, it will do its best, within broad limits, to make that case less attractive – or to steal and adapt the Opposition's clothes. In this broad sense, therefore, the voice of Opposition contributes to the policy-making of Government in any given Parliament and is not simply a factor in deciding what the composition of the *next* Parliament should be. For example, although Conservative Party opinion prompted the production of the Commonwealth Immigrants Act which became law in 1962, an assessment of Opposition feeling was an important factor in preventing the Government from going further. As it was, the Bill was fought bitterly by the Labour Opposition. This was a generally popular measure but had the Government taken it so far as to have appeared to ordinary people to be unreasonable . . . then many more people might have been swung against it and the Opposition would have been presented with a very much stronger case. To see this point, one has only to try to envisage what shape the measure might have taken had the Labour Opposition not expressed such uncompromising hostility, *in advance*. Indeed, leaving aside the question of the Opposition's part in determining the issues and outcome of any next election, one has only to try to imagine the silence of the Opposition during any Parliament to comprehend what difference it would make to the current conduct of politics.

Apart from the real if indirect effect it has on the evolution of Government policy, the Opposition can also, by a carefully fought and reasoned campaign, get the details of legislation amended. Many, perhaps most, crucial amendments to Bills are in the name of the Minister concerned, yet they may well have arisen from the activity of the Opposition. Thus the capital gains provisions of the 1964 Labour Government were heavily amended by the Chancellor. Yet the detailed pressure for amendment and the exposure of weak elements in the Government's original proposal came from the Conservative Opposition. The Government's acceptance of some of them cannot be explained in terms of its small majority but rather reflected the Chancellor's understanding that he had to meet a powerful Opposition case.

In British politics, everything depends on the convention that the power of the majority should not be used to steamroller into silence the protests of the minority. If numbers were all that counted, a Government majority could any day silence the minority Opposition, and it is owing less to the formal rules of Parliament than to an acceptance of the spirit of common procedures that it does not do so.

It is a principal virtue of ministerial responsibility that it provides a justification and opportunities for opposition parties to 'harry and embarrass ministers': see Kam, 'Not just parliamentary "cowboys and indians": ministerial responsibility and bureaucratic drift' (2000) 13 *Governance* 365.

The two-party system acknowledges only a modest role for minor parties in the proceedings of Parliament. As the third party, the Liberal Democrats, have increased their share of the vote they have urged their claim to greater recognition and weight in the business of the House of Commons.

Nevil Johnson, 'Opposition in the British Political System' (1997) 32 *Government and Opposition* 487, 508–10

> The British political system clearly belongs to the still relatively small group of mature democratic regimes. All such regimes necessarily acknowledge opposition, both as an entailment of their basic political values and as an expression of the social pluralism which sustains democratic government. But in such societies opposition can be and is embodied in different political habits and procedures. Both formal institutions and the patterns of parties may diffuse opposition so that it finds expression more in the multiplicity of points of opposition within a society and its political system than in the presence of a single focal point for opposition. But in some liberal democracies opposition is highly focused and institutionalised, and of these Britain is the pre-eminent example.
>
> Perhaps the British view of opposition retains its fascination precisely because it is unusual in its clarity of definition as the institutionalisation of an alternative government and, therefore, as a necessary component of a system of democratic government worthy of that name. It is still seen as the means of enabling the electorate to change its government and to punish those office-holders in whom it has lost faith. The failings of the principle are the encouragement it offers to the over-simplification of the issues arising in political life, the exaggeration of adversarial relationships in the public sphere, and a certain kind of brutal disregard for those parties which are not players in the big league. And after all there can only be two in any big league. The virtues of this approach are to be found in the protection it offers against the domination of public life by in-bred and often introverted party oligarchies. It does in a certain sense open the doors to the people and there is underlying it a coherent normative theory of popular government and democratic control. Despite the fact that it has not actually been widely exported and when it has, has often failed, there are still grounds for believing that 'loyal Opposition' remains one of the great political inventions of the British.

(On the ways in which the Scottish Parliament has – and has not – moved beyond the two-party model of government and opposition still dominant at Westminster, see J McFadden and M Lazarowicz, *The Scottish Parliament* (3rd edn 2003), ch 4 and Page in R Hazell and R Rawlings (eds), *Devolution, Law-making and the Constitution* (2005), ch 1; on Wales, see R Rawlings, *Delineating Wales* (2003), chs 6–9.)

(b) Backbenchers

Backbenchers on both sides of the House of Commons have a role in the checking of government. Although they generally give their primary loyalty to party they have also other interests and loyalties, and will often speak in the

House for their constituencies, or on behalf of outside groups with which they are associated, or to argue the cases of individuals who complain of unfair treatment by government departments. This pleading of special interests, or checking of the detail of administration, is rather a function of backbenchers than of organised parties. The procedure and practice of the House provide for it in a number of ways.

Backbench members can raise issues of concern to them or their constituents in a daily half-hour adjournment debate and other adjournment debates in the Chamber of the House and also in the 'parallel Chamber' in Westminster Hall. The Westminster Hall sittings, providing an additional forum for the scrutiny and accountability of government in politically non-contentious matters, have substantially increased the amount of time available for backbench members' debates. Standing Order 24 (emergency debates) provides an opportunity for backbenchers (as well as opposition frontbench MPs) to raise urgent issues on the floor of the House, even though a subsequent debate is only rarely allowed. Backbenchers make frequent use of Question Time in the House (see below) and write to ministers (many thousands of letters each year) about the grievances of constituents. Even if much of this backbench activity has no obvious impact on the government, an administration that did not have to submit to it could afford to be less careful and more high-handed.

Important reforms have been brought about by private members' bills – for example, the liberalisation of the laws on abortion, homosexual behaviour and divorce, the abolition of capital punishment, the ending of theatre censorship and, more recently, the Public Interest Disclosure Act 1998 (giving protection to 'whistleblowers' who disclose malpractices of their employers), the Female Genital Mutilation Act 2003 and the Gangmasters (Licensing) Act 2004. Standing Orders give precedence to private members' bills on thirteen Fridays in each session, and there is a further (rather remote) chance for a private member's bill to reach the statute book by way of the '10-minute rule' procedure (SO 23), by which a backbencher may move for leave to bring in a bill, allowing a brief speech to be made in favour of the proposed bill. (Mr Tam Dalyell used this procedure in 1999 to present a bill requiring prior Commons approval for military action against Iraq, but leave was not given for its introduction.) Although a private member's bill has no prospect of being enacted in the teeth of government opposition, if the bill has support on both sides of the House the government may stay its hand, help the bill on its way, or promise to introduce a bill of its own. For example, the strength of the support for bills on Crown immunity in National Health Service hospitals and on official secrecy introduced by a backbencher, Mr Richard Shepherd, helped to persuade the government to bring forward legislation of its own (the National Health Service (Amendment) Act 1986 and the Official Secrets Act 1989). Again, the Government was induced by backbench pressure and a series of private members' bills to introduce its own bill which became the Disability Discrimination Act 1995.

A government is more concerned to retain the loyalty and support of its own backbenchers than to placate the Opposition. If disaffection should break out among its backbenchers the government's management of the House becomes difficult, the signs of disunity affect its reputation in the country, and it may suffer defeats in the House in circumstances of maximum publicity.

In recent decades government backbenchers have shown an increased willingness to use their votes independently – even on occasion to inflict defeats on the government, knowing that such defeats do not normally put the government's survival in question (see above). Between 1970 and 1979 both Conservative and Labour Governments suffered numerous defeats, on the floor of the House and in standing committees, as a result of backbench defection. Between 1979 and 1992 Conservative Governments with comfortable majorities were less vulnerable to defeat, but nevertheless saw new immigration rules voted down by the House in 1982 and the loss of the Shops Bill in 1986, suffered defeats in committee and repeatedly had their majorities reduced by backbench revolts. After 1992 Conservative backbenchers showed a revived independence and joined with opposition MPs to inflict significant defeats on the Major Government, notably in votes on the Maastricht Treaty in July 1993, on VAT on domestic fuel in December 1994 and on European fisheries policy in December 1995.

The Labour Governments elected with commanding Commons majorities in 1997 and 2001 and a reduced but still substantial majority in 2005 have been confronted by increasingly assertive Labour backbenchers. In Mr Blair's first term the Government experienced significant backbench rebellions in votes on such matters as a reduction in lone-parent benefit (1997), restrictions on eligibility for incapacity benefit (1999), the partial privatisation of National Air Traffic Services (2000) and the Freedom of Information Bill (2000). In the Parliament elected in 2001 substantial backbench rebellions were provoked by provisions in a number of government bills, among them the Anti-terrorism, Crime and Security Bill (2001), the Education Bill (2002), the Nationality, Immigration and Asylum Bill (2002), the Criminal Justice Bill (2003) and the Health and Social Care (Community Health and Standards) Bill (2003). In January 2004, seventy-two Labour MPs voted against the Government at the second reading of the Higher Education Bill (providing for top-up fees), and a succession of revolts marked the passage of the Asylum and Immigration (Treatment of Claimants etc) Bill (2004). On the question of Iraq, large cohorts of Labour backbenchers, resisting pressure from ministers and the Whips, voted against the Government on successive occasions, notably on 26 February and (on a motion authorising military action) 18 March 2003. The latter, as Philip Norton remarks, was 'the largest parliamentary party rebellion of any Prime Minister on a question of high policy' ('Governing alone' (2003) 56 *Parliamentary Affairs* 543, 550). In the 2005–06 session the Government suffered notable rebellions by its backbenchers in votes on the Identity Cards Bill and the Education and Inspections Bill, and was twice *defeated* in votes on

the Terrorism Bill and twice again on the Racial and Religious Hatred Bill. These examples of backbench independence suggest that the commonly held view of executive dominance of Parliament needs substantial qualification. In the following extract Philip Cowley explains something of the tactics involved.

P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005), pp 146–7

The standard tactic of backbench rebels during the first Blair term (and, indeed, beforehand) had been to use a Bill's second reading debate as a chance to raise issues of concern, but only very rarely to try to vote against or to defeat the entire Bill. The aim was to demonstrate unhappiness, in the hope that the government would alter the Bill before any later votes. For the most part, this was just sensible politics. Few pieces of legislation are entirely without merit . . . and attempting to defeat an entire Bill was therefore difficult; would-be rebels are always susceptible to arguments not to throw out the positive policy contained in some obscure subclause of the Bill. The tactic therefore at second reading was to mutter, moan and gripe . . ., and then to focus a rebellion on the Bill's later stages, targeting particular pieces of a Bill. Eschewing the nuclear strike in favour of the scalpel was also sensible because rebellions can lose momentum once they have been unsuccessful; rebels therefore hold back from striking until the most advantageous moment . . .

But by 2003 the nuclear option was looking increasingly attractive to many of Labour's backbenchers. This was partly just frustration; having seen so many pieces of legislation reach the statute book as a result of carefully calibrated concessions that placated just enough backbench opinion to get through the Commons, plenty of Labour MPs began to think that it was better to stop legislation as early as possible. There was also a feeling that the changes to the Commons procedures introduced as part of the government's package of 'modernisation' – especially the automatic programming of government legislation – squeezed out backbenchers from the later stages of Bills. Programming, many backbenchers began to complain, divided the time up between the front benches, but meant there was no guarantee that backbench amendments would be chosen for debate (or, if they were chosen, there was no guarantee that they would be the right amendments, the ones with most chance of maximising backbench support). Therefore, increasingly, the view on the back benches was that when faced with objectionable legislation, the thing to do was to stop it outright.

See further P Cowley, *Revolts and Rebellions: Parliamentary Voting under Blair* (2002); Cowley and Stuart, 'Parliament: more bleak house than great expectations' (2004) 57 *Parliamentary Affairs* 301 and 'Parliament: hunting for votes' (2005) 58 *Parliamentary Affairs* 258; Whitaker, 'Backbench influence on government legislation?' (2006) 59 *Parliamentary Affairs* 350; P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005).

Even though the majority of government bills pass through the House of Commons unscathed, the influence of government backbenchers is not to be measured solely in government defeats. A less obvious but continuous and powerful restraint (or spur) operates on government through the *anticipated*

reactions of its backbenchers. As Philip Cowley has put it (*The Rebels: How Blair Mislaid his Majority* (2005), p 9):

> MPs may not *make* policy, but they do constrain (and occasionally prod) government. All but the most technical of decisions are affected by some considerations of party management.

Backbench opinion, transmitted through the Whips or expressed in party committees or in private meetings with ministers, indicates to the government the limits of the possible, and may cause it to discard or trim a policy which backbenchers will not support. A famous instance was the Labour Government's abandonment of its proposal to legislate on industrial relations ('In Place of Strife') in 1969 when it became evident that Labour backbenchers would not support the bill. (Opposition in the Cabinet and from the TUC also contributed to this major reversal of policy.) Both Conservative and Labour Governments have been induced by backbench opinion or threats of revolt to reverse or modify their policies on many occasions. Cowley and Stuart have written that one reason why some of the revolts under the present Labour Government have not been even larger 'is that the government, like all other recent governments, have been prepared to compromise with backbench critics in order to smooth the passage of legislation through the Commons' ('Rebelliousness in a Westminster system: Labour MPs under the Blair Government' (2006), available at www.revolts.co.uk).

Cross-party combinations of backbenchers can be formidable. It was such a combination (the 'unholy alliance' led by Mr Foot and Mr Powell) that in 1969 defeated a scheme for the reform of the House of Lords which was supported by both Government and official Opposition. At a remove from the battleground of party politics, all-party subject groups of members (such as the all-party disability group), often linked with outside interests, can on occasion exert a significant influence on government policy. (See further D Judge, *Backbench Specialisation in the House of Commons* (1981), pp 141–4; S James, *British Government* (1997), pp 170–94; Whitaker, 'Backbench influence on government legislation?' (2006) 59 *Parliamentary Affairs* 350.)

(c) The House

There are occasions, not very frequent, when members on both sides of the House of Commons combine to assert the power of the House against what they see as an encroachment by the executive upon its rights or privileges. On these rare but instructive occasions we see the House acting as a body to claim its constitutional authority over the executive. One such instance occurred in 1980.

Following the seizure of American hostages in Iran on 4 November 1979 the United Kingdom Government introduced in the House of Commons on 8 May 1980 the Iran (Temporary Powers) Bill, providing for economic sanctions

against Iran. The minister in charge of the bill assured the House that the bill and orders to be made under it would apply only to future contracts, and would not affect the implementation of those already made by British exporters. The bill was duly passed by both Houses and received the royal assent on 15 May 1980.

On 18 May it was agreed at a meeting of the Foreign Ministers of the Member States of the European Community that sanctions should be jointly applied against Iran and should extend to all contracts entered into after 4 November 1979. Since the Iran (Temporary Powers) Act 1980 did not apply to contracts already made, the Government proposed to rely upon earlier legislation, the Import, Export and Customs Powers (Defence) Act 1939, under which orders could be made prohibiting the export of goods to Iran under contracts entered into at any time after 4 November 1979. When this decision was announced in the House of Commons by the Lord Privy Seal (speaking for the Foreign Office) he was strongly criticised, from both sides of the House, by members who considered that the House had been misled. After the announcement an Opposition MP sought and obtained leave from the Speaker to move the adjournment of the House 'for the purpose of discussing a specific and important matter that should have urgent consideration' and, the required support of not less than forty members having been given, an emergency debate was set down for the next day. On 20 May 1980 the Lord Privy Seal made the following statement to the House (HC Deb vol 985, cols 254–5):

> After my statement yesterday about decisions taken on the implementation of sanctions against Iran by Foreign Ministers of the European Community meeting informally in Naples over the weekend, the House made its view very clear that the inclusion of retrospection, however limited, was unacceptable.
>
> The Government have therefore decided that sanctions will not be retrospective. No orders will be laid before the House which ban the supply of goods under arrangements made before the date on which those orders were laid. Last night we informed our European Community partners and the Government of the United States that, in view of the opposition of this House to retrospection, we would no longer be prepared to proceed to apply any element of retrospection among the decisions that we agreed to at the meeting in Naples.

4 Control and scrutiny

The effectiveness of parliamentary control and scrutiny of government depends much less on the formal powers of Parliament than on the recognition by governments of the authority of Parliament and their voluntary submission to the constraints of parliamentary government. In the view of some parliamentarians, successive governments have failed in these respects

in their constitutional duty to Parliament. These discontents were expressed by Mr Alan Beith (a Liberal Democrat) in the following motion in the House of Commons (HC Deb vol 316, col 932, 21 July 1998):

> That this House, reiterating the importance of a strong parliamentary democracy in Britain, deplores the fact that successive governments have increasingly diluted the role of Parliament by making announcements to the media before making them to this House; by undermining the legitimate revising role of the House of Lords; by giving access to lobbyists at a time when the representations of elected Members are dealt with in an increasingly dilatory fashion; by inhibiting the rights of backbenchers to make criticisms of their own side; by encouraging planted supplementary questions which fail to hold the Executive to account; and by responding to questions and arguments with meaningless soundbites and partisan rhetoric instead of constructive answers.

Grounds for some of these strictures may appear later in this chapter. For the present we may note that in the debate on Mr Beith's motion particular concern was expressed about governments' breaches of the principle, declared in the Ministerial Code (1997), para 27 (reaffirmed in the 2001 edition), that 'the most important announcements of Government policy should be made, in the first instance, in Parliament'. The Speaker from time to time rebuked ministers for lapses in the observance of this convention (see eg, HC Deb vol 306, col 565, 12 February 1998) but they continued to occur. In response to criticism in a report of the Public Administration Committee of the House of Commons, the Government undertook to strengthen the provision of the Code on this point: see now the more precise requirements set out in the Ministerial Code (2005), paras 7.1–7.5.

A more optimistic view than that expressed in Mr Beith's motion (above) is taken by some observers, among them Philip Norton who discerned 'an improvement in the capacity of Parliament to subject government to scrutiny and to influence what government does' (in R Pyper and L Robins (eds), *Governing the UK in the 1990s* (1995), p 100). The same author has placed emphasis on parliamentary procedure as a factor constraining government: all governments must operate *through* Parliament and its procedures (such as those relating to the passage of bills) present obstacles to arbitrary or unconsidered action by government. See Norton, 'Playing by the rules: the constraining hand of parliamentary procedure' (2001) 7 *Journal of Legislative Studies* 13.

On the other hand, developments in the organisation and working of central government (eg the creation of executive agencies, the accrual of power to the Prime Minister's Office and the Cabinet Office, the more prominent role of special advisers to ministers, contracting out of governmental functions) present new challenges to parliamentary scrutiny. In the judgement of the

Hansard Society Commission on Parliamentary Scrutiny (*The Challenge for Parliament: Making Government Accountable* (2001), p 6), Parliament's:

> response to developments has been inadequate. It has failed to adapt sufficiently and remains, in many ways, the last unreformed part of the constitution. As a result Parliament is not effectively performing its core tasks of scrutinising and holding Government to account.

The Power Report (*Power to the People* (2006)) was persuaded of the inability of Parliament to control an executive which has acquired greatly enhanced power, concluding that 'the Executive in Britain is now more powerful in relation to Parliament than it has probably been since the time of Walpole ['the first Prime Minister' d 1745]'. On the other hand, as Seaward and Silk remark (in V Bogdanor (ed), *The British Constitution in the Twentieth Century* (2003), p 186): 'it is easy to overstress the growth in executive powers, and just as striking, over the course of the century, has been the survival of a belief in the importance of scrutiny and accountability, and the development of devices to assist that process'.

(See generally P Giddings (ed), *The Future of Parliament* (2005); A Brazier *et al, New Politics, New Parliament?* (2005) and Tomkins, 'What is Parliament for?', in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (2003), ch 3.)

(a) Policy and administration

(i) Debates

The main contest between the parties takes place in debates on the floor of the House. Battle is joined on such general issues as unemployment, immigration or the government's expenditure plans, or debate may focus on specific governmental decisions such as the closure of a hospital, the deportation of a non-British resident or the sale of arms to a foreign government.

Each session begins with a debate on the address in reply to the Queen's speech, continuing over some five or six days, which allows for discussion of items of government policy chosen by the Opposition. Debates are held in every session on certain matters, such as Budget proposals, foreign affairs, reports of the Public Accounts Committee and developments in the European Union. Debates on policy and administration initiated by the government, opposition parties and backbenchers continue throughout the session, interspersed with debates on legislation and other business of the House. Debates on particular subjects may be arranged through 'the usual channels'. As an exercise in 'control', debates are most effective when governmental proposals are presented to the House, it may be in a Green Paper, before they have become firm, as a test of parliamentary and public opinion.

Since what is said in a debate on the floor of the House rarely affects the result of the vote at its end or induces the government to reverse a decision already

taken, it is apparent that debates are not a strong instrument of control. But they are an essential part of the continuous parliamentary scrutiny of government, compelling it to explain and defend its policies and decisions.

Philip Norton, *The Commons in Perspective* (1981), p 119

> [G]eneral debates are . . . not without some uses in helping to ensure a measure of scrutiny and influence, however limited. A debate prevents a Government from remaining mute. Ministers have to explain and justify the Government's position. They may want to reveal as little as possible, but the Government cannot afford to hold back too much for fear of letting the Opposition appear to have the better argument. The involvement of Opposition spokesmen and backbenchers ensures that any perceived cracks in the Government's position will be exploited. If it has failed to carry its own side privately, the Government may suffer the embarrassment of the publicly expressed dissent of some of its own supporters, dissent which provides good copy for the press. On some occasions, Ministers may even be influenced by comments made in debate. They will not necessarily approach an issue with closed minds, and will normally not wish to be totally unreceptive to the comments of the Opposition (whose co-operation they need for the efficient despatch of business) or of their own Members (whose support they need in the lobbies, and among whom morale needs to be maintained); a Minister who creates a good impression by listening attentively to views expressed by Members may enhance his own prospects of advancement. . . . A Minister faced by a baying Opposition and silence behind him may be unnerved and realise that he is not carrying Members on either side with him, and in consequence may moderate or even, in extreme cases, reverse his position.

See also A Adonis, *Parliament Today* (2nd edn 1993), pp 142–8 and, for a sceptical view, S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999), pp 382–4.

Adjournment debates initiated by backbenchers on local or narrow issues of administration may take place in an almost empty House and attract no publicity, but a minister is obliged to attend and answer what is sometimes a skilfully presented case. If the minister is not often persuaded to change his mind, the debate may serve at least to bring into the open the way in which a decision was reached.

Foster and Plowden have noted – and deplored – a recent decline in the significance and value of debates in the House of Commons, which they find to be no longer central to the parliamentary process or, what formerly they were, 'a stringent check on ministerial misbehaviour'. A factor in this trend has been, they say, 'the catastrophic decline in the attention the media give to parliamentary debates, precipitous since 1992' (*The State under Stress* (1996), pp 203–4), and they call for a revival of 'the great tradition of parliamentary debate' on important issues (at p 238). 'The main arena of British political debate', says Peter Riddell, 'is now the broadcasting studio rather than the chamber of the House of Commons' (*Parliament under Blair* (2000), p 160).

(ii) Questions

The Procedure Committee of the House of Commons declared in its *Third Report*, HC 622 of 2001–02, para 1:

> The right of Members of the House of Commons to ask questions of Ministers, to seek information or to press for action, is an essential part of the process by which Parliament exercises its authority and holds the Government to account.

Any MP (other than a minister or, by convention, the Leader of the Opposition) may ask Questions of ministers by giving notice to the Table Office. If an oral answer in the House is required, the Question is marked with an asterisk; other Questions are given a written answer. Questions to ministers 'must relate to matters for which those Ministers are officially responsible. They may be asked for statements of their policy or intentions on such matters, or for administrative or legislative action': Erskine May, *Parliamentary Practice* (22nd edn 1997), p 348.

The requirement that a Question must relate to matters for which ministers are responsible to Parliament will generally exclude Questions about matters within the competence of the devolved institutions in Scotland and Wales and (upon the restoration of devolved government) Northern Ireland. Likewise out of order are Questions about the activities of local authorities, the European Commission, privatised industries, public corporations, other non-departmental public bodies and the police. For instance, when the Home Secretary was asked a series of Questions about police investigations into the murder of Carl Bridgewater, a Home Office minister replied on behalf of the Secretary of State: 'These are all operational matters and the responsibility of the chief constable of Staffordshire constabulary' (HC Deb vol 272, cols 630–1W, 29 February 1996). Ministers can, however, be asked about the exercise of any powers they may have in respect of such bodies – for instance, powers of appointment, or to give directions, issue guidance, approve expenditure or call for reports. Also, ministers will sometimes respond to Questions about the actions of public bodies for which they do not bear responsibility by giving information supplied by the body concerned or requesting it to write to the member.

Questions relating to the day-to-day operations of an executive agency are referred by the minister to the agency chief executive for reply, but a member who is dissatisfied with the reply given may raise the matter again with the minister.

A minister is not compellable to answer any Question, and there are many matters on which ministers customarily refuse to give answers. Among these are confidential exchanges with foreign governments, matters affecting national security, proceedings in Cabinet and ministerial committees, internal discussion and advice, matters that are *sub judice*, commercial confidences and confidential information about individual persons and companies.

Information requested may be refused on the grounds that it is not available or could only be obtained at disproportionate cost. Departments apply a general rule that a cost exceeding a certain sum – £600 in 2006 – justifies refusal to give a written answer. All these are matters of ministerial practice, not of parliamentary convention.

Although ministers cannot be compelled to answer Questions fully or at all, they are required by the House in terms of its resolution of 19 March 1997 (above, p 572), as reaffirmed in the Ministerial Code (2005), para 1.5d, to be:

> as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest which should be decided in accordance with the relevant statutes and the Freedom of Information Act 2000.

The Government agreed in 1996 that if ministers refused to provide a full answer to a parliamentary Question, otherwise than on the ground of disproportionate cost, they should give reasons which related to the exemptions allowed then by the Code of Practice on Access to Government Information. (The undertaking was not always faithfully observed.) The Code of Practice has since been superseded by the Freedom of Information Act 2000. The Government's *Guidance to Officials on Drafting Answers to Parliamentary Questions* now states:

> If you conclude that material information must be withheld and the PQ cannot be fully answered as a result, draft an answer which makes this clear and explains the reasons, such as disproportionate cost or the information not being available, or explains in terms similar to those in the Freedom of Information Act (without resorting to explicit reference to the Act itself or to section numbers) the reason for the refusal. For example, 'The release of this information would prejudice commercial interests'.

(The Government was of the opinion that the deadlines for answering Parliamentary Questions did not allow for full consideration of the public interest such as is required by many provisions of the Freedom of Information Act and that it was accordingly not appropriate to make explicit reference to exemptions under that Act.)

A member who is refused an answer may raise the matter in an adjournment debate, or ask the Question again (but only after an interval of three months, unless circumstances have changed). Another recourse for a member who is refused an answer or is dissatisfied with the answer given is to write to the department concerned with a request for the information. This brings the matter within the scope of the Freedom of Information Act and may entitle the member to obtain the information in accordance with the provisions of that Act.

Draft answers to Questions are prepared for ministers by officials. The Government's *Guidance to Officials on Drafting Answers to Parliamentary*

Questions reminds officials that 'It is of paramount importance that Ministers give accurate and truthful information to Parliament' and should be 'as open as possible with Parliament and the public, refusing to provide information only when disclosure would not be in the public interest', and continues:

> It is a civil servant's responsibility to Ministers to help them fulfil those obligations. It is the Minister's right and responsibility to decide how to do so. Ministers want to explain and present Government policy and actions in a positive light. Ministers will rightly expect a draft answer that does full justice to the Government's position.

Officials are admonished not to 'omit information sought merely because disclosure could lead to political embarrassment or administrative inconvenience'.

The Public Administration Committee monitors the performance of government departments in answering Questions, and in reporting its conclusions annually to Parliament may draw attention to failures in openness and accuracy in answers given (see Hough [2003] *PL* 211).

Written answers are given to 'unstarred' Questions and also to Questions put down for oral answer that are not reached in the time allotted on the floor of the House. A considerable amount of information is elicited from the government in written answers. A member can put down any number of unstarred Questions (whereas a member may not have more than two oral questions tabled on any one day) and can coordinate his or her Questions to different departments so that a picture is built up of the government's whole operations in the area in question.

Questions for oral answer are taken for about fifty-five minutes on Mondays, Tuesdays, Wednesdays and Thursdays. Ministers answer in accordance with a rota which is customarily arranged after consultation through the usual channels, more time being set aside for the major (or most controversial) departments. In addition 'cross-cutting' Questions, covering the responsibilities of a number of departments, can be asked in the 'parallel chamber' of Westminster Hall. The Prime Minister answers Questions for thirty minutes on Wednesdays.

A member who receives an oral answer can go on to ask a supplementary Question, of which no prior notice need have been given, and other members may put supplementaries if they catch the Speaker's eye. The Leader of the Opposition has the right to question the Prime Minister through supplementaries, and regularly engages in gladiatorial combat with the Prime Minister on Wednesdays.

Among Questions to the Prime Minister, who accepts a responsibility to answer for the whole range of governmental activities, are 'open Questions', which are designed not to reveal the subject matter of the supplementary Question that will follow. This allows the MP to raise a supplementary which is topical on the day when the Question comes up for answer, and also provides

an element of surprise. The inscrutable character of open Questions ensures that they will not be transferred to other, more directly responsible, ministers, which might happen if the real purport of the Question were apparent on its face.

House of Commons, HC Deb vol 437, cols 834–5, 19 October 2005

Mr Bob Russell (Colchester) (Liberal Democrat) asked the Prime Minister if he would list his official engagements for Wednesday 19 October.

The Prime Minister (Mr Tony Blair): This morning I had meetings with ministerial colleagues and others. In addition to my duties in the House, I will have further such meetings later today.

Mr Bob Russell: The right hon Gentleman is aware that some local authorities are warning of big increases in the council tax next year, with job losses and cuts in services. Does he agree that now is not the time to embark on grandiose projects, particularly those that will rely on a heavy annual subsidy from the public purse?

It will be evident that the purpose of the supplementary Question was not to obtain information. It may be questioned whether the kind of point-scoring duel typically arising from open Questions contributes anything to the accountability of government.

In the 2003–04 session 3,687 Questions were tabled for oral answer by ministers: 2,060 were reached for oral answer in the House and those not reached were given a written answer. In addition 54,875 Questions were set down by members for written answer. (*Sessional Returns 2003–04*, HC 1 of 2004–05.)

Questions put by backbenchers on the government side may reflect their constituency and other interests or their unease about aspects of government policy, and in this way they play their part in the scrutiny of ministers. Government backbenchers may also table Questions with the object of balancing hostile Questions asked by opposition members. On one occasion it came to light that civil servants had assisted ministers in the preparation of a 'bank' of favourable Questions to be supplied to sympathetic backbenchers. A select committee which considered this incident advised that (*Report from the Select Committee on Parliamentary Questions*, HC 393 of 1971–72, para 36):

> it is not the role of the Government machine to seek to redress the party balance of Questions on the Order Paper, and civil servants should not in future be asked to prepare Questions which have this object.

The Government agreed to lay down a new rule in accordance with this recommendation (HC Deb vol 847, cols 462–3W, 6 December 1972).

Select Committee on Procedure, *Third Report*, HC 178 of 1990–91

In evidence to the committee the Principal Clerk of the Table Office outlined the purposes of parliamentary Questions, whether oral or written:

> (a) a vehicle for individual backbenchers to raise the individual grievance of their constituencies;
> (b) an opportunity for the House as a whole to probe the detailed actions of the Executive;
> (c) a means of illuminating differences of policy on major issues between the various political parties, or of judging the parliamentary skills of individual Members on both sides of the House;
> (d) a combination of these or any other purposes, for example a way of enabling the Government to disseminate information about particular policy decisions. [Standing Orders now make provision for written ministerial statements and policy announcements are expected to be made in this way rather than in answer to ministerially inspired Questions.]

The committee said in its report that there should be added to these 'the obtaining of information by the House from the Government and its subsequent publication'. The report continued (para 27):

> [T]he relative prominence assumed by the different purposes of parliamentary questions has tended to vary from one era to another. This is especially true of oral questions, which, certainly so far as the main Departments are concerned, have taken on a markedly more partisan aspect over recent decades, especially perhaps since the late 1960s. The notion that an oral question is designed as a genuine enquiry to obtain factual information belongs – sadly, some might say – to a growing extent in the past. Increasingly, in recent Parliaments, questions have become vehicles for supplementaries aimed at establishing a specific political point as part of the ideological clash between the parties. Indeed, it is often claimed that very few Members now table an oral question unless they already know the likely answer.

The committee noted other strands of Question Time which had been emphasised in evidence to it, 'notably the raising of constituency matters and the pursuit of campaigns on issues which either cut across party lines or which do not have a strong ideological content'. In any event the committee did not believe that parliamentary accountability was 'incompatible with the increased use of Question Time for the exposure of policy differences between the parties'.

'Urgent Questions', which are not subject to the notice requirements for ordinary Questions, may be allowed by the Speaker for raising urgent matters of public importance for answer on the same day. The Speaker is not often persuaded to permit them, unless applied for by opposition frontbench spokespersons.

(See further Procedure Committee, *Parliamentary Questions*, HC 622 of 2001–02 and *Government Response* (Cm 5628/2002); Hough, 'Ministerial

responses to parliamentary questions: some recent concerns' [2003] *PL* 211; Giddings and Irwin, 'Objects and questions', in P Giddings (ed), *The Future of Parliament* (2005).

(iii) Select committees

Besides ad hoc committees set up from time to time for particular investigations, the House of Commons has some twenty-five select committees which are appointed each session in accordance with standing orders. They include the Committee on Standards and Privileges, whose predecessor the Committee of Privileges dates from the seventeenth century, the Committee of Public Accounts, first set up in 1861, and such more recent creations as the European Scrutiny Committee, the Environmental Audit Committee and the Select Committees on Public Administration and Modernisation. Not all of these committees are concerned with the control or scrutiny of the executive, but this is the essential function of the select committees established in 1979 'to examine the expenditure, administration and policy' of the principal government departments and the public bodies associated with them.

Governments have not always regarded with enthusiasm the establishment of select committees which can question their policies and investigate the details of administration. The 'departmentally related' select committees set up in 1979 owe their existence to backbench pressure and the persistence of a reform-minded Minister and Leader of the House, Mr St John-Stevas, just as an earlier, more limited experiment with specialist committees is associated with Mr Richard Crossman as Leader of the House from 1966 to 1968. The committees established in the 1966–70 Parliament – on Agriculture, Science and Technology, Education and Science, Race Relations and Immigration, Scottish Affairs, and Overseas Aid – did some useful work but were at first regarded with scepticism by many MPs and with suspicion by the Government, which tried to influence the selection of members and the choice of subjects to be investigated. The Committee on Agriculture, which showed a particular independence of spirit, was soon wound up. It became evident that too great an assertiveness by the committees would result in counter-measures by the government – a reminder that the traditions of British parliamentary government do not easily accommodate rival institutions which will 'balance' the power of the executive.

Nevertheless it was increasingly realised by backbenchers that in select committees they could take part in a concerted and informed scrutiny of the administration which was more effective than their sporadic efforts on the floor of the House. The system developed in a rather piecemeal way until in 1978 the Select Committee on Procedure recommended a new structure of committees which 'would cover the activities of all departments of the United Kingdom Government, and of all nationalised industries and other quasi-autonomous governmental organisations' (*First Report*, HC 588-I of 1977–78, para 5.22). The new departmentally related committees were established on a firm footing in the standing orders of the House in 1979. In 2006 there were eighteen of these

committees, each of them 'shadowing' one or more government departments and their associated bodies:

Communities and Local Government
Constitutional Affairs
Culture, Media and Sport
Defence
Education and Skills
Environment, Food and Rural Affairs
Foreign Affairs
Health
Home Affairs
International Development
Northern Ireland Affairs
Science and Technology
Scottish Affairs
Trade and Industry
Transport
Treasury
Welsh Affairs
Work and Pensions

If it is to keep the work of a department and its satellite public bodies under effective review a committee may need to appoint a sub-committee to carry out simultaneous inquiries. A committee may meet concurrently with any other committee of *either* House and committees may make available to each other evidence taken by them in the course of their inquiries. Since 1999 four committees – those for Defence, Foreign Affairs, International Development and Trade and Industry – have worked together in scrutinising the government's policy on strategic export controls: in acknowledging the work of this 'quadripartite committee' a Foreign Office minister paid it the compliment of having 'given the government so much trouble' in its 'detailed and expert analysis' (HC Deb vol 359, col 32 WH, 14 December 2000).

The maximum number of members of a 'departmental' (departmentally related) committee is in most cases eleven, but some have a maximum membership of thirteen or fourteen. Since 1979 members have been appointed on the nomination of an all-party Committee of Selection which would have regard to the balance of parties in the House. In practice, however, government and opposition Whips exercised a covert and decisive influence, as has been seen from time to time when backbenchers of independent spirit have been deprived of their places on select committees. When two Labour MPs were excluded from, respectively, the Foreign Affairs Committee and the Transport, Local Government and the Regions Committee, seemingly for the vigour with which they had performed their function of critical scrutiny, the House of Commons delivered a rare cross-party rebuke to government in voting to restore the two

members to their places on the committees. (See HC Deb vol 372, cols 35 *et seq*, 16 July 2001; vol 372, cols 508 *et seq*, 19 July 2001.)

A House of Commons committee has declared it to be 'wrong in principle that party managers should exercise effective control of select committee membership' (Liaison Committee, *First Report*, HC 300 of 1999–00, para 13). The Government initially disfavoured any change in the system of nomination (see the Government's *Response* to the Liaison Committee's Report, Cm 4737/2000, paras 6–14) but a new Leader of the House (Mr Robin Cook) proved more flexible (see HC Deb vol 372, col 1320, 18 October 2001), and the matter was considered afresh by the Modernisation Committee, chaired by the Leader of the House. In its *First Report*, HC 224-I of 2001–02, that committee made a proposal for placing nominations to all select committees 'in the hands of an independent authoritative body', which would 'command the confidence of the House on both sides'. This would be a new Committee of Nomination, composed of the Chairman of Ways and Means, seven members of the Chairmen's Panel (who are appointed by the Speaker) and the most senior backbencher from the government and opposition sides of the House. The political parties could submit proposals to the Committee of Nomination which, acting with the 'utmost impartiality', would scrutinise the proposals made and would have the final say. When the matter came before the House for decision, MPs were not persuaded of the case for a Committee of Nomination which, it was objected, would assume powers belonging properly to the parties in Parliament and the House as a whole. The influence of the Whips may perhaps be discerned in this outcome. (See HC Deb vol 385, cols 648 *et seq*, 13 May 2002.) Reform-minded MPs continued to campaign for a new system of election to select committees, providing for nominations to be made by any member and election by secret ballot of MPs. Meanwhile the unreformed nomination procedure remains in place, and prevention of abuse depends, as before, on the will of the House to resist manipulation by the Whips.

The departmental select committees are the preserve of backbenchers: neither Parliamentary Private Secretaries nor frontbench spokesmen are appointed to them. The committees elect their own chairpersons, but informal arrangements have ensured that a number of the chairs are occupied by opposition members, account being taken of the balance of parties in the House. Chairpersons serve on a Liaison Committee which coordinates the work of select committees and makes representations on their behalf (on staffing, powers, etc) to the House. The Liaison Committee's report, *Shifting the Balance* (*First Report*, HC 300 of 1999–00), assessed the effectiveness of the departmental committees and proposed reforms for strengthening them in their task of holding the executive to account. Few of the recommendations were implemented and the committee expressed disappointment with the Government's response (*Shifting the Balance: Unfinished Business*, HC 321-I of 2000–01). The project was resumed by the Modernisation Committee under its reform-minded chairman and Leader of the House, Mr Robin Cook. Its *First Report*

of 2001–02 (above) made twenty-two recommendations for enabling the committees to perform their task of scrutiny more effectively. The proposed reforms included additional staff and resources for the committees, an alternative parliamentary career structure devoted to scrutiny, with salaries for committee chairpersons, and a clear definition of committees' common objectives. These proposals were approved by the House of Commons on 14 May 2002 (HC Deb vol 385, cols 648 *et seq*). Following this resolution, the Commons Liaison Committee defined the 'core tasks' of the committees: these, it is said, 'now provide the central scrutiny agenda for the accountability of ministers and their departments to Parliament' (*Annual Report of the Liaison Committee for 2004*, HC 419 of 2004–05). They are set out as follows, in guidance to each committee.

OBJECTIVE A: TO EXAMINE AND COMMENT ON THE POLICY OF THE DEPARTMENT

Task 1 To examine policy proposals from the UK Government and the European Commission in Green Papers, White Papers, draft Guidance etc, and to inquire further where the Committee considers it appropriate.
Task 2 To identify and examine areas of emerging policy, or where existing policy is deficient, and make proposals.
Task 3 To conduct scrutiny of any published draft bill within the Committee's responsibilities.
Task 4 To examine specific output from the department expressed in documents or other decisions.

OBJECTIVE B: TO EXAMINE THE EXPENDITURE OF THE DEPARTMENT

Task 5 To examine the expenditure plans and out-turn of the department, its agencies and principal NDPBs.

OBJECTIVE C: TO EXAMINE THE ADMINISTRATION OF THE DEPARTMENT

Task 6 To examine the department's Public Service Agreements, the associated targets and the statistical measurements employed, and report if appropriate.
Task 7 To monitor the work of the department's Executive Agencies, NDPBs, regulators and other associated public bodies.
Task 8 To scrutinise major appointments made by the department.
Task 9 To examine the implementation of legislation and major policy initiatives.

OBJECTIVE D: TO ASSIST THE HOUSE IN DEBATE AND DECISION

Task 10 To produce reports which are suitable for debate in the House, including Westminster Hall, or debating committees.

Each of the departmental committees has power 'to send for persons, papers and records'. This formal power is rarely exercised, the committees preferring to proceed by invitation rather than command, but some initial refusals to appear or provide evidence have led to the service of formal orders by the

Serjeant-at-Arms. The committees cannot themselves enforce their orders, but a refusal to comply could be reported to the House which might treat the refusal as a contempt. MPs and ministers may be ordered to attend select committees or produce documents only by the House itself. (See R Blackburn and A Kennon, *Griffith and Ryle on Parliament* (2nd edn 2003), paras 11-095–11-101; Leopold [1992] *PL* 541.)

The Leader of the House of Commons gave the following assurance on behalf of the Government on 25 June 1979 (HC Deb vol 969, col 45):

> There need be no fear that departmental Ministers will refuse to attend Committees to answer questions about their Departments or that they will not make every effort to ensure that the fullest possible information is made available to them.
>
> I give the House the pledge on the part of the Government that every Minister from the most senior Cabinet Minister to the most junior Under-Secretary will do all in his or her power to co-operate with the new system of Committees and to make it a success.

These undertakings have been renewed subsequently and in general have been honoured by ministers – although *former* ministers have refused to give evidence to committees (Baroness Thatcher in 1994 in the Foreign Affairs Committee's inquiry into the Pergau Dam affair) or have attended reluctantly after initial refusal (Mrs Edwina Currie in 1989 in the Agriculture Committee's inquiry into salmonella in eggs). In 2002 the Transport, Local Government and the Regions Committee expressed its dissatisfaction that no Treasury minister or official had consented to appear before it to answer questions about rail franchising or funding proposals for London Underground, although the Treasury had been closely involved in decisions taken. The Treasury, it said, 'is ever more powerful and influential but is unwilling to be fully accountable' to the scrutinising committees (Liaison Committee, *First Report*, HC 590 of 2001–02, Appendix R, para 8; see also Transport, Local Government and the Regions Committee, *First Special Report*, HC 771 of 2001–02). Successive Prime Ministers consistently refused to appear before select committees until, in April 2002, Mr Blair announced that he would, in future, submit to questioning by the Liaison Committee at least once every six months. (It is a noteworthy feature of our unwritten constitution that the terms on which ministers answer to Parliament can sometimes be a matter for unilateral decision by the Prime Minister.)

Both ministers and civil servants (including special advisers) appear frequently before the departmental committees, are questioned at length and in detail, and are usually helpful to the committees in their inquiries. On the other hand 'there remains concern that the lack of specific powers leaves committees at a disadvantage in obtaining the fullest cooperation from Government' (Liaison Committee, *First Report*, HC 323-I of 1996–97, para 10). The committees have sometimes experienced difficulty in obtaining relevant information from government (see below) and have complained from time to time of a lack of frankness on the part of departments.

Committees may summon named civil servants to appear before them and the government acknowledges a *presumption* that a request for attendance of a particular official will be agreed to, but this is subject to the right of ministers 'to decide which official or officials should represent them' (*Departmental Evidence and Response to Select Committees*, below, paras 43–44). Moreover, 'Civil servants who give evidence to Select Committees do so on behalf of their Ministers and under their directions' (*ibid*, para 40), and so may be instructed not to answer particular questions or disclose certain information. In 1984 the Government declined to allow the Director of the Government Communications Headquarters and a trade union official employed there to give evidence to the Select Committee on Employment, which was inquiring into a ban on trade union membership at GCHQ. (See Employment Committee, *First Report*, HC 238 of 1983–84, paras 6–7.) In the course of its inquiry into the Westland affair (above, p 378) in 1986, the Defence Committee wished to question five officials about their conduct in the affair, but ministers refused to allow them to attend. The committee criticised this refusal as an evasion of accountability to Parliament, and was supported in this by the Treasury and Civil Service Committee: Defence Committee, *Fourth Report*, HC 519 of 1985–86, paras 225–38; Treasury and Civil Service Committee, *Seventh Report*, HC 92-I of 1985–86, para 3.18. The Government said in its reply that it did not believe 'that a Select Committee is a suitable instrument for inquiring into or passing judgement upon the actions or conduct of an individual civil servant': *Westland plc* (Cmnd 9916/1986), para 44. Guidelines subsequently issued to civil servants insist that questions by select committees about the conduct of individual officials (raising the possibility of criticism or blame) should not be answered by civil servants: it is the responsibility of the minister to make any necessary inquiry and then to inform the committee of what happened and of any corrective action taken. (See *Departmental Evidence and Response to Select Committees*, below, paras 73–8.) In the Trade and Industry Committee's *Arms Exports to Iraq* inquiry, the Government refused to assist the committee in facilitating the giving of evidence by two retired officials, on the grounds that they would not have access to departmental papers and could not give evidence on behalf of ministers (*Second Report*, HC 86 of 1991–92, para 125; see further S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999), pp 412–13; Erskine May, *Parliamentary Practice* (22nd edn 1997), pp 760–1).

Some categories of information are withheld from select committees. The criteria to be applied by officials are set out in the so-called 'Osmotherly Rules' (formerly entitled a *Memorandum of Guidance for Officials Appearing before Select Committees*) of which the 1980 edition was issued by an official of that name. The guidance has since been revised from time to time and has become less restrictive in recent editions. It is now entitled *Departmental Evidence and Response to Select Committees* (2005 edn). The guidance states (para 53) as its 'central principle' that officials should be as forthcoming and helpful as possible to select committees, and that any withholding of information 'should be decided in accordance with the law and care should be taken to ensure that no

information is withheld which would not be exempted if a parallel request were made under the FOI [Freedom of Information] Act'. Information is not to be disclosed, for instance, if it relates to national security or would be likely to cause harm to defence, international relations or the economy, or if it concerns the private affairs of individuals or was supplied to the government in confidence. As regards the discussion of government policy, the guidance states (para 55):

> Officials should as far as possible confine their evidence to questions of fact and explanation relating to government policies and actions. They should be ready to explain what those policies are; the justification and objectives of those policies as the Government sees them; the extent to which those objectives have been met; and also to explain how administrative factors may have affected both the choice of policy measures and the manner of their implementation. Any comment by officials on government policies and actions should always be consistent with the principle of civil service political impartiality. Officials should as far as possible avoid being drawn into discussion of the merits of alternative policies where this is politically contentious. If official witnesses are pressed by the Committee to go beyond these limits, they should suggest that the questioning should be referred to Ministers.

In a memorandum provided to the Liaison Committee by the Clerks to the Committee in 2004 it is said:

> At least since the 1970s, there has been a continuing struggle between committees and successive Governments to establish a modus operandi on attendance by civil servants. The Government's position is set out in the so called Osmotherly rules. These have, however, never been approved by the House, which asserts that it is not for Ministers unilaterally to abridge or fetter its powers to call evidence. On the other hand, political reality implies that these powers cannot be enforced against the wishes of a Government with a majority in the House. The resulting agreement to disagree, on this point, together with undertakings by Government, most notably set out in the Resolution of 19 March 1997 [above, p 572], have created informal conventions which normally enable committees to carry out their work without major hindrance. However, periodically there are refusals of cooperation over particular Government witnesses.

Various instances of difficulty experienced by committees in securing information or the attendance of witnesses are recounted by the Liaison Committee (*Shifting the Balance: Unfinished Business*, HC 321-I of 2000–01, paras 118–26). A committee which is dissatisfied with a department's refusal to disclose information to it may report the matter to the House. The Leader of the House said on 16 January 1981 (HC Deb vol 996, col 1312):

> I am entirely prepared to give a formal undertaking that where there is evidence of widespread general concern in the House regarding an alleged ministerial refusal to disclose information to a Select Committee, I shall seek to provide time to enable the House to express its view.

This undertaking is reaffirmed in *Departmental Evidence and Response to Select Committees*, para 30.

When the Government refused in 1998 to provide the Foreign Affairs Committee with copies of telegrams received at the Foreign Office relating to breaches of an embargo on the supply of arms to Sierra Leone, the committee asked that the matter should be debated in the House: Foreign Affairs Committee, *First Special Report*, HC 760 of 1997–98 and *Second Special Report*, HC 852 of 1997–98. The issue between the Government and the committee was not yet resolved when it was raised for debate on an Opposition motion. The motion was defeated, the Government having affirmed its readiness to provide the committee with a summary of the telegrams on a confidential basis: HC Deb vol 315, cols 865 *et seq*, 7 July 1998. In 2003 the Foreign Affairs Committee, in its report on *The Decision to Go to War in Iraq*, was 'strongly of the view that we were entitled to a greater degree of co-operation from the Government on access to witnesses and to intelligence material'. It regarded 'the Government's refusal to grant us access to evidence essential to our inquiries as a failure of accountability to Parliament'. (*Ninth Report*, HC 813 of 2002–03, paras 6, 163. See also this committee's *Second Report*, HC 522 of 2005–06, paras 16–23.)

The relative weakness of select committees (despite their formal power to send for persons, papers and records) in face of a refusal to produce documents has been contrasted with the experience of the (non-statutory) Hutton Inquiry into the Circumstances Surrounding the Death of David Kelly CMG (HC 247 of 2003–04), which was able to secure production of all the documents that it required, some of which had been denied to the Foreign Affairs Committee. (See the Memorandum to the Liaison Committee by the Clerks to the Committee, cited above; Foreign Affairs Committee, *First Special Report*, HC 440 of 2003–04, paras 9–12; *Annual Report of the Liaison Committee for 2003*, HC 446 of 2003–04, paras 87–91.) In its *Annual Report for 2004*, HC 419 of 2004–05, para 130, the Liaison Committee was encouraged by the new assurance in para 68 of *Departmental Evidence and Response to Select Committees* that 'the presumption is that requests for information from Select Committees will be agreed to'. This declaration, it is hoped, will herald a greater readiness to cooperate with the committees. In any event it has been the case, as Michael Ryle remarks, 'that in the end nearly all committees have succeeded in getting answers to the vast majority of the questions they ask. Little remains hidden' ((1997) 11 *Contemporary British History* 63, 69).

High hopes have been expressed for what the departmental committees might achieve, as when a Leader of the House said that they were intended to 'redress the balance of power' between Parliament and the executive (HC Deb vol 969, col 36, 25 June 1979). As such, the committees have an important role in the scrutiny of the executive. Ministers and civil servants are questioned in depth in a way that is impossible on the floor of the House, and are obliged to explain and justify their actions. Departmental activities are investigated, in many hours of questioning, by members who have acquired some proficiency

in the subject and can call on the assistance of expert advisers. Not only the departments themselves but others involved with or affected by their policies – local authorities, political parties, pressure groups, industrialists, trade unions – may be called to give evidence. The committees have prised many facts and explanations from the departments that could not have been extracted in any other way, and their published reports (300 or more in a parliamentary session) constitute a considerable body of information about the processes of government. (For instance, it has been remarked that the reports of the Treasury Committee are 'the primary source of what we now know about economic policy-making': A Robinson, in G Drewry (ed), *The New Select Committees* (2nd edn 1989), p 283.)

The Treasury Committee assumed a new role for itself in 1998 after the establishment (by the Bank of England Act 1998) of a Monetary Policy Committee of the Bank of England with responsibility for setting interest rates. The Treasury Committee decided to hold regular non-statutory 'confirmation hearings' on appointments of members of the Monetary Policy Committee to satisfy itself and Parliament that those appointed were of 'demonstrable professional competence and personal independence of the government'. (See Treasury Committee, *Third Report*, HC 571 of 1997–98 and *Sixth Report*, HC 822-I, II of 1997–98.) It holds to the view that it should be given power by statute to confirm nominations to the Monetary Policy Committee (*Ninth Report*, HC 42 of 2000–01, para 49), but the Government has not conceded this. In 2003 the Public Administration Committee argued that there were 'solid reasons for Parliament to take a more assertive approach to public appointments' and recommended that select committees should have the right to hold meetings with proposed appointees to key positions and be empowered to require competition for a post to be re-opened if of the opinion that the person proposed was unsuitable (*Fourth Report*, HC 165-I of 2002–03, paras 103–10). The Government rejected this recommendation. Scrutiny of major appointments is one of the 'core tasks' (above, p 616) of the select committees and it is common practice for them to hold evidence sessions with incumbents of major posts soon after appointment.

Another of the committees' core tasks is the scrutiny of draft bills, in this way making a useful contribution to the quality of legislation. For instance, the draft Freedom of Information Bill was scrutinised by the Select Committee on Public Administration in 1999, and in 2001 three committees (Home Affairs, Defence and the Joint Committee on Human Rights) commented on the Anti-terrorism, Crime and Security Bill before its second reading; two amendments proposed by the Home Affairs Committee were accepted by the Government. In 2003, forty of the recommendations made by the Office of the Deputy Prime Minister Committee in its examination of the draft Housing Bill had a positive response from the Government. A number of the recommendations in the report of the Home Affairs Committee on the draft Identity Cards Bill in 2004 were incorporated in the bill introduced in Parliament. A recent innovation has been the

publication by a committee of its own draft bill, in making a case for legislative reform. In 2004 the Public Administration Committee published draft bills on the civil service and on the Executive's prerogative powers (*First Report*, HC 128-I and *Fourth Report*, HC 422 of 2003–04).

Between the departments and the committees that shadow them there is a continual dialogue, the departments replying to the committees' reports (normally within two months), and their replies sometimes stimulating further inquiry. It has been found possible in the committees 'for people of widely disparate views to work together exclusively as parliamentarians' (Mr Edward du Cann, MP, in evidence to the Select Committee on Procedure (Finance), HC 365-vi of 1981–82, Q 459). The committees do not usually vote on party lines and generally strive for consensus, which adds weight to reports that are often sharply critical of government policy or its administration.

It is difficult to assess the impact of the committees on governmental decision-making. Even when recommendations of the committees are accepted, it may be that departmental thinking was in any event moving in the same direction. On the other hand, even if a committee's report has no observable result it may bring new evidence and argument into the debate within government, or may contribute to the climate of opinion in which departments must operate. An instance of direct and significant impact was the Home Affairs Committee's report on the 'sus' law (loitering as a suspected person) which helped to bring about its repeal by the Criminal Attempts Act 1981.

There has also been some effect on the House as a whole. Select committee reports may be specifically debated in the House: three Estimates Days are set aside for such debates in each session, but the main forum for debating select committee reports is the parallel chamber in Westminster Hall. In addition, many reports are relevant to the subject matter of other debates. For example, the report of the Foreign Affairs Committee on the 'patriation' of the Canadian constitution (see chapter 3) provided much material for the debates in Parliament. Members of the committees are, too, better equipped to play their part on the floor of the House, in the striving for accountability that takes place there.

The select committees are Parliament's best method for enforcing the accountability of government, and in this they have had some success, although their achievement has been partial and uneven. Recent changes in the working methods and objectives of the departmental committees, together with specialist assistance from a recently established Scrutiny Unit, give promise of more systematic and effective scrutiny of the executive. A change of culture may also be needed. Governments are ambivalent in their attitude to select committees: as Peter Riddell remarks, 'Too often, select committees have been seen by ministers and civil servants as a problem to be tackled, and if possible neutralised, than as a potentially important factor in policy making and implementation, and legislation' (*Parliament under Blair* (2000), p 214). The committees themselves cannot be wholly detached from the contest of the parties in Parliament, engaged there in a perpetual election campaign. Members of the committees are supportive of

their party, may be hopeful of office, yet are called upon to assert themselves as parliamentarians in confronting and restraining the executive. In this they sometimes falter, though it is perhaps remarkable that they are often able to transcend party differences in exposing the errors and deficiencies of government policy and administration.

Not everyone would welcome an extension of the bipartisan role of select committees, seen as contributing to a sterile 'government by consensus'. Tony Benn, for instance, believes that the select committees 'have become effectively a network of coalitions, knitting government and opposition backbenchers together through a common desire to reach unanimous conclusions' (in K Sutherland (ed), *The Rape of the Constitution*? (2000), p 48).

On the strengths and weaknesses of the committees see further D Woodhouse, *Ministers and Parliament* (1994), ch 10; Giddings, 'Select committees and parliamentary scrutiny' (1994) 47 *Parliamentary Affairs* 669; S Weir and D Beetham, *Political Power and Democratic Control in Britain* (1999), pp 405–18; P Riddell, *Parliament under Blair* (2000), pp 208–22; Tomkins, 'What is Parliament for?', in N Bamforth and P Leyland (eds), *Public Law in a Multi-layered Constitution* (2003), ch 3; L Maer and M Sandford, *Select Committees under Scrutiny* (2004); Natzler and Hutton, 'Select committees: scrutiny *a la carte*?', in P Giddings, *The Future of Parliament* (2005).

(iv) Parliamentary Ombudsman

The office of Parliamentary Commissioner for Administration (or 'Parliamentary Ombudsman' – the name by which the officer is commonly known) was established by the Parliamentary Commissioner Act 1967 for the investigation of complaints by members of the public of injustice resulting from 'maladministration' by government departments. The model for the new office was the Scandinavian Ombudsman, but unlike the officers of this title in Sweden, Denmark, Norway and Finland the British Parliamentary Ombudsman was to be harnessed to the legislature and to function as an extension of parliamentary scrutiny and control. The office was intended, as the Government said in 1965, to provide members of Parliament with 'a better instrument which they can use to protect the citizen' (*The Parliamentary Commissioner for Administration*, Cmnd 2767/1965, para 4). The Parliamentary Ombudsman is an independent officer, appointed by the Crown – in practice, on the motion of the Prime Minister with the agreement of the leaders of the main opposition parties and of the Chairman of the House of Commons Select Committee on Public Administration – and answerable to the House of Commons.

The Ombudsman (Ann Abraham in 2006) can at present undertake an investigation only at the request of an MP, to whom she reports the result. She makes an annual report to Parliament and other reports as she thinks fit and she is supported by the Select Committee on Public Administration (successor to the former Select Committee on the Parliamentary Commissioner), which itself reports to the House on the work of the Ombudsman and takes up with the

departments any cases in which there has been an inadequate response to the Ombudsman's findings.

The linkage with Parliament has been a controversial feature of the institution, for the 'MP filter' has operated in an arbitrary way – some MPs rarely or never refer complaints to the Ombudsman while others do so frequently – and is a hindrance to the ordinary citizen in need of a clear and simple remedy for grievances against the administration. A former Ombudsman has said that 'the filter serves to deprive members of the public of possible redress for injustice caused by maladministration' (*Annual Report* (1993), para 2), but in the view of the then Select Committee on the Parliamentary Commissioner the filter 'acts as an extremely effective sifting mechanism and is one of the greatest strengths of the UK system. In effect, every individual Member of Parliament is himself an Ombudsman and deals in his elected capacity with many complaints without having to seek recourse to the PCA' (Select Committee on the Parliamentary Commissioner, *First Report*, HC 706 of 1987–88, para 9; see also the Committee's *First Report*, HC 33-I of 1993–94, paras 52–77). On the other hand, as the JUSTICE–All Souls Review remarked, 'An MP who raises a matter direct with a minister has neither the time nor the resources to probe the answer which he receives' (*Administrative Justice* (1988), para 5.8). Direct access to the Ombudsman or equivalent officer by members of the public is allowed in almost every other country that has this institution, and there is direct access to the Health Service Ombudsman and Local Government Ombudsmen. A survey carried out for the Cabinet Office, *Review of the Public Sector Ombudsmen in England* (Collcutt Report) (2000), was emphatic in recommending the abolition of the MP filter, supported in this by the Select Committee on Public Administration, and the Government accepted this recommendation (HC Deb vol 372, col 464W, 20 July 2001), which awaits legislative implementation. Some complainants, unaware of the present restriction, apply directly to the Parliamentary Ombudsman, who has adopted a practice which mitigates the effect of the present rule. If the complaint seems to be 'clearly investigable', the Ombudsman sends it with the complainant's consent to his or her constituency MP, inviting the Member to refer it to the Ombudsman for investigation.

The Ombudsman can investigate the complaint of a member of the public 'who claims to have sustained injustice in consequence of maladministration' by a scheduled government department or authority (Parliamentary Commissioner Act 1967, s 5(1) and sch 2), but she is not authorised to question the *merits* of a decision taken, without maladministration, in the exercise of discretion (s 12(3)). The Ombudsman has stated as follows the four basic requirements a complaint must satisfy if it is to be accepted for investigation (*Annual Report* (1983), HC 322 of 1983–84, para 17):

> (1) the department or authority concerned must be one within my jurisdiction; (2) there must be *some* evidence from which it may reasonably be inferred that there has been *administrative* fault; (3) I have to be satisfied that there is an apparent link between the alleged

maladministration and the personal injustice which the aggrieved person claims to have suffered; and (4) I also need to be satisfied that there is some prospect of my intervention, if I find the complaint justified, leading to a worthwhile remedy for the aggrieved person or some benefit to the public at large.

'Maladministration' is not defined in the Act, but its intended scope appears from the 'Crossman catalogue' of procedural improprieties instanced by Mr Richard Crossman in the second reading debate on the Parliamentary Commissioner Bill in the House of Commons: 'bias, neglect, inattention, delay, incompetence, inaptitude, perversity, turpitude, arbitrariness and so on' (HC Deb vol 734, col 51, 18 October 1966). The Ombudsman has provided an expanded list of examples, going beyond the Crossman catalogue (*Annual Report* (1993), HC 290 of 1993–94, para 7):

rudeness (though that is a matter of degree);
unwillingness to treat the complainant as a person with rights;
refusal to answer reasonable questions;
neglecting to inform a complainant on request of his or her rights or entitlement;
knowingly giving advice which is misleading or inadequate;
ignoring valid advice or overruling considerations which would produce an uncomfortable result for the overruler;
offering no redress or manifestly disproportionate redress;
showing bias whether because of colour, sex, or any other grounds;
omission to notify those who thereby lose a right of appeal;
refusal to inform adequately of the right of appeal;
faulty procedures;
failure by management to monitor compliance with adequate procedures;
cavalier disregard of guidance which is intended to be followed in the interest of equitable treatment of those who use a service;
partiality; and
failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment.

Maladministration has 'nothing to do with the nature, quality or reasonableness of the decision itself', per Lord Donaldson MR in *R v Local Commissioner for Administration, ex p Eastleigh Borough Council* [1988] QB 855, 863. It has been said that 'maladministration comes in many different guises' and that while it may overlap with unlawful conduct, they are not synonymous: Henry LJ in *R v Local Commissioner for Administration, ex p Liverpool City Council* [2001] 1 All ER 462, [17]. The Ombudsman cannot investigate if the complaint is simply that a department's decision affecting the complainant was wrong, if there is no suggestion that the complainant's case was mishandled in some way, as by disregarding relevant facts, drawing unjustified conclusions, mislaying information, giving inaccurate or misleading advice – 'and so on'.

Injustice – also undefined – may be experienced as hardship, or financial loss, or the forfeiture of some benefit, or simply as distress, anxiety or inconvenience, or 'the sense of outrage aroused by unfair or incompetent administration' (Sedley J in *R v Parliamentary Commissioner for Administration, ex p Balchin* [1996] EWHC Admin 152 at [15]–[16].

The investigatory jurisdiction of the Parliamentary Ombudsman extends to most kinds of administrative action by over 300 government departments and non-departmental public bodies. There are some notable exclusions, such as public service personnel matters, contractual or other commercial transactions and decisions from which there is a right of appeal to a tribunal or a remedy in a court of law (see further section 5 and Schedule 3 to the 1967 Act). Contracted-out functions performed on behalf of listed departments remain subject to the Ombudsman's jurisdiction. (See the Deregulation and Contracting Out Act 1994, section 72.)

The Ombudsman has wide powers for carrying out her investigations and may adopt whatever investigative procedure she considers appropriate in the circumstances of the case. She has the same powers as the High Court to compel witnesses to attend for examination and can require any minister or civil servant to provide relevant information or documents. (But material relating to the proceedings of the Cabinet and its committees may be withheld from her.) The Ombudsman is subject to the ordinary supervisory jurisdiction of the courts and her findings may be set aside if she should exceed her statutory powers, act unlawfully or fail to consider a relevant factor (see eg, *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 WLR 621 and comment by Marsh [1994] *PL* 347); and *R v Parliamentary Commissioner for Administration, ex p Balchin (No 2)* [1999] EWHC Admin 484, (1999) 2 LGLR 87 and comment by Giddings [2000] *PL* 201).

If the Ombudsman finds injustice caused by maladministration she may recommend to the department concerned whatever action she thinks should be taken by way of redress, but has no power of enforcement. Departments normally comply with the Ombudsman's recommendations, although compliance has occasionally been grudging and exceptionally has been refused. Redress may take the form of an *ex gratia* payment, so as to restore the complainant to the position in which he or she would have been had the maladministration not occurred, or an apology, or the reversal of the decision of which complaint was made. A department may also revise its procedures or standing instructions for the future. If it appears to the Ombudsman that an injustice will not be remedied she may make a special report on the case to Parliament (s 10(3) of the 1967 Act). A demurring department is unlikely to defy the Ombudsman's recommendation if she is supported by the select committee.

Probably the most complex and wide-ranging investigation so far undertaken by the Parliamentary Ombudsman was that of 1988–89 into the Department of Trade and Industry's handling of matters relating to the Barlow Clowes group of companies. The collapse of Barlow Clowes resulted in considerable loss to

many investors, who made complaints about the Department's exercise of its regulatory functions in relation to the investment business of the companies. In his report (*The Barlow Clowes Affair*, HC 76 of 1989–90) the Ombudsman identified five areas in which there had been, in his view, 'significant maladministration' by the Department resulting in injustice to investors 'which ought to be remedied by the payment of compensation'. The Government disagreed with a number of the Ombudsman's specific findings but recognised that the events had caused great hardship and agreed, without admission of fault or liability, to make substantial payments to investors who had suffered loss. (See *Observations by the Government* on the Ombudsman's report, HC 99 of 1989–90 and see further Gregory and Drewry, 'Barlow Clowes and the Ombudsman' [1991] *PL* 192, 408.)

The Channel Tunnel Rail Link: exceptional hardship

In February 1995, for only the second time in the history of the office, the Ombudsman laid a special report before each House of Parliament (under section 10(3) of the Parliamentary Commissioner Act 1967) stating his view that injustice had been caused to persons in consequence of maladministration and had not been remedied (*Fifth Report*, HC 193 of 1994–95). Complaints had been forwarded by MPs to the Ombudsman from householders who had been unable to sell their properties as a result of the blight caused by prolonged delay in settling the route of the Channel Tunnel rail link. Existing compensation schemes did not cover a number of persons who, as the Ombudsman found, had suffered 'exceptional or extreme hardship' in consequence of the delay. He concluded that the Department of Transport, in failing to consider *ex gratia* redress for householders who had been affected in this extreme degree, had been guilty of maladministration resulting in injustice. The Department did not agree and made no offer of redress.

The Select Committee on the Parliamentary Commissioner acted upon the Ombudsman's special report in taking evidence from the Ombudsman and the Department and, in line with the principle that maladministration included 'a failure to mitigate the effects of rigid adherence to the letter of the law where that produces manifestly inequitable treatment', agreed with the Ombudsman that maladministration causing injustice had occurred. The committee recommended that the Department should reconsider the payment of compensation to those who had suffered exceptional hardship. If the Department should remain obdurate, they would recommend 'that as a matter of urgency a debate on this matter be held on the floor of the House' (Select Committee on the Parliamentary Commissioner, *Sixth Report*, HC 270 of 1994–95). While continuing to deny that maladministration had occurred, the Department then agreed to reconsider the question of redress 'out of respect for the PCA Select Committee and the office of the Parliamentary Commissioner'. The Department subsequently formulated a scheme for identifying

and compensating those who had suffered exceptional hardship (Select Committee on the Parliamentary Commissioner, *Second Report*, HC 453 of 1996–97; *Annual Report of the Parliamentary Ombudsman*, HC 845 of 1997–98, para 5.10. See also James and Longley [1996] *PL* 38.)

A Debt of Honour; Trusting in the Pension Promise

In the 2005–06 parliamentary session the Ombudsman twice reported to Parliament under section 10(3) of the Parliamentary Commissioner Act 1967 that injustice had been caused by maladministration and that the Government did not intend to remedy it.

In *A Debt of Honour* (HC 324) the Ombudsman dealt with a complaint about the administration by the Ministry of Defence of a scheme for making *ex gratia* payments to (among others) British civilians who had been interned and ill-treated by the Japanese during the Second World War. The complainant had been denied compensation on the ground that the scheme, as varied after its introduction, was limited to British claimants born in the United Kingdom or with a parent or grandparent who had been born there. The Ombudsman found that there had been maladministration in the manner in which the scheme was brought into effect (with the criteria for eligibility left unclear) and also by reason of inconsistency in its operation. Maladministration on the first ground was admitted by the Government, which made due apology and modest financial recompense, but the finding of inconsistency was initially rejected. The Ombudsman's section 10(3) report was considered by the Public Administration Committee, which concluded that there was 'ample evidence to support the Ombudsman's finding of maladministration' (*First Report*, HC 735, para 37); at the same time the Ministry's further investigations led it to acknowledge that there had indeed been inconsistencies in the operation of the scheme and that errors had been made. In the result the Minister agreed to make changes to the eligibility criteria and to ensure that the new criteria would be properly introduced and applied.

From 2004 to 2006 the Ombudsman investigated the actions of several government bodies which had led to the referral by MPs of over 200 complaints to her office. These related to certain final salary occupational pension schemes which had been wound up with insufficient assets to pay the promised benefits, so that scheme members suffered substantial financial losses. In *Trusting in the Pensions Promise* (HC 984) the Ombudsman found that the Government had, in promoting such schemes, provided inaccurate, incomplete, unclear and inconsistent information which had misled participants as to the risks involved. Having concluded that there had been maladministration resulting in injustice, the Ombudsman recommended that the Government should consider appropriate arrangements for the restoration of benefits to those who had suffered loss. The Government rejected the Ombudsman's finding of maladministration and her principal recommendations, upon which she laid her report before

Parliament under section 10(3) of the 1967 Act. The Public Administration Committee supported the Ombudsman's conclusions (*Sixth Report*, HC 1081), saying:

> In future, we hope that the Government will engage with the Ombudsman positively, and start from the presumption that it is her job to determine whether or not maladministration has occurred, not its own.

It may be noted, as regards both of the Ombudsman's inquiries considered above, that there have been parallel proceedings for judicial review, directed not to the question of maladministration but to the *legality* of decisions taken by the departments concerned.

The number of complaints received by the Ombudsman is not great, but has increased in recent years. In the 2005–06 session, 1,964 cases were accepted for investigation. A significant number of complaints referred to the Ombudsman fall outside her jurisdiction (about 1,000 in 2005–06); still more are declined after initial consideration, for instance, if there is no evidence of maladministration or no worthwhile outcome is likely. Many complaints are resolved informally after the Ombudsman has made inquiries of the department or public body concerned. If the matter is not concluded in any of these ways a full investigation is undertaken. A resolution of the complaint may be achieved in the course of this; otherwise the investigation proceeds until concluded by a formal investigation report sent to the referring MP and the department or public body. In 2005–06, 54 per cent of complaints investigated were fully or partly upheld.

The Department for Work and Pensions with its agencies and HM Revenue and Customs are major sources of complaints, large numbers of individuals being directly affected by the operations of these departments.

As well as securing redress for victims of maladministration, the Ombudsman has the objective of enhancing standards of service to the public by bringing about improvements in departmental procedures and decision-making. The Government has responded by issuing a guidance document for civil servants, *The Ombudsman in Your Files* (rev edn 1997), which seeks to encourage good practice and an avoidance of conduct that may lead to complaints. The Ombudsman is at present developing a set of Principles of Good Administration or 'broad statements of what the Ombudsman believes bodies within our jurisdiction should be doing to deliver good administration and good customer service'. It is hoped that the Principles will help 'to shape a common understanding of what constitutes good practice in public administration'. The draft Principles can be found at www.ombudsman.org.uk.

Separate Ombudsman schemes are established in Scotland, Wales and Northern Ireland. (See the Scottish Public Services Ombudsman Act 2002, the Public Services Ombudsman (Wales) Act 2005 and the following Orders in Council relating to the Northern Ireland Ombudsman: the Ombudsman

(Northern Ireland) Order 1996, SI 1996/1298 and the Commissioner for Complaints (Northern Ireland) Order 1996, SI 1996/1297.) These schemes are not qualified by a parliamentary or assembly 'filter' and complaints may be taken directly to the Ombudsman.

The various Parliamentary and Local Government Ombudsmen in England became concerned that the system under which they worked had become inflexible and outmoded, presenting particular difficulties for any person whose complaint involved more than one sector of public administration (see the *Annual Report of the Parliamentary Ombudsman*, HC 593 of 1999–00). In 1998 they made a joint proposal to the Government that there should be a comprehensive review of the organisation of public sector Ombudsmen in England. The review was undertaken by the Cabinet Office and its report, *Review of the Public Sector Ombudsmen in England* (the Collcutt Report), was published in April 2000. The principal recommendation of the Collcutt Review was that a new, collegiate Commission should be established which would combine the offices of the Parliamentary Ombudsman, the Health Service Commissioner for England and the Commissioners for Local Administration for England. There would be direct public access to the Commission, providing a single 'gateway' for all complaints within the Ombudsmen's jurisdiction. The individual Ombudsmen would be appointed 'as office-holders with a personal jurisdiction across the entire work of the new Commission', although by internal arrangement each Ombudsman would deal with a particular group of bodies under jurisdiction.

The Government accepted the Colcutt Review's main recommendations and was supported by the Parliamentary and Health Service Ombudsman, Ann Abraham, in saying that the constraints in existing legislation 'prevented the Ombudsman from providing a seamless, accessible and responsive service'. (See *Reform of Public Sector Ombudsmen Services in England* (2005), para 28.) In her *Annual Report for 2005–06*, HC 1363, she emphasised 'the need to reform the legislative framework governing working arrangements between Ombudsmen to allow them to publish joint reports and share information' and looked forward to the introduction of legislation which would achieve this (pp 5, 21).

(b) Legislation

Legislation as a governmental function was considered in chapter 7; what follows should be read in the light of the material considered there.

(i) Primary legislation

The passage of government bills through Parliament is a process in part collaborative and in part adversarial, the mixture depending on the extent to which the bill arouses party controversy. The parliamentary process not only provides the formal legitimation of government legislation but allows for the delivery

of an attack on the principle of the bill – mainly at second reading – and for argument on the detail of its provisions – mainly at the committee stage. Ministers are obliged to explain and defend the bill, which is given a public and critical scrutiny. Most government bills presented to Parliament have, however, already been put into firm shape by the responsible department, often in consultation with outside interests (see chapter 7), and the debates and scrutiny in Parliament usually have only a modest effect on the outcome of the legislation. Even when the detail of the bill is less firm, the adjustment of its provisions in committee is done chiefly on the government's initiative. Few opposition and backbench amendments are agreed to.

JAG Griffith, 'Standing Committees in the House of Commons' in SA Walkland and Michael Ryle (eds), *The Commons Today* (rev edn 1981), pp 121–2, 130–1

Amendments may have one or more of a great variety of purposes. Whether moved by the Opposition or by a government backbencher, an amendment may be intended to cause political mischief, to embarrass the Government, to discover what are the Government's real intentions and whether (in particular) they include one or more specific possibilities, to placate interests outside Parliament who are angered by the bill, to make positive improvements in the bill the better to effect its purposes, to set out alternative proposals, to initiate a debate on some general principle of great or small importance, to ascertain from the Government the meaning of a clause or sub-section or to obtain assurances on how they will be operated, to correct grammatical errors or to improve the draftsmanship of the bill. If moved by the Government, the purpose of an amendment is most likely to be to correct a drafting error or to make minor consequential changes, to record agreements made with outside bodies which were uncompleted when the bill was introduced, to introduce new matter, or occasionally to meet a criticism made by a Member either during the second reading debate or at an earlier part of the committee stage, or informally.

Not all of these purposes, if fulfilled, are likely to make the bill 'more generally acceptable'. Apart from the trivialities of minor errors, the occasions of an amendment falling within that phrase are when an opposition amendment is accepted by the Government or when a government amendment goes some way to meet an objection. This of course, may, at the same time, make the bill less acceptable to some of the government supporters. This is not to say that committee debates seldom, if ever, result in the improvement of a bill. It is to say, however, that very many amendments are not put forward with that purpose, and of those that are, not all have that effect.

More importantly, much of what takes place during committee on a controversial bill is an extension and an application of the general critical function of the House and there is little or no intention or expectation of changing the bill. The purpose of many Opposition amendments is not to make the bill more generally acceptable but to make the Government less generally acceptable. . . .

If the value of the proceedings in standing committee on government bills is judged by the extent to which Members, other than Ministers, successfully move amendments, then the value is small. It has been as rare for ministerial amendments to be rejected as for other Members' amendments to be successfully moved against government opposition. Party discipline is largely maintained in standing committee. Not surprisingly when the latter rarity occurs it is often on bills concerned with matters of the highest social controversy like race relations or immigration policy. For it is on such matters that the Whip is most likely to be defied.

On the other hand, minor reforms are quite often successfully achieved by persuading the Minister to 'look again' when the matter is before the committee and not infrequently he may propose some compromise on report.

But more important than the making of amendments is the scrutiny to which Ministers and their policies are subjected. Committee rooms are not large and do not have that sense of space and support which can be felt on the floor of the House (though that also can no doubt be at times a very lonely place). For hour after hour and for week after week a Minister may be required to defend his bill against attack from others who may be only slightly less knowledgeable than himself. His departmental brief may be full and his grasp of the subject considerable but even so he needs to be constantly on the alert and any defects he or his policy reveals will be very quickly exploited by his political opponents.

The effectiveness of committee proceedings depends largely on the ability of MPs to inform themselves adequately about the background, objectives and machinery of the bill. Outside interests affected by a bill will often supply MPs on the committee with facts, arguments and draft amendments. Modest adjustments to the bill may be won or conceded. Committees rarely manifest such potency as when, in 1985, the combined resistance of government and opposition backbenchers in the committee proceedings caused the government to abandon its Civil Aviation Bill. In general, as the Modernisation Committee has noted, 'on Bills where policy differences are great, the role of Government backbenchers on a Standing Committee has been primarily to remain silent and to vote as directed' (*First Report*, HC 190 of 1997–98, para 8).

It has been questioned whether the adversary proceedings of committees on bills are well adapted to their constructive examination and improvement. The Study of Parliament Group said in a Memorandum to the Select Committee on Procedure (*First Report*, HC 588-III of 1977–78, Appendix I, Part II, para 17):

A principal characteristic of Standing Committees is their lack of initiative. They are never able to ask what is the best way of treating a Bill. Whether the Bill has 100 clauses or 2, whether it is likely to be contested on party lines, non-party lines or not at all, whether the Committee has 50 members or 16, it still has to deal with a Bill in a preordained manner. But while many Bills profit from detailed public debate conducted on adversary lines, not all Bills do so. In some cases there may be a very strong case for the public examination of such essential

matters as the evidence on which major clauses are based; or the degree, intensity and content of any prior consultation and the relevance of Bills to on-going Departmental policy. For these reasons committees on bills should be given power to send for persons, papers and records and to appoint sub-committees if they so wish and thereby to take evidence.

The Procedure Committee recommended that standing committees should normally be authorised to hold 'a limited number of sittings in select committee form, calling witnesses and receiving written submissions' about the factual and technical background to a bill, before proceeding to the usual examination of clauses and debating of amendments (*First Report*, above, HC 588-I, para 2.19). An experiment on these lines was approved by the House of Commons in 1980 and in the result Standing Orders provided that a bill might be committed, on the motion of any Member, to a 'special standing committee' with power to send for persons, papers and records and receive oral evidence at not more than three morning sittings. At these hearings the committee could examine ministers, civil servants, outside experts and pressure group representatives, before going on to the detailed consideration of the bill's clauses. A special standing committee on the Criminal Attempts Bill in the 1980–81 session heard evidence on the bill from a High Court judge, a member of the Law Commission (which had produced an initial draft of the bill) and two academic lawyers. A number of improvements to the bill resulted from these hearings. Subsequently the procedure was seldom used, but in 1999 the Immigration and Asylum Bill was committed to a special standing committee which received oral and written evidence from civil rights groups, refugee organisations and church groups. The Adoption and Children Bill was committed to a special standing committee in October 2001. A number of MPs appointed to the committee had personal experience of social work and the committee heard evidence from over twenty expert witnesses. The Modernisation Committee recommended in 2006 that special standing committees should be the norm for government bills originating in the Commons (*First Report*, HC 1097 of 2005–06, paras 58–62). In response to this report, changes were made to the House of Commons Standing Orders on 1 November 2006 having the effect that government bills which commence in the Commons and are subject to programming (timetabling) will normally be referred to a committee having power to take evidence. The House of Lords introduced a special public bill procedure in 1994, appointing committees to take oral and written evidence on bills not affected by party political controversy, such as Law Commission bills (eg the Family Homes and Domestic Violence Bill 1995). Very occasionally a public bill is referred, after second reading in the House of Lords, to a select committee of that House for examination of the policy and contents of the bill. This procedure was followed in 2004 in regard to the Constitutional Reform Bill, which had not been published in draft or given prelegislative scrutiny. Some significant amendments to the bill resulted from the deliberations of this committee.

Parliamentary reformers have repeatedly urged that Parliament should undertake a 'prelegislative scrutiny' of government proposals for legislation. The Modernisation Committee of the House of Commons said in its *First Report* (HC 190 of 1997–98, para 20):

> There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers, and for the Opposition to have a real input into the form of the actual legislation which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by legislation. At the same time such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; the use of the Chair's powers of selection would naturally reflect the extent and nature of previous scrutiny and debate. Above all, it should lead to better legislation and less likelihood of subsequent amending legislation.

The Modernisation Committee's proposals have been acted upon in the submission of a number of draft government bills to prelegislative scrutiny, either by the appropriate departmental committee or by a specially constituted select committee or joint committee of both Houses. Between 1997 and 2004, twenty-nine draft bills were scrutinised by parliamentary committees; more recent instances, in 2005–06, include the draft Corporate Manslaughter Bill, considered jointly by the Home Affairs and Work and Pensions Committees, and the draft Legal Services Bill, considered by a joint committee of both Houses. Prelegislative scrutiny is, however, as the Modernisation Committee has noted, 'in the gift of the Government' (*First Report*, HC 1097 of 2005–06, para 56), and many bills escaped this salutary process. The Constitution Committee of the House of Lords recommended in 2004 that 'the decision as to which draft bills should be subject to pre-legislative scrutiny should be negotiated between the Government and the Liaison Committee of the House of Commons' (*Fourteenth Report*, HL 173-I of 2003–04), but the Government in its reply took the view that the current process (involving the 'usual channels' and consultation with the Liaison Committee) was satisfactory. (See further G Power, *Parliamentary Scrutiny of Draft Legislation 1997–1999* (2000); A Brazier, *Parliament, Politics and Law Making* (2004), ch 4; Smookler, 'Making a difference? The effectiveness of pre-legislative scrutiny' (2006) 59 *Parliamentary Affairs* 522.)

In its efforts to get to grips with legislation during its passage, Parliament faces difficulties of the kind noted by Roger Smith, director of JUSTICE (*The Times*, 20 September 2005):

> Parliament has too little independence. The result is poor law-making. Whips stifle the role of the House of Commons. The House of Lords is restrained by lack of democratic legitimacy. Much legislation is simply too long. The Criminal Justice Act 2003, for example, has

330 sections and 38 schedules. Neither House could possibly scrutinise it properly. Some controversial proposals are withheld until the parliamentary procedure is almost complete. The celebrated section 55 of the Nationality, Immigration and Asylum Act 2002, which deprives failed asylum-seekers of income, was inserted only after the Bill had completed its initial passage through the Commons and committee stage of the Lords.

This rather pessimistic viewpoint may be contrasted with the conclusions reached by Philip Cowley:

P Cowley, *The Rebels: How Blair Mislaid his Majority* (2005), pp 241–3

The combination in the rise of backbench rebellion – on a scale that would have been beyond the wildest fears of whips 50 years ago – together with the rise in the assertiveness of the House of Lords . . ., which is now also behaving in a way that would have been unimaginable 50 years ago, have created a Parliament that is far more assertive and much more of an irritant to government than the doomsayers realise.

It is, of course, important not to overstate the case. Cohesion on the back benches weakened during the 2001 Parliament, but it did not collapse. Most votes still saw complete cohesion . . .

Despite everything, despite all the huffing and puffing, the government survived the entire parliament undefeated on a whipped vote in the Commons [as we saw above, the government was defeated on such votes in the first session of the 2005 Parliament: see above, pp 601–2] . . .

That the government usually got its way eventually was not because of the servility of its MPs – but because it enjoyed a quite enormous majority, and was prepared to do deals with its backbenchers in order to get any rebellion down to a manageable size.

See generally the House of Lords Constitution Committee, *Fourteenth Report: Parliament and the Legislative Process*, HL 173 of 2003–04.

(ii) Delegated legislation

Parliamentary control of delegated legislation is severely restricted. Statutory instruments can normally only be approved or disapproved as a whole, without amendment. In the House of Commons a 'prayer' or motion to annul a negative instrument is unlikely to be debated on the floor of the House and may fail to be debated at all within the forty-day period fixed by section 5 of the Statutory Instruments Act 1946. Debates on affirmative instruments on the floor of the House are generally subject to a time limit of ninety minutes. In practice an instrument is more likely to be debated in a delegated legislation committee, to which a negative instrument may be referred on the motion of a minister of the Crown. (Affirmative instruments are automatically so referred unless a minister tables a motion to the contrary.) Debate in the committee takes place on a neutral motion – that the committee 'has considered' the

instrument – which does not allow of any recommendation being made to the House: the committee can only express its disapproval of an instrument by voting that it has not considered it. The effective vote on the instrument is taken subsequently on the floor of the House: indeed, once a negative instrument has been debated in the committee there is usually no vote on the prayer for annulment. Although the official Opposition can generally secure a debate on an instrument to which it is strongly opposed, a very large proportion of prayers on negative instruments are not debated at all, and the procedures do not provide for an adequate parliamentary consideration of the general run of statutory instruments. The Select Committee on Procedure has described the parliamentary procedures for debating and deciding on statutory instruments as 'palpably unsatisfactory' (*Fourth Report*, HC 152 of 1995–96, para 1) and as being 'urgently in need of reform' (*First Report*, HC 48 of 1999–00, para 53). A court, in considering the interpretation and effect of an item of delegated legislation, may take account of the inadequacies of the negative procedure as an instrument of parliamentary control: see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 (CA) at [68], (HL) at 382–3.

In 2003 the House of Lords established a Select Committee on the Merits of Statutory Instruments to consider SIs laid before each House and decide whether the special attention of the Lords should be drawn to an instrument on any of the following grounds:

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
(b) that it is inappropriate in view of the changed circumstances since the passage of the parent Act;
(c) that it inappropriately implements European Union legislation;
(d) that it imperfectly achieves its policy objectives.

The working methods of this committee were described in its *Third Report*, HL 73 of 2003–04. It is particularly concerned to identify negative instruments of special interest on any of the specified grounds. There is no equivalent House of Commons committee.

A technical examination of statutory instruments laid before Parliament, and other instruments of a general and not local character, is carried out by the Joint Committee on Statutory Instruments, composed of members of both Houses. (Instruments laid only before the House of Commons are considered by the Commons members of the Committee sitting without the peers.) The Committee determines whether the special attention of each House should be drawn to any instrument on grounds not impinging on its merits or policy – for example, if its drafting appears to be defective, or if it is excluded by the enabling Act from challenge in the courts, or if there is doubt whether it is intra vires, or if it 'appears to make some unusual or unexpected use of the powers conferred

by the statute under which it is made'. (See SO 151.) Before reporting to the House the Committee must give the department concerned an opportunity to provide an explanation.

When a significant technical defect is discovered by the Joint Committee, the department concerned is usually willing to amend the instrument. If it declines to do so, members may attempt to use such opportunities as are provided by the affirmative or negative procedure to oppose the instrument in the House. If no parliamentary procedure is prescribed by the enabling Act, other occasions may be found for raising the question on the floor of the House. But an 'adverse report by the Committee has no effect on the manner in which an instrument is considered, and there is no procedure to prevent a substantive decision [by the House of Commons] before the Committee has completed its consideration' (Procedure Committee, *First Report*, HC 588-I of 1977–78, para 3.8).

The Regulatory Reform Committee of the House of Commons scrutinises and reports on draft orders laid before the House under the Legislative and Regulatory Reform Act 2006. A wider scrutiny of statutory delegations of legislative power is carried out by the Delegated Powers and Regulatory Reform Committee of the House of Lords (see further chapter 7).

Both the Procedure Committee and the Joint Committee on Statutory Instruments have urged the adoption of a standing order precluding any decision by the House on a statutory instrument before it has been considered by the Joint Committee. (See Procedure Committee, *First Report*, HC 48 of 1999–00, para 21.) Provision to this effect is already made in standing orders of the House of Lords.

See generally Hayhurst and Wallington, 'The parliamentary scrutiny of delegated legislation' [1988] *PL* 547; *Report of the Hansard Society Commission on the Legislative Process* (1992), paras 364–87; A Brazier (ed), *Parliament, Politics and Law Making* (2004), ch 5; Salmon, 'Scrutiny of delegated legislation in the House of Lords' (2005) *The Table* 46.

(c) Finance

'The real power to have in Parliament is control over money' (Mr Edward du Cann, MP, in D Englefield (ed), *Commons Select Committees: Catalysts for Progress*? (1984), p 38). Parliament exercises a formal financial control over the government in that its authority has to be obtained for taxation and the expenditure of public money. In practice the financial control and accountability of government depend on a variety of parliamentary procedures of which some have been relatively effective and others decidedly weak. Public finance and expenditure, the process of 'getting and spending', was until recently neglected by parliamentary reformers. But the raising and expenditure of public money involves choices between different policy goals and can profoundly affect the prosperity of the country and the distribution of wealth in society.

Taxation may be proposed only on behalf of the Crown and has to be authorised by Parliament (see above, pp 140–1). Much of it is provided for in permanent legislation, but rates of income, corporation and other taxes are fixed for the year, and new taxes may be introduced, in an annual Finance Bill which follows the presentation of the Budget and the approval of ways and means resolutions in the House of Commons. The House accordingly has opportunities to debate proposals for taxation when fiscal legislation and Budget resolutions are before it. The government is, admittedly, unlikely to agree to significant alterations to the Budget and, as the Treasury and Civil Service Committee noted, 'Although the tablets of stone on which the Finance Bill is written can in theory be amended during its consideration, in practice the Government's reputation is at stake and so major substantive amendments are rare' (*Sixth Report*, HC 137 of 1981–82, para 2.1). Yet it has been remarked that the Commons debates on the Finance Bill 'are often some of the best argued and most effective of any held in the House' (R Blackburn and A Kennon, *Griffith and Ryle on Parliament* (2nd edn 2003), para 6-188), and the hazards of politics may, exceptionally, compel the government to give way, as in December 1994 when it retreated from the imposition of additional VAT on domestic fuel. On the other hand, the Treasury select committee has expressed dissatisfaction with procedure on the Finance Bill, 'which lets badly drafted and insufficiently tested tax legislation onto the statute book every year' (*Third Report*, HC 73-I of 2000–01, para 54).

In 1997 the Labour Government announced measures for wider consultation on Budget proposals, in particular through publication of a 'Pre-Budget Report' (*Financial Statement and Budget Report*, HC 85 of 1997–98, para 1.30). The Pre-Budget Report appears in the autumn, allowing several months for consultation (with bodies such as the Institute of Chartered Accountants and the Chartered Institute of Taxation) before the Budget.

Another source of government revenue, borrowing, largely escapes parliamentary scrutiny, although it has been of great importance in the management of the economy. The Select Committee on Procedure (Finance) recommended that the House of Commons should be given formal power to approve the Government's annual borrowing requirement (*First Report*, HC 24-I of 1982–83, para 44), but the Government did not accept this.

The fundamental principle relating to *expenditure* by the government is stated in the Treasury's handbook, *Government Accounting 2000* (para 11.2.1):

> Under long-established constitutional practice, the Crown (the government) demands provision, the House of Commons grants it, and the House of Lords assents to the grant.

Money is 'granted' (ie expenditure is authorised) by Parliament only on the 'demand' of the Crown. This exclusive financial initiative of the Crown has been an important element in the establishment of the government's ascendancy over Parliament. The rule, as Gordon Reid says (*The Politics of Financial Control* (1966), p 44), provides governments with 'a powerful controlling technique',

and 'protects parties in government from the political embarrassment of having to vote against a wide range of alternative proposals, initiated in other parts of the House, and designed to appeal to the electorate'. Parliament cannot increase the items of expenditure submitted to it by the government or vote for the expenditure of money on objects of its own choice.

Nevertheless the formal requirement that expenditure must be authorised by Parliament opens up the possibility of an exercise of some control or influence by the House of Commons over the government's spending policies.

The bulk of government expenditure is approved annually by Parliament in voting 'supply': Estimates of departmental expenditure are laid before the Commons by the Treasury and, once approved by resolution of the House, are confirmed by legislation (Appropriation Acts or a Consolidated Fund Act), giving authority for the money to be issued from the Consolidated Fund. Expenditure that does not require the annual approval of Parliament consists of certain payments charged directly by statute on the Consolidated Fund – for example, judges' salaries and payments to the European Union – and moneys issued from the National Loans Fund, for example, loans or advances to public corporations and local authorities. Some departmental activities are financed through Trading Funds, which fall outside the parliamentary supply process.

The detailed scrutiny by the House of Commons of the proposed supply expenditure of government departments was abandoned long ago, and the government's Estimates presented to the House came to be passed 'on the nod'. In 1880 the House voted to reduce an Estimate by £80, the cost of providing food for the pheasants in Richmond Park (P Einzig, *The Control of the Purse* (1959), p 271), but a century later a vote of £500 million would be approved without debate. Supply days had come to be used for debating questions of policy or administration chosen by the Opposition rather than for the detailed examination of departmental Estimates. (These are now 'Opposition days', unconnected with the supply procedure. Since 1982 three days have been allotted in each session for debates on the Estimates, the subjects for debate being chosen on the recommendation of the Liaison Committee. These debates, too, are usually on matters of general policy, focusing on reports from the departmental select committees; voting on Estimates has become a formality, and the power of the House over expenditure has become, in the words of the Procedure Committee, 'if not a constitutional myth, very close to one' (*Sixth Report*, HC 295 of 1998–99, para 4).

There have undoubtedly been substantial improvements in the comprehensiveness and quality of the financial information provided to Parliament. Several of the departmental committees have responded by taking a greater interest in the material provided, examining departmental Estimates or the departments' Annual Reports which describe their activities and performance over the previous year and set out their future spending plans. This is one of the 'core tasks' of the committees (see above, p 616), but their coverage of government expenditure is not complete or systematic.

In 1997 the Government announced that public expenditure planning would in future be based on forward spending reviews, departments being set 'firm plans and fixed budgets for three years at a time'. A Comprehensive Spending Review to be launched in 2007 is to be a 'long-term and fundamental review of government expenditure' and will include spending allocations to departments for 2008–09, 2009–10 and 2010–11. Each spending review is followed by a half-day debate in the Commons and may be examined by the Treasury Committee. The Treasury negotiates 'public service agreements' with departments which relate to the three-year review, setting targets to be achieved by the departments in the use of the money to be allocated to them. It is a core task of the departmental committees to examine the departments' public service agreements and the associated targets. These innovations have strengthened the role of the Treasury with respect to spending and policy-making by other government departments, and there are increased opportunities for Parliament to scrutinise decision-making on public expenditure.

A reform which took full effect from 2001–02 was the change to a system of resource-based supply and accounting, in place of the traditional, exclusively cash-based system. Parliament approves expenditure expressed in terms of costs to be incurred, as well as the cash actually to be spent in the year ahead. Resource estimates and accounts (replacing the former cash-based appropriation accounts) provide Parliament with more comprehensive financial information and have the potential of improving parliamentary control. It is unfortunate, however, that recommendations of the Procedure Committee designed to strengthen parliamentary scrutiny of government expenditure (*Sixth Report*, HC 295 of 1998–99) were for the most part rejected by the Government.

(See further McEldowney, 'The control of public expenditure', in J Jowell and D Oliver, *The Changing Constitution* (5th edn 2004), ch 15; T Daintith and A Page, *The Executive in the Constitution* (1999), chs 4–6; F White and K Hollingsworth, *Audit, Accountability and Government* (1999); Report of the Hansard Society Commission, *The Challenge for Parliament: Making Government Accountable* (2001), ch 5; Lord Sharman, *Holding to Account: the Review of Audit and Accountability for Central Government* (2001).)

(i) Public Accounts Committee

Parliament also needs to check that expenditure by the government has been for the purposes authorised and that value for money has been obtained. Since 1861 this *ex post facto* scrutiny has been carried out on behalf of the House of Commons by its Public Accounts Committee, of which the chairman is always, by convention, a member of the Opposition. The work of the Committee is closely linked with that of the Comptroller and Auditor General, who examines and reports to Parliament on the annual accounts of government departments, executive agencies and a wide range of other public bodies, drawing attention to any losses, extravagance or impropriety that he may have discovered. In addition the Comptroller conducts special investigations during the year into the

'economy, efficiency and effectiveness' with which government departments and other public bodies have used their resources, presenting the results to Parliament in a succession of 'Value for Money' reports (around fifty a year). (Recent reports have covered such matters as 'Progress on the channel tunnel rail link', 'Reducing vehicle crime', 'Improving adult literacy and numeracy', 'Prisoner diet and exercise'.) The reports of the Comptroller and Auditor General are considered by the Public Accounts Committee, which questions departmental Accounting Officers and other senior officials on the matters to which the Comptroller has drawn attention, and itself reports to Parliament on the results of its inquiries. The Committee's reports to Parliament have, over the years, revealed many instances of waste and failure of financial control, and the Committee is said to have 'contributed significantly to the maintenance of high standards in the handling of public money by the Civil Service' (Procedure Committee, *First Report*, HC 588-I of 1977–78, para 8.3).

The importance of the Public Accounts Committee's work appears from its report on the Chevaline project (*Ninth Report*, HC 269 of 1981–82). The Ministry of Defence embarked on this programme for the improvement of the Polaris missile system in the late 1960s, and the first cost estimate for the project was £175 million. The Secretary of State for Defence informed the House of Commons of the project in January 1980, and announced that the estimated cost had risen to £1,000 million. The Committee decided to investigate Chevaline and in due course reported to Parliament its finding of significant weaknesses in the Department's management and control of the project, with serious underestimates of costs and timescales. The Committee also drew attention to more general grounds for disquiet (para 15):

> In the case of Chevaline a major project costing £1,000 million continued for over ten years without Parliament being in our view properly informed of its existence and escalating costs. Expenditure each year was included in the normal way in the Defence Estimates and Appropriation Accounts; our criticism is that the costs were not disclosed, and that there was no requirement that they should be disclosed. Incidental and oblique references to a Polaris enhancement programme made in Parliament or to Parliamentary committees in our view do not provide sufficient information for Parliament to discharge its responsibility to scrutinise major expenditure proposals and to exercise proper financial control over supply.

The Government in reply agreed to provide the Public Accounts Committee with financial information about major defence projects in future (*Treasury Minute*, Cmnd 8759/1982): see Report by the Comptroller and Auditor General, HC 238 of 1997–98.

In its *Eighth Report* for 1993–94 (HC 154), the Public Accounts Committee drew the attention of Parliament to serious instances of mismanagement and misuse of public funds in government departments and non-departmental public bodies, observing that these represented 'a departure from the standards of public conduct which have mainly been established during the past 140 years'.

The Public Accounts Committee works on non-party lines and its reports, which are in practice unanimous, are debated each year in the House of Commons. The great majority of the Committee's recommendations are accepted by the government.

It is important that the Comptroller and Auditor General should be independent of government. The office was formerly thought to be too closely associated with the Treasury; the Government agreed to a change in the status of the office only under considerable backbench pressure and after a private member's bill to reform the system of state audit had won widespread support from MPs. The National Audit Act 1983 established the Comptroller and Auditor General as an officer of the House of Commons who is appointed by the Crown on an address from the House, moved by the Prime Minister with the agreement of the chairman of the Public Accounts Committee.

5 The House of Lords

In considering the control and accountability of government we have concentrated on the role of the House of Commons. We have, however, already noted some of the ways in which the House of Lords takes part in the supervision of the executive – for example, through the work of its Select Committees on the European Union and on the Merits of Statutory Instruments and its participation with the House of Commons in the Joint Committee on Statutory Instruments. We have also noted the establishment of the Lords' Delegated Powers and Regulatory Reform Committee and Special Public Bill Committees. We saw, too (in chapter 5), that peers join with MPs in the Joint Committee on Human Rights, which considers a range of matters relating to human rights in the United Kingdom. The House of Lords has no departmentally related committees like those of the Commons, but since 1979 there has been a Lords' Select Committee on Science and Technology which inquires into government policy and other matters of public concern affecting science and technology. It has reported on such subjects as renewable energy, science teaching in schools and cannabis: the scientific evidence. The committee work of the House has been expanded with the establishment in 2001 of new sessional (permanent) committees on the constitution and on economic affairs. The terms of reference of the Constitution Committee are:

> to examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

A notable instance of this committee's work was its report on *Waging War: Parliament's Role and Responsibility* (*Fifteenth Report*, HL 236-I of 2005–06).

The House also sets up ad hoc committees from time to time, inquiring for instance into proposals for a bill of rights, sustainable development and human cloning and stem cell research. One such committee conducted a thorough

inquiry into the law of murder, making an important contribution to the debate on the subject of the mandatory life sentence for this crime: *Report from the Select Committee on Murder and Life Imprisonment*, HL 78 of 1988–99. Rodney Brazier remarks that 'the expertise at the disposal of Lords select committees gives them considerable authority' (*Ministers of the Crown* (1997), p 259).

The powers of the House of Lords in relation to primary legislation are substantially restricted by the Parliament Acts 1911 and 1949. A money bill passed by the House of Commons, if sent up to the House of Lords at least one month before the end of the session, may be presented for the royal assent if it has not been passed by the Lords without amendment within one month. For this purpose a 'money bill' is a public bill dealing *only* with such matters as central government taxation, supply, appropriation and government loans, and must have been certified as such by the Speaker of the House of Commons. (The annual Finance Bill is not necessarily a money bill as it may deal with other matters besides taxation.) Any other public bill – except a bill to extend the maximum duration of Parliament beyond five years – may be presented for the royal assent if it has been passed by the Commons in two successive sessions and the Lords have rejected it in each of those sessions, provided that a year has elapsed between the second reading of the bill in the House of Commons in the first session and its third reading in that House in the second session. So far seven bills have been passed without the consent of the Lords under the procedure of the Parliament Acts: the Government of Ireland Act 1914, the Welsh Church Act 1914, the Parliament Act 1949, the War Crimes Act 1991, the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000 and the Hunting Act 2004. The power to overcome the resistance of the Lords by this means is one of last resort, and most differences between the Houses (or between the government and peers contesting its legislation) are resolved by compromise or concession.

The question whether the prohibition on the use of the Parliament Acts for the passage of a bill to extend the life of a Parliament beyond five years (see above) could itself be deleted by an Act passed by the machinery of those Acts, was a matter on which differing views were expressed by the Law Lords in *R (Jackson) v Attorney General* [2005] UKHL 56, [2006] 1 AC 262: yes, said Lord Bingham [32]: no, said Lords Nicholls [57]–[59], Steyn [79], Hope [118], [122], Carswell [175] and Baroness Hale [164]; probably no, in the opinions of Lords Rodger [139] and Brown [194].

When the Labour Government that came to power in 1945 embarked on a radical programme of nationalisation which was threatened by the existence of a Conservative majority in the House of Lords, the leader of the Conservative peers, Lord Salisbury, urged self-restraint and reached an agreement with Lord Addison, the Leader of the House, to the effect that the Upper House should not reject a 'manifesto' bill, considered to have been approved by the electorate. In 1967 another leader of the Conservative Opposition in the Lords reaffirmed the 'Salisbury (or Salisbury-Addison) doctrine' with respect to manifesto bills: it

should be assumed that any such bill had been approved by the electorate and, while the Lords might properly amend it in order that the Commons might reconsider a matter, they should not insist on the amendment if the Commons remained firm. Restraint should be exercised also with regard to non-manifesto bills passed by the Commons, but in certain circumstances the Upper House would be justified in using its delaying power, rejecting the bill or insisting on an amendment.

House of Lords, HL Deb vol 280, cols 419–20, 16 February 1967

Lord Carrington: . . . [T]his House, the unelected Chamber, should not, except in the last resort and in quite exceptional circumstances, override the opinion of the House of Commons which has been elected by the people of this country. If we did not adopt such a course it would be impossible for any Labour Government to govern, since obviously much of the legislation which is introduced is bitterly opposed by those of us in the Conservative Party. It would really not be possible for a two-Chamber system of Government to operate, nor would it be a justifiable position for the unelected Chamber to control the timing of the Government's legislative programme by using its delaying powers. . . .

. . . There could arise a matter of great constitutional and national importance, on which there was known to be a deep division of opinion in the country or perhaps on which the people's opinion was not known. In a case of this kind, it seems to me that the House of Lords has a right, and perhaps a duty, to use its powers, not to make a decision, but to afford the people of this country and Members of the House of Commons a period for reflection and time for views to be expressed.

It may be doubted whether these principles are sufficiently precise, or are supported by a sufficiently consistent practice, to give them the status of a true convention, but they have played a part in guiding the conduct of the House in its relation to the Commons. R Rogers and R Walters, *How Parliament Works* (5th edn 2004), p 222, remark that 'the Salisbury convention is perhaps more a code of behaviour for the Conservative Party when in opposition in the Lords than a convention of the House'. In a House of Lords in which the Conservative Party no longer had a majority and from which most of the hereditary peers (all but ninety-two) had been removed by the House of Lords Act 1999, it was contended by opposition peers that the Salisbury convention had lost much of its justification. For instance, Lord McNally, the leader of the Liberal Democrats in the Lords, said (HL Deb vol 668, col 1371, 26 January 2005):

the Salisbury convention was designed to protect the non-Conservative government from being blocked by a built-in hereditary-based majority in the Lords. It was not designed to provide more power for what the late Lord Hailsham rightly warned was an elective dictatorship in another place [the House of Commons] against legitimate check and balance by this second Chamber.

(See also HL Deb vol 672, cols 20–1, 17 May 2005; cols 759–60, 762–3, 6 June 2005.) The terms on which a reformed second chamber is to engage with the House of Commons will need to be renegotiated, to settle the rules, conventions or practices governing the relationship.

Even as constrained by law and practice, the House of Lords was able to cause considerable difficulty to the 1974–79 Labour Government, which had at best only a very slender overall majority in the Commons and did not always command the voting strength to remove Lords' amendments. The Upper House set aside its customary restraint and caused the Government's supporters in the Commons to suffer a diet of three-line Whips and late nights in the Chamber. The Government was compelled to accede to major Lords' amendments to some of its bills. A Trade Union and Labour Relations (Amendment) Bill introduced in the 1975–76 session was passed only after its reintroduction in the succeeding session and under threat of invoking the Parliament Acts to overcome the Lords' opposition. The passage of this legislation was prolonged by some four months.

The renewed assertiveness of the Lords continued under subsequent Conservative Governments, and opposition parties made well-organised and effective use of the Upper House in delivering their challenge to the Government. Cross-bench and dissenting Conservative peers not infrequently joined them, so as to inflict defeat on the Conservative Government in its traditional bastion. A notable instance of this sort occurred in 1984, when the Local Government (Interim Provisions) Bill, which provided for the cancellation of forthcoming elections in Greater London and the metropolitan counties and the establishment of nominated bodies in place of the elected councils, suffered a wrecking amendment in the House of Lords which obliged the Government to keep the elected authorities in being until their abolition took effect under the Local Government Act 1985. In the 1984–85 session the Lords undermined the Government's Education (Corporal Punishment) Bill by amending it to provide for the abolition of corporal punishment in state schools, in place of provision for parental choice. The Government abandoned the bill and introduced legislation in terms of the Lords' amendment in the following session (the Education (No 2) Act 1986, section 47; see now the Education Act 1996, section 548, as amended).

Conservative Governments proved more vulnerable to defeat in the Lords than in the Commons. Between 1979 and 1990, 148 defeats were inflicted on government bills in the Lords, and in the majority of cases the Lords' amendments were accepted by the Government or the bill was otherwise modified to placate opposition in the Upper House. (See Donald Shell, *The House of Lords* (2nd edn 1992), pp 157–8.) The House was no less assertive in the 1990s, when defeats or the threat of them in the Lords obliged the Government to make concessions on a number of bills, among them the Education (Schools) Bill in 1992, the Railways Bill in 1993, the Police and Magistrates' Courts Bill in 1994, the Pensions Bill in 1995, the Police Bill and the Crime (Sentences) Bill in 1997.

In other instances the Government stood firm, using its Commons majority to overcome radical Lords' amendments – for example, in the Criminal Justice and Public Order Bill in 1994.

The willingness of the House of Lords to assert its independence and vote against the legislation of a Conservative Government should not be exaggerated. Although the Conservatives did not always have an overall majority of the 'effective House' (all peers except those with leave of absence or without writs of summons), there was generally a loyal Conservative majority among the regularly voting peers. A study confirming this found also that cross-bench peers 'overwhelmingly support the Conservatives' (Adonis, 'The House of Lords in the 1980s' (1988) 41 *Parliamentary Affairs* 380, 382). When a strong attack, supported by a number of cross-bench and a few Conservative peers, was mounted on the Local Government Finance Bill (introducing the community charge or 'poll tax') in 1988, strenuous efforts by the Government Chief Whip assured the defeat of an amendment relating the charge to ability to pay, in a huge turnout of over 500 peers, including many who had rarely attended the House before.

It was to be expected that the Labour Government elected in May 1997 would face a combative House of Lords. This proved to be so, the Lords inflicting thirty-six defeats on Government bills in the 1997–98 parliamentary session. The Teaching and Higher Education Bill proceeded back and forth between Lords and Commons, in contention on the subject of student tuition fees in Scotland, until – as the matter came before the House of Lords for the seventh time – the Government made a concession which was accepted by the peers. (The Parliament Acts could not have been used in this instance as the bill had begun in the House of Lords.) In 1998 the House of Lords gave a striking demonstration of its capacity for the discomfiture of government in repeatedly rejecting the Government's 'closed list' system of proportional representation in the European Parliamentary Elections Bill, compelling the Government to resort to the Parliament Acts to secure the Bill's passage.

Even as the process of reform of the House of Lords got under way in the course of the 1997–2001 Parliament, the Upper House continued to exert to the full the powers available to it. The Parliament Acts were again invoked by the Labour Government to overcome the Lords' resistance and ensure the enactment of the Sexual Offences (Amendment) Act 2000, providing for an equal age of consent for homosexuals and heterosexuals. The Government's attempt in the Local Government Bill 2000 to bring about the repeal of the notorious section 28 of the Local Government Act 1988 (prohibiting local authorities from 'promoting' homosexuality) was frustrated by the Lords. The bill having begun in the Upper House the Parliament Acts were inapplicable and the Government relinquished the repealing clause in order to save the bill. Challenges from the House of Lords to a number of other Government bills were overcome when Lords' amendments were reversed by the Commons, or peers were placated by concessions, but the Government was unable to rescue its Criminal Justice (Mode of Trial) (No 2) Bill (restriction of jury trial) or its

Tobacco Advertising Bill. Following the 2001 general election the (partially reformed) Upper House reasserted its power. In the 2001–05 Parliament, government defeats in the Lords were of an unprecedented frequency and wrested significant concessions from the Government during the passage of, among others, the Anti-terrorism, Crime and Security Bill in 2001, the Police Reform Bill in 2002, the Criminal Justice Bill in 2003 and the Constitutional Reform Bill in 2005. The Hunting Bill received the royal assent in 2004 only by recourse to the Parliament Acts. In the first session of the new Parliament elected in May 2005 further defeats in the Lords compelled the Government to compromise on provisions in the Racial and Religious Hatred Bill and the Terrorism Bill in 2005 and the Identity Cards Bill in 2006. (See further M Russell and M Sciara, *The House of Lords in 2005: A More Representative and Assertive Chamber*? (2006).)

This recital of government defeats and consequent revisions of policy exacted by the Lords may be seen as supporting the case for a confident Upper House with the ability to frustrate ill-considered or flawed legislation. On the other hand, the unrestrained activity of the House of Lords in dealing with government bills in opposition to the will of the Commons raises questions about the legitimacy of a House with a largely nominated and still in part hereditary membership.

It is aptly said by Paul Carmichael and Brice Dickson (*The House of Lords* (1999), p 17) that 'Although the Lords' delaying power is constitutionally important . . . there is little doubt that in the routine work of Parliament the major legislative function of the House of Lords is in the examination and revision of government legislation passed by the Commons or introduced in the Upper House before being passed to the Commons for consideration'. The scale of this work was evident in the long 1999–2000 session, when the Lords made 4,619 amendments to government bills brought up from the Commons. The great majority of Lords' amendments to government bills are the Government's own amendments, incorporating second thoughts or concessions arising from the proceedings in the Lower House or the continuing efforts of outside interests. For instance, in the 2003–04 session 2,915 government amendments were made to government bills. Some other amendments are accepted by the Government in recognition of their utility or from a willingness to compromise. In these respects the House of Lords performs a useful revising function. Amendments to which the Government remains opposed are generally removed when the bill is sent back to the House of Commons, and the Lords, unless taking a strong stand on what they regard as a matter of principle, usually defer to the democratic character of the elected House and do not insist on amendments with which the Commons disagree.

The House of Lords carries out a necessary scrutiny and improvement of bills which have left the Commons after an incomplete examination (in particular when the guillotine has been applied there, or amendments are introduced at a late stage). The House of Lords has also a useful role in facilitating the legislative programmes of government, through the introduction of less controversial

government bills in that House. But as a check and restraint upon government the House of Lords has not enjoyed the legitimacy of a representative chamber, and the anomalous composition of the unreformed House imported an element of imbalance into the constitution.

The Lords have equal powers with the Commons in regard to statutory instruments, other than financial instruments laid before the Commons only, and have therefore a power of veto over most affirmative and negative instruments. This power has seldom been used, but in 1968 the Conservative majority in the House of Lords voted to reject an affirmative instrument, the Southern Rhodesia (United Nations Sanctions) Order. The result of this unprecedented vote was that inter-party talks then taking place on the reform of the House of Lords were suspended. Having made their protest, the Lords approved a substantially similar Order soon afterwards. The House has generally refrained from voting on statutory instruments, but on 20 October 1994 it agreed to a motion affirming 'its unfettered freedom to vote on any subordinate legislation submitted for its consideration' (HL Deb vol 558, col 356 *et seq*). Peers supporting the motion acknowledged that the right was to be exercised only as a last resort. (See also HL Deb vol 574, col 687 *et seq*, 15 July 1996.)

The Lords asserted themselves in February 2000 when two items of delegated legislation relating to Greater London Authority elections were laid before Parliament. The Greater London Authority (Election Expenses) Order was laid in draft and was subject to affirmative resolutions of both Houses, while the Greater London Authority Elections Rules were laid after being made and were subject to the negative procedure. (See above, p 457 as to the affirmative and negative procedures.) There was opposition to both orders because neither provided for free mailshots for candidates in the elections. In the House of Lords a government motion to approve the draft Election Expenses Order was defeated, and a negative resolution was carried against the Elections Rules. Having lost both orders, the Government entered into negotiations with opposition peers and a compromise was agreed, upon which modified orders were laid which were not contested and duly came into effect. (See further R Blackburn and A Kennon, *Griffith and Ryle on Parliament* (2003), paras 12–161–12–162.) It has been debated whether a reformed Upper House should have power only to delay and not to veto delegated legislation.

(a) Reform

The need for the reform of the House of Lords has been generally acknowledged, and it was a Conservative Deputy Leader of the House who remarked in 1967 that the hereditary element in the composition of the House was 'not really a rational basis on which to run a second chamber in a democracy' (see J Morgan, *The House of Lords and the Labour Government 1964–1970* (1975), p 172). A carefully worked-out scheme of reform was incorporated in the Parliament (No 2) Bill 1968, but a campaign of filibustering by backbenchers on both sides

of the House of Commons and the press of more urgent matters caused the Labour Government to drop the bill. (Its scheme of a two-tier House of voting and non-voting peers is described in the White Paper, *House of Lords Reform*, Cmnd 3799/1968.) Various other schemes of reform have been proposed, whether for an elected Upper House or for one partly elected and partly nominated. A proposal of the latter kind was made in the Report of the Conservative Review Committee, *The House of Lords*, in 1978, but the interest of the Conservative Party in reforming the House of Lords afterwards waned, until 1998 when the Conservative leader, Mr William Hague, set up a commission to consider possible reforms. A Labour Party policy review of 1989 proposed an elected second chamber whose members would 'particularly reflect the interests and aspirations of the regions and nations of Britain' and which would have an extended power to delay, for the whole life of a Parliament, legislation affecting fundamental rights (*Meet the Challenge, Make the Change* (1989), pp 55–6). Labour Party policy in the 1990s became more reticent as to the composition of a reformed second chamber, but was committed to the removal of the hereditary element. The Labour and Liberal Democrat Parties reached agreement on a two-stage programme of reform, which was reflected in the Labour manifesto for the 1997 general election.

The manifesto promised that as an initial, self-contained reform, 'the right of hereditary peers to sit and vote in the House of Lords will be ended by statute'. This was to be 'the first stage in a process of reform to make the House of Lords more democratic and representative'. Its legislative powers would remain unaltered. Appointments of life peers would continue, at least for the time being, but should 'more accurately reflect the proportion of votes cast at the previous general election'. An 'independent cross-bench presence of life peers' would be maintained, so that no one political party would be assured of a majority in the House. In the second stage, a committee of both Houses of Parliament would be appointed 'to undertake a wide-ranging review of possible further change and then to bring forward proposals for reform'. The Labour Government subsequently amplified its commitment to further reform, saying that it would first appoint a Royal Commission to carry out 'the wide-ranging review' and to make recommendations for legislation; the proposed joint committee of both Houses would then examine the parliamentary implications of the Royal Commission's work.

In January 1999 the Government announced the appointment of the Royal Commission, with Lord Wakeham as chairman, with terms of reference requiring it 'to consider and make recommendations on the role and functions of a second chamber; and to make recommendations on the method or combination of methods of composition required to constitute a second chamber fit for that role and for those functions'.

At the same time a House of Lords Bill was introduced in the House of Commons, providing for the removal of the right of hereditary peers (then some 750 in number) to sit and vote in the Upper House. In order to facilitate

the passage of the bill through the House of Lords, the Government agreed to an amendment (the 'Weatherill amendment') to allow ninety-two hereditary peers to remain in the House until the second stage of reform was implemented. Of this number, ninety would be elected from the existing hereditary peers in accordance with arrangements in new Standing Orders (providing also for by-elections to maintain the number at ninety) while two other hereditary peers holding great offices of state (the Earl Marshal and the Lord Great Chamberlain) would remain as members of the House *ex officio*. The bill duly received royal assent as the House of Lords Act 1999.

Pending further reform the House of Lords was to continue as a House of predominantly appointed peers, together with twenty-six Church of England bishops and the Law Lords. The Prime Minister announced that he would forego his right of veto over nominations of peers by opposition leaders, and that his power to nominate cross-bench peers would be transferred to an independent Appointments Commission. No one party would be in a position to dominate the transitional House. The non-statutory Appointments Commission of seven members was appointed in May 2000: four members were selected in an open recruitment exercise conducted in accordance with the principles of the Commissioner for Public Appointments, while one member was nominated by each of the three main political parties. The seven members were reappointed in 2003 for a further three-year term. Persons recommended by the Appointments Commission must have 'independence, integrity and a commitment to the highest standards of public life'. By mid-2006, thirty-six non-party-political peers had been appointed by the Queen on the recommendation of the Commission. The Prime Minister continues to nominate directly to the Queen distinguished public servants on their retirement for appointment to non-party-political peerages (no more than ten in any one Parliament). The Appointments Commission also has the role of scrutinising all nominations for peerages, in particular those made by the political parties (other than peerages to be conferred on persons who are to serve in the Upper House as ministers). It reports to the Prime Minister any concerns it may have about the propriety of nominations, but does not have a veto.

On the first stage of the reform see Shell, 'Labour and the House of Lords: a case study in constitutional reform' (2000) 53 *Parliamentary Affairs* 290.

The report of the Wakeham Royal Commission (*A House for the Future*, Cm 4534/2000) made 132 recommendations. It proposed relatively modest changes in the legislative and scrutinising functions of the Lords, intended to enhance their role in the legislative process and enable them more effectively to hold the executive to account, but without significantly enlarging their powers or disturbing the existing balance between the two Houses. The principal recommendations of the Wakeham Commission related to the composition of the Upper House, to consist of about 550 members. The Law Lords would remain and there would be thirty-one representatives of the different religious faiths. For the rest the House would be composed of a majority of appointed members

and a minority of elected regional members (65, 87 or 195 according to the several options proposed). All appointments would be the responsibility of a statutory Appointments Commission which would be required to maintain a political balance reflecting each party's share of the votes in the most recent general election, and also to ensure that at least 20 per cent of the total membership of the House should be cross-bench (independent) members. Under this arrangement no single party would have an overall majority in the House. (On the Wakeham Report see Shell [2000] *PL* 193, Oliver [2000] *PL* 553 and Russell and Cornes (2001) 64 *MLR* 82.)

The Government's initial response to the Wakeham Report was positive. The Lord Privy Seal (Baroness Jay) said in the House of Lords (HL Deb vol 610, col 912, 7 March 2000):

> The Government accept the principles underlying the main elements of the Royal Commission's proposals on the future role and structure of this House, and will act on them. That is, we agree that the second Chamber should clearly be subordinate, largely nominated but with a minority elected element and with a particular responsibility to represent the regions. We agree that there should be a statutory appointments commission.

The Lord Privy Seal added, however:

> Nothing I have said today indicates that the Government accept any particular one of the report's detailed proposals.

The Government's proposals for the second stage of reform were published in a White Paper, *Completing the Reform* (Cm 5291/2001), and were seen to deviate from the Royal Commission Report in some important respects. While adhering to the Wakeham principle of a largely appointed Upper House with a minority (20 per cent in the White Paper) of regionally elected members, and entrusting the appointment of cross-bench members to a statutory Appointments Commission, the White Paper would leave nomination of the political members in the hands of the political parties.

The White Paper followed Wakeham in leaving the powers and functions of the House of Lords substantially unchanged, but for a new power to delay a statutory instrument for up to three months, in place of the existing veto power over delegated legislation.

If the Wakeham Report had been widely regarded as over-cautious, if realistic, and as including some well-devised and sensible proposals, the White Paper met with a generally hostile response, not least among Labour backbenchers, was deprecated by Lord Wakeham himself, and was criticised as a timid and executive-minded approach to the unfinished business of reform. There was particular dissatisfaction with the proposal that a majority of members should be nominees of the political parties and much support for the view that a substantial majority of members should be democratically elected.

(See HL Deb vol 630, col 561 *et seq*, 9 January 2002; HC Deb vol 377, col 702 *et seq*, 10 January 2002.) More than 300 MPs signed an Early Day Motion calling for a wholly or substantially elected second chamber, and the Public Administration Committee was unanimous in recommending that 60 per cent of the members should be elected, in a chamber of no more than 350 members in total (*Fifth Report*, HC 494-I of 2001–02). The Government, conceding that consensus on the composition of a reformed second chamber had not been achieved, agreed in May 2002 to the establishment of a joint committee of both Houses (its membership to be settled through 'the usual channels') to explore afresh the options for reform and to bring forward alternative proposals to be voted on by each House. The joint committee (of twelve MPs and twelve peers) presented seven options: a wholly appointed House, a wholly elected House, and a House of 20, 40, 50, 60 or 80 per cent elected members. In February 2003 the House of Lords voted by a substantial majority in favour of an all-appointed House, but there was no majority support for any of the proposed options in the Commons (who voted decisively against an all-appointed House and also against an additional option of abolition of the House of Lords. The 80 per cent elected option was defeated by only three votes.)

In response to this impasse the Government published in September 2003 a consultation paper, *Constitutional Reform: Next Steps for the House of Lords*, which conceded that there was no parliamentary consensus on further reform and proposed instead that legislation should consolidate the reforms already made by providing for the removal of the remaining hereditary peers and for the establishment of a new independent Appointments Commission. In the following year the Government announced that it had decided not to proceed with the proposed legislation, since it was persuaded that the Lords would not pass a bill making such provision.

The Labour Party manifesto for the 2005 general election reaffirmed the party's position that 'a reformed Upper Chamber must be effective, legitimate and more representative without challenging the primacy of the House of Commons'. The manifesto included commitments to remove the remaining hereditary peers, to limit to sixty days the time for consideration of a bill in the House of Lords, to seek the cooperation of other parties in setting up a joint committee of both Houses to review the 'key conventions' of the Lords, and to allow a free vote on the composition of the Upper House. In May 2006 the two Houses agreed to establish a Joint Committee on Conventions 'to consider the practicality of codifying the key conventions on the relationship between the two Houses of Parliament which affect the consideration of legislation'. In its *First Report*, HL 265-I, HC 1212-I of 2005–06, the Joint Committee recommended as follows:

(1) 'it would be practicable for the Lords to debate and agree a resolution setting out the terms of the [Salisbury-Addison] Convention' and to communicate it to the Commons for their consideration: in this connection the

Committee noted 'the emergence in recent years of a practice that the House of Lords will usually give a Second Reading to any government Bill, whether based on the manifesto or not';

(2) while there is a convention that the Lords should deal with government bills in reasonable time, a fixed time limit would have unacceptable consequences and be of benefit only to the Government;

(3) other than in exceptional circumstances (as when special attention has been drawn to a statutory instrument by the Joint Committee on Statutory Instruments or the Lords' Merits Committee) 'opposition parties should not use their numbers in the House of Lords to defeat an SI simply because they disagree with it';

(4) formal codification of the conventions was not appropriate, but the Committee's own formulations and any consequent resolutions of the Houses should improve clarity and shared understanding of the conventions.

The Committee observed in conclusion that if the Lords acquired an electoral mandate the conventions between the Houses would have to be re-examined. Discussions continue between the parties on the next stage of reform, and agreement on the composition of the second chamber has yet to be reached. Most reformers do not envisage any major change in the role or functions of the House of Lords and foresee it as continuing to be a revising, scrutinising and deliberative assembly which does not contest primacy with the Commons. A reformed House with a restored legitimacy and immune from dominance by party or the executive could assume a more active role, in partnership with the Commons, in making accountability effective.

10

The courts: judicial review and liability

Contents

1 Nature and foundations of judicial review

The decision of a minister, local authority or other public officer or body may be challenged in court by recourse to the machinery of judicial review. Judicial review is to be distinguished from appeal, which is sometimes available as a means of contesting an administrative decision. Judicial review is the exercise of an ancient and inherent supervisory jurisdiction of the court, by which excess or abuse of public power may be restrained or remedied. On the other hand,

appeal to a court against an administrative act is possible only where, exceptionally, provision for it is made by statute. Take, for instance, *Quigly v Chief Land Registrar* [1993] 1 WLR 1435. Quigly sought to appeal against an administrative decision of the Chief Land Registrar, but the court ruled that it had no jurisdiction to hear an appeal from such a decision. This ruling was upheld by the Court of Appeal. Hoffmann LJ remarked that 'A right of appeal to the court is entirely a creature of statute'; there was no provision in the relevant legislation for a right to appeal against the decision in question. The judge continued: 'This does not mean that the exercise of administrative powers by the registrar is altogether beyond judicial control. I should have thought that it would be subject to judicial review in the same way and on the same principles as any other public power.' While some statutes provide for appeal to a court against the decision of a public authority (it might be, as in certain planning matters, from the decision of a minister), provision is more commonly made for appeals against administrative decisions to be heard by a special tribunal, at all events in the first instance, sometimes with a right of further appeal to a court on questions of law.

The distinction between appeal and review was emphasised by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 234 (what he said in this passage with reference to a local authority may be taken as applying to *any* public authority whose decision is challenged in proceedings for judicial review):

> The power of the court to interfere . . . is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

The distinctive features of judicial review were considered by the House of Lords in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155. The Law Lords noted that judicial review is concerned, not with the merits or demerits of the decision reached by an administrative authority – with whether that decision was right or wrong – but with the process by which the decision was reached. Lord Hailsham of St Marylebone said:

> [I]t is important to remember in every case that the purpose of the remedies [in judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law. There are passages in the judgment of Lord Denning MR (and perhaps in the other judgments of the Court of Appeal) in the instant case . . . which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves consider

fair and reasonable on the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court.

In *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 898, 905, Sir Thomas Bingham MR said that a court exercising judicial review has 'one function only, which is to rule upon the lawfulness of decisions'.

The jurisdiction and powers of an appellate court or tribunal depend on the particular provision made in the relevant statute, but in broad terms we may say that appeal is concerned with merits, judicial review with legality and process. Again, whereas an appellate court is usually empowered to substitute its own decision for that of the body appealed from, a court exercising review cannot normally do this: it is restricted to granting one or more of certain specific remedies – for instance, an order setting aside the decision of the administrative body. The courts, as Jaffey and Henderson observe, 'have by historic warrant and general consent a valuable and indispensable role in the administrative process'. Their task, say these authors, 'is to contain administrative activity within the bounds of delegated power: to apply to administrative action the test of "legality"'((1956) 72 *LQR* 345, 346).

The justification for judicial review has been looked for in the principle that powers granted to a public body must not be exceeded. This is the ultra vires principle: the act of a public authority that falls outside the limits of its jurisdiction or powers is unlawful and will be prevented or, after the event, set aside by the reviewing court. Where power is conferred by statute it will be for the court to determine what limits Parliament has imposed on the use of the power and whether those limits have been exceeded.

Daymond v South West Water Authority [1976] AC 609 (HL)

Section 30 of the Water Act 1973 authorised water authorities 'to fix, and to demand, take and recover such charges for the services performed, facilities provided or rights made available by them . . . as they think fit'. The South West Water Authority imposed a charge for sewerage services on a householder, Daymond, whose house was not connected to a public sewer. Daymond contested the validity of the charge.

Viscount Dilhorne: . . . Section 30 must have been intended to entitle water authorities to demand, take and recover their charges from some persons and classes of persons. Is it to be inferred that it was the intention of Parliament that they should be at liberty to charge

> anyone they thought fit in Great Britain? That has only to be stated to be rejected for it is, to my mind, inconceivable that Parliament should have intended to entrust such an extensive power of taxation to a non-elected body. Is it then to be inferred that it was intended to give them only power to charge those living in their area and those who came into it and made use of their services, facilities and rights? I think that such a limitation must be implied.
>
> If that is to be inferred, is it also to be inferred that they are completely at liberty to charge such of those persons as they think fit? . . .
>
> The natural inference to be drawn from a provision which only says that a statutory body can demand, take and recover such charges for the services it performs, the facilities it provides and the rights it makes available, as it thinks fit, is, in my opinion, that it can charge only those who avail themselves of its services, facilities and rights.

There was no other provision in the Act indicating that any different interpretation was to be placed on section 30. The House of Lords decided (by a majority) that the charge imposed on Daymond was not permitted by the statute.

What a statute permits, or does not permit, may be spelled out clearly and unmistakably in the language used: what is intra vires and what ultra vires is immediately apparent. Often, however, the statutory language is equivocal and has to be interpreted (as in *Daymond*'s case, above). In this task the court may be assisted by *presumptions* – for instance, the presumption that Parliament would not have intended to authorise interference with fundamental rights, unless its intention to do so appears 'by irresistible inference from the statute read as a whole' (Lord Reid in *Westminster Bank v Minister of Housing and Local Government* [1971] AC 508, 529). Presumptions of this kind derive from the common law, which is to say that the courts have developed them, and so we see that judicially created principles may be applied by the courts in deciding what a statute permits to be done. It has been questioned whether, in this case, the courts are really giving effect to the unexpressed but presumed intention of Parliament or are rather simply requiring statutory powers to be exercised in conformity with principles which the courts see it as their responsibility to uphold, and which have their source in a judicial conception of the rule of law. If this is so it would seem that the judges are not acting – or at all events are not acting exclusively – on a principle of ultra vires. Rather they are enforcing the rule of law, taken to mean not only that precisely limited statutory powers must not be exceeded, but that powers must not be used – we should say abused – in ways or for purposes that run counter to principles of justice and fair dealing evolved by the courts in the long experience of judging and developing the common law.

In recent years the ultra vires theory of the basis of judicial review has been strongly challenged by those who find the source and justification of review in the common law. In their view the principles applied by the courts are not derived from an implied – and altogether fictional – intention of Parliament, but rest on the historic function and character of courts 'as guardians and pronouncers of

values anchored in society and culture' (R Cotterrell in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994), p 17) – values which the courts have 'discovered' in, or transplanted into, the common law. Paul Craig and Nicholas Bamforth, 'Constitutional analysis, constitutional principle and judicial review' [2001] *PL* 763 say (at p 767) that proponents of the common law model (they are among them):

> argue that the principles of judicial review are in reality developed by the courts. They are the creation of the common law. The legislature will rarely provide any indication as to the content and limits of what constitutes judicial review. When legislation is passed the courts will impose the controls which constitute judicial review which they believe are normatively justified on the grounds of justice, the rule of law, etc. . . . The courts will decide on the appropriate procedural and substantive principles of judicial review which should apply to statutory and non-statutory bodies alike. Agency action which infringes these principles will be unlawful. A finding of legislative intent is not necessary for the creation or general application of these principles.

On the other hand, the courts have generally continued to explain the review jurisdiction in terms of ultra vires, as providing a basis for their far-reaching power of control that is overtly respectful of parliamentary sovereignty. (See eg, *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, 701; *Boddington v British Transport Police* [1999] 2 AC 143, 164, 171.) Some academic commentators, too, remain wedded to ultra vires as the comprehensive, unifying principle of the judicial review of statutory powers and have mounted a spirited defence of this principle. For them it is no mere fiction to say that Parliament, in granting manifold powers to ministers, local authorities, non-departmental public bodies and other agencies, does so on an unexpressed condition that the powers must be used rationally, fairly and for the purposes for which they are given. Even though a large measure of discretion is allowed in exercising the power – the statute using some such phrase as 'the Minister may, if he thinks fit . . .' – it is argued that Parliament cannot be indifferent as to whether the power is diverted to collateral ends that are not compatible with the statutory purpose, or is used in an arbitrary manner that disregards the rights or legitimate expectations of individuals, or defies reason. If the courts devise principles to forestall abuses such as these, are they not acting to reinforce the will of Parliament?

(The ultra vires controversy has attracted a considerable literature. Significant contributions to the debate can be found in C Forsyth (ed), *Judicial Review and the Constitution* (2000). See further M Elliott, *The Constitutional Foundations of Judicial Review* (2001); Craig and Bamforth, 'Constitutional analysis, constitutional principle and judicial review' [2001] *PL* 763; Barber, 'The academic mythologians' (2001) 21 *OJLS* 369; Halpin, 'The theoretical controversy concerning judicial review' (2001) 64 *MLR* 500; Allan, 'The constitutional foundations of judicial review' [2002] *CLJ* 87.)

Although the focus is often on judicial review as a means of protecting the individual and providing remedies for wrongs done, we should not lose sight of a broader aim of review. Lord Woolf regards judicial review as 'primarily concerned with enforcing public duties on behalf of the public as a whole and as only concerned with vindicating the interests of the individual as part of the process of ensuring that public bodies do not act unlawfully and do perform their public duties' (*Protection of the Public: A New Challenge* (1990), pp 33–4). If review is to have a deeper effect in improving the quality of administration and the official treatment of members of the public, it must generate clear principles which can provide guidance to administrators, who in their turn must accept a responsibility to act upon the guidance so given. In these respects it must be said that the achievement of judicial review has been modest. Although it has developed greatly in recent decades as a means of redress for wrongs, the principles of review are still something lacking in clarity and precision while the reaction of the administration to this burgeoning jurisdiction has been mixed, by turns unaware, acquiescent, sceptical or hostile, less often conscientiously receptive. There are some indications, however, that a more positive administrative response may be emerging. (See further Rawlings, 'Judicial review and the "control of government"' (1986) 64 *Pub Adm* 135; Richardson and Sunkin, 'Judicial review: questions of impact' [1996] *PL* 79; Barker, 'The impact of judicial review: perspectives from Whitehall and the courts' [1996] *PL* 612; Halliday, 'The influence of judicial review on bureaucratic decision-making' [2000] *PL* 110; Sunkin and Pick, 'The changing impact of judicial review' [2001] *PL* 736; and M Hertogh and S Halliday (eds), *Judicial Review and Bureaucratic Impact* (2004). On the tensions – damaging or creative? – which may arise between the judiciary and the executive see Loveland, 'The war against the judges' (1997) 68 *Political Quarterly* 162 and Woolf, 'Judicial review: the tensions between the executive and the judiciary' (1998) 114 *LQR* 579.)

Judicial review is a procedure which is known to both English and Scots law. While the principal *grounds* on which judicial review may be sought are largely the same in the two jurisdictions, there are several differences of *procedure*. The questions 'against whom may judicial review be sought?' and 'who may seek judicial review?', for example, are answered differently in English and Scots law (see further below). In both English and Scots law judicial review has its own procedure, different in a variety of respects from ordinary private law procedure. This has been true in English law since 1977 and in Scots law since 1985. In England the procedure is known as the claim for judicial review. It is governed by Part 54 of the Civil Procedure Rules. In Scotland the procedure is known as the petition for judicial review. It is governed by Rule 58 of the Rules of the Court of Session. The procedures are designed to allow for a relatively speedy process. Unmeritorious claims or petitions can be dispensed with quickly. The procedure is not principally designed to allow courts to resolve substantial disagreements of fact. In most judicial review cases there will be no disagreement between the parties as to the facts: the issue will be whether the

government minister or other public authority has acted (or is proposing to act) lawfully or not. For this reason, most evidence in judicial review cases will be written rather than oral, and there will not be extensive cross-examination. In both English and Scots law judicial review procedure is exclusive: if a litigant wishes to argue that an authority subject to judicial review has acted unlawfully, the judicial review procedure is the only procedure available to them. (The leading authority on this point in English law is *O'Reilly v Mackman* [1983] 2 AC 237; in Scots law the issue of exclusivity is clear from the terms of Rule 58.)

The remedies available in judicial review allow the courts to quash an unlawful decision, to order that a duty be performed, to prohibit an unlawful decision from being taken or to make a declaration (in Scots law a declarator) – an authoritative ruling on a question of law in contention between the parties. In English law the first three of these remedies were formerly known as certiorari, mandamus and prohibition. They are now known as quashing, mandatory and prohibiting orders. In Scots law they are known as reduction, implement and suspension. It is important to note that damages, while theoretically available, are granted in judicial review cases only rarely. This is because of the nature of the argument in judicial review. As we have seen, the argument in judicial review focuses less on whether the claimant (or petitioner) should be compensated and more on whether the public authority under review has acted lawfully or not. Damages and compensatory remedies are, however, beginning to grow in importance in public law, not least (as we saw in chapter 5) under the influence of European Community and European human rights law. We consider their availability against the Crown and other public authorities when we examine questions of liability later in this chapter.

Judicial review procedure and remedies are considered in greater depth in the literature on administrative law: see eg, C Harlow and R Rawlings, *Law and Administration* (2nd edn 1997), ch 16; S Bailey, *Cases, Materials and Commentary on Administrative Law* (4th edn 2005), ch 14; M Elliott, *Administrative Law: Cases and Materials* (3rd edn 2005), chs 13, 14 and S Blair, *Scots Administrative Law: Cases and Materials* (1999), chs 10, 11.

2 Grounds of review

In *Council of Civil Service Unions v Minister for the Civil Service* (the 'GCHQ' case) [1985] AC 374, 410, Lord Diplock said:

> Judicial review has I think developed to a stage today when . . . one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

In identifying these categories Lord Diplock had no intention of setting a limit to the expansion of judicial review, for he added: 'That is not to say that further

development on a case by case basis may not in course of time add further grounds.' We shall consider the grounds of review under Lord Diplock's three heads, albeit that in our consideration of irrationality we shall also consider questions of proportionality. For reasons that we shall explore, these now need, at least in some cases, to be read together. It is important to recognise that the various heads of review are not entirely distinct. As Lord Irvine LC remarked in *Boddington v British Transport Police* [1999] 2 AC 143, 152:

> Categorisation of types of challenge assists in an orderly exposition of the principles underlying our developing public law. But these are not watertight compartments because the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

The grounds of review, with one relatively minor exception concerning ultra vires (see below), are largely the same in English law and in Scots law. The Court of Session was quick to accept that Lord Diplock's formulation of the grounds of review in the *GCHQ* case applied also in Scots law: see *City of Edinburgh DC v Secretary of State for Scotland* 1985 SC 261.

(a) Illegality

If a public authority acts in bad faith, deliberately exceeding the limits of its power, it is guilty of illegality. Such conduct is rare, and when a public authority acts illegally it is generally as a consequence of an error of law, be it in misinterpreting a statute or disregarding common law principles that govern the exercise of public power. At one time it was held that only certain errors of law would affect the validity of a decision, namely those which related to the scope of the decision-maker's powers (jurisdictional error) or which appeared on the face of the record of the decision taken, but in English law these limitations have been overcome and it is now clear that any relevant error of law (affecting the decision reached) can result in the decision being quashed by the court. (See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. This is not the case in Scots law, where the distinction between ultra vires and intra vires errors of law continues to be important: see eg, *Watt v Lord Advocate* 1977 SLT 130, 1979 SLT 137.) Lord Griffiths summarised the English law position as follows (in *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, 693):

> If [administrative bodies] apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law so that they may make their decision upon a proper understanding of the law.

Administrative action may be shown to be invalid on the simple ground that the public authority has stepped outside limits clearly fixed by a statute conferring the power: here we may surely still say that the authority has acted ultra vires. Such action is properly described as illegal. In addition, an exercise of power – or a failure to exercise it – will offend against legality if such conduct runs counter to the policy and objects of the empowering Act or defeats the purpose for which the power was given. We may distinguish several ways in which this kind of default, or illegality, may occur.

(1) *Extraneous or improper purposes.* A power-conferring statute will doubtless be found to give a discretion to the public officer or body concerned. Any such discretion may be exercised only for the purposes – to be discovered by construing the Act as a whole – for which it was given and not for extraneous purposes of the decision-maker.

In *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1 WLR 386 we see a striking instance of a minister's decision being held unlawful because it was not within the statutory purpose. The Overseas Development and Co-operation Act 1980 authorised the minister to provide financial assistance 'for the purpose of promoting the development or maintaining the economy' of a country outside the United Kingdom. It was held by the Divisional Court that this provision did not empower the minister 'to disburse money for unsound development purposes': in this instance the contemplated development (the Pergau Dam in Malaysia) was 'so economically unsound that there is no economic argument in favour of the case'. The minister had taken into account the 'wider perspective' of the United Kingdom's political and commercial relations with Malaysia in approving the project, but the decision to give financial aid to so uneconomic a scheme was not permitted by the Act. Following the court's decision, funds set aside for the Pergau Dam were reallocated for emergency aid in Bosnia, Rwanda and other parts of the world. See the analysis of this case by Harden, White and Hollingsworth [1996] *PL* 661.

This kind of abuse of power was also seen in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357. Under section 32 of the Housing Act 1985 local authorities had power to dispose of land in furtherance of lawful public purposes. Westminster City Council adopted a policy of increasing the sales of residential properties in the city and in particular to sell 250 properties a year in eight marginal electoral wards. The aim of this policy was not the achievement of proper housing objectives: rather it was contemplated that purchasers would as owner-occupiers be likely to vote Conservative and that the composition of the electorates in the eight marginal wards would be altered so as to improve the prospects of the Conservative Party in the 1990 council elections. The House of Lords held that the council's adoption and implementation of this policy was a deliberate misuse of the statutory power for an unauthorised and improper purpose and was unlawful.

Statutes commonly specify the purposes for which a power is conferred and so expressly indicate the limits of the discretion allowed. In other cases restrictions on an exercise of statutory power may be inferred from the general purposes of

the Act or from fundamental principles which, it is presumed, Parliament will have intended to uphold.

R v Ealing London Borough Council, ex p Times Newspapers Ltd (1986) 85 LGR 316 (DC)

Ealing London Borough Council was, by virtue of the Public Libraries and Museums Act 1964, a library authority. As such it was empowered to provide a public library service and was under a duty to provide a comprehensive and efficient service for all persons in the borough (s 7).

Times Newspapers Ltd and other newspaper groups were engaged in a bitter industrial dispute with dismissed print workers and their trade unions. In response to representations from the unions and as a way of supporting their cause, Ealing Council, acting in concert with other library authorities, banned from public libraries in the borough all copies of newspapers and periodicals published by the newspaper groups concerned in the dispute. A resident in the borough applied for judicial review of the decision. The Divisional Court held that it was ultra vires and void as an abuse of the council's power.

Watkins LJ: . . . I am of the opinion that the ban imposed by the borough councils was for an ulterior object. It was inspired by political views which moved the borough councils to interfere in an industrial dispute and for that purpose to use their powers under the Act of 1964. Parliament, I am sure, did not contemplate such action as that to be within the power it conferred when it enacted section 7.

We may ask, what considerations led the court to its conclusion that Parliament had not intended to authorise such action as was taken by the council in this case? In considering whether power has been used for an improper purpose we may need to invoke common law principles rather than speculate about Parliament's intention. TRS Allan regards the decision in the *Ealing* case as an application of a principle of equality – 'the right to be free from unfair or hostile discrimination at the hands of the state' – which, he claims, is fundamental to the rule of law: *Law, Liberty, and Justice* (1993), pp 170–1. Other cases that may perhaps be explained in this way include *Wheeler v Leicester City Council* [1985] AC 1054 and *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938. (See Allan, above, pp 166–70; for a more sceptical interpretation of *Wheeler v Leicester City Council*, see A Tomkins, *Public Law* (2003), pp 179–80.)

(2) *Irrelevant considerations.* It is further necessary, if the exercise of discretionary power is to satisfy the requirement of legality, that the deciding authority should take account of all considerations that are relevant to its decision and disregard irrelevant considerations: arbitrary action in violation of these constraints is held to be illegal. A statute may itself specify considerations to be taken into account, but what factors are or are not relevant to the exercise of a power will often be a matter of construction or inference. As Lord Bridge

observed in *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858, 873, 'if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose'.

Padfield v Minister of Agriculture, Fisheries and Food, which revitalised judicial review after a long period of quiescence, by setting a precedent for a more penetrating scrutiny of executive action, was a case in which a minister's decision was held to be vitiated because he had been influenced by irrelevant considerations.

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (HL)

A milk marketing scheme for England and Wales had been established under the Agricultural Marketing Act 1958. Under the scheme producers had to sell their milk to a Milk Marketing Board, which itself fixed the prices to be paid, on a regional basis. The Act provided machinery for dealing with complaints made by producers to the minister about the operation of the scheme. A complaint would be referred, 'if the Minister in any case so directs', to a committee of investigation which would consider the complaint and make a report to the minister. If the committee reported that anything done under the scheme was contrary to the interest of the complainants and was not in the public interest, the minister was empowered (although not obliged) to make an order amending the scheme. Producers in the south-eastern region complained to the minister that the prices being paid to them by the board were too low and asked that their complaint should be referred to the committee of investigation. The minister refused to refer the complaint and the producers applied to the court for an order commanding him to refer it.

Plainly the minister was not under a duty to refer every complaint to the committee of investigation and the minister argued that the Act gave him an unfettered discretion ('if the Minister . . . so directs') whether or not to refer. The House of Lords rejected this. Although the discretion was expressed in unqualified terms it must be exercised (per Lord Reid) 'to promote the policy and objects of the Act'. The minister had given his reasons for refusing to refer the complaint and their Lordships went on to examine these. The minister had said, in the first place, that the complaint raised wide issues, affecting the interests of other regions and the price structure as a whole. Secondly, if the committee were to uphold the complaint the minister was concerned that he would be expected to give effect to its recommendations: the implication here, as their Lordships saw it, was that a report by the committee might generate pressure on the minister to take corrective action, against his judgement, and put him in a politically embarrassing position.

The House of Lords held (Lord Morris dissenting) that the considerations on which the minister had taken his decision left altogether out of account the

merits of the complaint and showed that he had misdirected himself in law. That the complaint raised wide issues and affected other regions was not a good ground for refusing to refer it to the committee of investigation; on the contrary, these were matters which the committee was well qualified to investigate. As to the possibility of political embarrassment, that was manifestly a bad reason and, as Lord Upjohn remarked, was 'alone sufficient to vitiate the Minister's decision which . . . can never validly turn on purely political considerations'. In the result the minister was directed to reconsider the complaint according to law.

The sequel to this decision was that the minister duly reconsidered the complaint and referred it to the committee of investigation. The committee reported in favour of the complainants: it was then for the minister to decide whether there were 'other public interests which outweigh the public interest that justice should be done to the complainers' (per Lord Reid in *Padfield*). The minister concluded that it would not be in the public interest to give effect to the committee's report.

This outcome shows the limits of judicial review, which does not allow a court to substitute its own judgement of what is good policy for that of the minister. Yet even the final decision of the minister in this case would have been reviewable if he had again acted under a misapprehension as to what was legally required of him in exercising his statutory discretion.

In this case the statute did not oblige the minister to give reasons for a refusal to refer a complaint to the committee. He chose to give reasons and they were found to be bad in law. Suppose that he had given no reasons. The Law Lords were in no doubt that even so a court could intervene if the circumstances indicated that the minister had acted contrary to the policy and objects of the statute. This point was elaborated as follows by Lord Keith in *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 1 WLR 525, 539–40:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision.

It is not always clear in advance what the courts will deem to be a relevant or irrelevant consideration. *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (DC) and [1995] 1 WLR 1037 (CA) concerned a decision of a local authority to ban stag hunting on its land. The authority purported to rely on a power in the Local Government Act 1972 which allowed it to make decisions relating to the 'benefit, improvement or development' of the area (s 120(1)(b)). It was clear that the authority had resolved to ban stag hunting on the land because a majority of the councillors voting found it to be morally repulsive. In the Divisional Court Laws J held that the authority had acted illegally as the statutory power was not broad enough to encompass the sort of moral

judgement the councillors had sought to make: the statutory language 'is not wide enough to permit the council to take a decision about activities carried out on its land which is based upon freestanding moral perceptions', he ruled. A majority of the Court of Appeal affirmed the decision of Laws J, but on different grounds. Simon Brown LJ dissented, on the basis that it was 'impossible to say that the councillors must shut their minds to the cruelty argument'. (The courts' approaches in *Fewings* may be contrasted with that of the Court of Session in *Adams v Scottish Ministers* 2004 SC 665, above, pp 206–8, concerning very similar subject matter, albeit in the context of a challenge to an Act of the Scottish Parliament rather than to a resolution of a local authority.)

The reasoning in *Padfield* and *Fewings* was closely bound up with the statutes that conferred decision-making power on the minister and on the local authority in those cases. But what if there is no such statute? What if the public authority is purporting to exercise a prerogative, rather than a statutory power, for example? *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513 shows that *Padfield* illegality may apply also in this context. If a minister purports to exercise a prerogative power improperly he may be acting illegally, just as he would be were he to exercise a statutory power improperly. In *ex p Fire Brigades Union* a majority of the House of Lords held that the Home Secretary had acted unlawfully in seeking to use his prerogative powers to effect a change in the system of criminal injuries compensation, which had been approved by Parliament.

Three further observations may be made on relevant and irrelevant considerations. First, a consideration is legally relevant only if it is something that the decision-maker is obliged (on a right understanding of any applicable statute) to take into account and is not merely a factor which may properly be taken into account (*CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172, 183, approved on this point by the House of Lords in *Re Findlay* [1985] AC 318, 333). Secondly, the weight to be attached to the relevant considerations is a matter for the judgement of the decision-maker – subject to *Wednesbury* unreasonableness (on which see below): *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 764, 780; see further Herling, 'Weight in discretionary decision-making' (1999) 19 *OJLS* 583. Thirdly, irrelevant considerations and improper purposes overlap and may often be more or less alternative ways of characterising the same unlawful action. It has been remarked that 'When a decision-maker pursues a purpose outside of the four corners of his powers, he mostly does so by taking an "irrelevant consideration" into account' (S de Smith, Lord Woolf and J Jowell, *Judicial Review of Administrative Action* (1995), para 6–063).

(3) *Unlawful delegation.* A public body on which power is conferred by statute may not divest itself of the power by delegating it to some other body, unless such delegation is expressly or impliedly authorised by the statute (see eg, *H Lavender & Son Ltd v Minister of Housing and Local Government* [1970] 1 WLR 1231). The non-delegation rule is qualified in an important – and controversial – way by the Deregulation and Contracting Out Act 1994,

section 69, which authorises ministers to delegate any of a wide range of statutory functions vested in themselves to persons outside government (see Freedland [1995] *PL* 21). The rule against delegation is to be contrasted with the *Carltona* principle (above, p 461) by which decision-making may be *devolved* to subordinate officers within the organisation of the authority entrusted with the power.

(4) *Fettering of discretion.* When a statute grants a discretionary power to a public authority, it is to be inferred that the authority must not do anything to constrain or fetter its discretion so that it is prevented from exercising the discretion in the manner, and with respect to all the matters, contemplated by the statute. An authority must not, for instance, make a contract or adopt a policy that nullifies or abridges its discretion, so defeating the purpose for which the discretion was given.

That said, it is lawful (and common practice) for an authority to adopt a policy regarding the exercise of a discretionary power and indeed it may be helpful to persons affected and make for consistency if this is done. Any such policy must, however, be in conformity with the objects of the statute and must not be applied in an inflexible way and without consideration of individual circumstances. (See *British Oxygen Co Ltd v Board of Trade* [1971] AC 610; *Re Findlay* [1985] AC 318.)

(b) Irrationality

It is often said that an administrative decision may be vitiated by 'unreasonableness'. Sometimes this word is used loosely 'as a general description of the things that must not be done' (per Lord Greene MR in the *Wednesbury* case, below), including action that is more properly described as illegal. Unreasonableness is, however, a distinct ground for challenging a decision, but then it bears a stricter, technical sense. In *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 230, Lord Greene MR said:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming . . . [I]t must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether.

Lord Greene gave the example, suggested in an earlier case, of a red-haired teacher, dismissed because she had red hair; in other words, 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.

The courts have repeatedly emphasised that only a high degree of unreasonableness, commonly labelled 'irrationality', allows a court to intervene. Lord

Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 said that:

> what can now be succinctly referred to as '*Wednesbury* unreasonableness' . . . applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

Evidently the justification for judicial intervention on this ground is meant to be an exacting one. In *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 757–8, Lord Ackner said:

> This standard of unreasonableness, often referred to as 'the irrationality test', has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision – that is, to invite an abuse of power by the judiciary.

'Perverse', 'irrational', 'absurd': so high a degree of folly appears to be demanded by the *Wednesbury* principle that one might doubt that any public authority would ever succeed in attaining it. The standard is less luridly expressed in saying that a decision is *Wednesbury* unreasonable if it is 'beyond the range of responses open to a reasonable decision-maker' (*R v Ministry of Defence, ex p Smith* [1996] QB 517, 554), and we arrive at the 'simple test' of 'whether the decision in question was one which a reasonable authority could reach' (Lord Cooke of Thorndon in *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 452). The applicable standard is elucidated by Lord Woolf in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213, para 65, as follows:

> Rationality, as it has developed in modern public law, has two faces: one is the barely known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic (though this can often be equally well allocated to the intrusion of an irrelevant factor).

At all events the argument of *Wednesbury* unreasonableness is often urged and the test is not uncommonly found to be satisfied.

(See generally Lord Irvine, 'Judges and decision-makers: the theory and practice of *Wednesbury* review' [1996] *PL* 59; Sir John Laws, '*Wednesbury*', in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998).)

West Glamorgan County Council v Rafferty [1987] 1 WLR 457 (CA)

The administrative decision that was challenged in this case was not the exercise of a statutory power but a decision by a local authority to evict squatters from its land. Under section 6 of the Caravan Sites Act 1968 the county council was under a duty to provide adequate accommodation in its area for gypsies and their caravans. It had failed to do so and was in breach of its statutory duty. There being no land in West Glamorgan on which gypsies could lawfully encamp, a number of them stationed their caravans on land belonging to the county council, so becoming trespassers on the land. The council commenced legal proceedings for the eviction of the gypsies. One of them applied for judicial review of the council's decision to institute proceedings. Kennedy J held that, having regard to the council's breach of statutory duty, its decision to evict the gypsy families from its land was in all the circumstances a decision which no reasonable authority could have made, and he granted an order quashing the decision.

On appeal by the county council, the Court of Appeal recognised that there were factors telling in favour of the decision to evict the gypsies; for instance, a scheme for redevelopment of the site was being held up and the unregulated presence of the gypsies was causing nuisance and some damage to neighbouring occupiers. On the other hand, there were factors telling against the decision; for instance it appeared that the presence on the site of many of those to be evicted was caused by the council's breach of duty, there was no other site in the county to which the gypsies could lawfully go, and eviction would cause substantial hardship to the gypsies and to those to whom the burden of receiving them would be transferred. The court considered these and other circumstances telling for or against eviction and took note of the fact that it would have been practicable for the council, while seeking possession, to offer to allow the caravans to remain on a designated part of the site for a period of time – but this alternative had not been considered. The court concluded that the factors against eviction had preponderant weight:

> **Ralph Gibson LJ:** . . . [I]t is clear to me that the question to be answered by reference to the factors discussed above could only reasonably be answered against eviction, if eviction was to be carried out with no provision for alternative accommodation, but that by itself is not enough to justify the decision of Kennedy J. Reasonable men and women can 'perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable': *per* Lord Hailsham of St Marylebone LC in *Re W (An Infant)* [1971] AC 682, 700.

> The question is whether . . . the decision of the plaintiffs must be described as perverse or as revealing 'unreasonableness verging on an absurdity': see *R v Hillingdon London Borough Council, ex parte Puhlhofer* [1986] AC 484, 518D. I have found the decision difficult but, in the end, I am driven to the same conclusion as that reached by Kennedy J for the following reasons. The court is not, as I understand the law, precluded from finding a decision to be void for unreasonableness merely because there are admissible factors on both sides of the question. If the weight of the factors against eviction must be recognised by a reasonable council, properly aware of its duties and its powers, to be overwhelming, then a decision the other way cannot be upheld if challenged. The decision on eviction was a decision which required the weighing of the factors according to the personal judgement of the councillors but the law does not permit complete freedom of choice or assessment because legal duty must be given proper weight.
>
> The continuing breach of duty by the plaintiffs under section 6 of the Act of 1968 to 'gipsies residing in or resorting to' the area of West Glamorgan does not in law preclude the right of the plaintiffs to recover possession of *any* land occupied by the trespassing gipsies, but that does not remove that continuing breach of duty from the balance or reduce its weight as a factor. The reasonable council in the view of the law is required to recognise its own breach of legal duty for what it is and to recognise the consequences of that breach of legal duty for what they are. The reasonable council, accordingly, was not in my judgement free to treat the interference with the intended reclamation and redevelopment of this site, for such period of time as would have resulted from the holding up of complete eviction from the entire site while temporary accommodation was provided elsewhere, as outweighing the effects of eviction on the gipsies then present and on those to whom the impact of trespassing by gipsies would necessarily be transferred. The decision is only explicable to me as one made by a council which was either not thinking of its powers and duties under law or was by some error mistaken as to the nature and extent of those powers and duties.

Decisions of ministers, too, have from time to time been found to be tainted by irrationality and set aside on this ground. In *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292 the Secretary of State had set up an independent inquiry (under section 2 of the National Health Service Act 1977) into issues arising from the conviction of Dr Shipman for the murder of fifteen of his patients. The minister having decided that the inquiry should be held in private, the families and friends of victims murdered or suspected of having been murdered by Dr Shipman sought judicial review of that decision. The Divisional Court identified a number of factors that militated in favour of a full public inquiry, including the expressed wishes of the families, the number of deaths that had occurred, an apparent breakdown in the checks and controls that might have prevented them, the need to restore public confidence in the National Health Service, and the fact that a public inquiry would be more effective in eliciting relevant and reliable evidence. These factors, in the view of the court, far outweighed the considerations that had led the minister to prefer a private hearing, and the court was 'driven to conclude' that his decision was

irrational. (The court was also of the opinion that the minister's decision was not in accord with the right to freedom of expression – including a right to receive information – affirmed by Article 10 of the European Convention on Human Rights, albeit that Article 10 had then not yet been given formal effect by the Human Rights Act 1998.)

For another instance of a minister's decision failing to satisfy the requirement of rationality see *R v British Coal Corporation, ex p Vardy*, below p 688.

Wednesbury unreasonableness or irrationality is a mechanism of judicial control which is not appropriately applied to every kind of administrative decision. As Lord Phillips MR observed in *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129 at [49]: 'The extent to which the exercise of a statutory power is in practice open to judicial review on the ground of irrationality will depend critically on the nature and purpose of the enabling legislation'. In *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554, Sir Thomas Bingham warned of the caution demanded in applying the irrationality test to decisions of a 'policy-laden' nature:

> The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational.

The House of Lords had earlier accepted this restriction of review for irrationality in *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 and *R v Secretary of State for the Environment, ex p Hammersmith London Borough Council* [1991] 1 AC 521. Both cases concerned decisions of the Secretary of State in matters of local government finance, and in each of them the decision had been presented to the House of Commons for approval, as required by the enabling Act, and had been approved by affirmative resolution of that House. In each case a challenge to the decision on the ground of irrationality was dismissed. Lord Bridge in the *Hammersmith* case expressed the principle of both cases in saying (at p 597):

> The formulation and the implementation of national economic policy are matters depending essentially on political judgement. The decisions which shape them are for politicians to take and it is in the political forum of the House of Commons that they are properly to be debated and approved or disapproved on their merits. If the decisions have been taken in good faith within the four corners of the Act, the merits of the policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy as unreasonable.

It must be emphasised that other grounds of challenge remain open in such cases. The legality of a decision is a matter for the courts, and approval by resolution of one or both Houses cannot legitimise a decision that is vitiated by illegality.

If the standard of review under *Wednesbury* unreasonableness is lowered in certain policy- or economic decision-making contexts, it is intensified in other circumstances. As Laws LJ has remarked, the *Wednesbury* principle 'constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake' (*R v Secretary of State for Education and Employment, ex p Begbie* [2000] 1 WLR 1115, 1130). A more exacting standard of rational decision-making has been applied by the courts when 'fundamental' or 'constitutional' rights are said to have been in question: see, for example, *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 and *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554. The latter case is particularly important.

R v Ministry of Defence, ex p Smith [1996] QB 517

Four members of Her Majesty's Armed Services were administratively discharged on the sole basis that they were homosexual. No allegations of sexual misconduct were made against them. They sought judicial review on the basis of irrationality.

Sir Thomas Bingham MR: . . . Mr David Pannick, who represented . . . the applicants . . . , submitted that the court should adopt the following approach to the issue of irrationality:

> 'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'

This submission is in my judgment an accurate distillation of the principles laid down by the House of Lords in *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 and *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696. In the first of these cases Lord Bridge of Harwich said, at p 531:

> 'I approach the question raised by the challenge to the Secretary of State's decision on the basis of the law stated earlier in this opinion, viz that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court's power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

. . . The present cases do not affect the lives or liberty of those involved. But they do concern innate qualities of a very personal kind and the decisions of which the applicants complain have had a profound effect on their careers and prospects. The applicants' rights as human beings are very much in issue. It is now accepted that this issue is justiciable. This does not of course mean that the court is thrust into the position of the primary decision-maker. It is not the constitutional role of the court to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so. But it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people . . .'.

The reasons underlying the present policy were given in an affidavit sworn by Air Chief Marshal Sir John Willis KCB, CBE, the Vice-Chief of the Defence Staff, an officer of great seniority and experience . . . Sir John advanced three reasons. The first related to morale and unit effectiveness, the second to the role of the services as guardian of recruits under the age of 18 and the third to the requirement of communal living in many service situations. Sir John described the ministry's policy as based not on a moral judgment but on a practical assessment of the implications of homosexual orientation on military life. By 'a practical assessment' Sir John may have meant an assessment of past experience in practice, or he may have meant an assessment of what would be likely to happen in practice if the present policy were varied. His affidavit makes no reference to any specific past experience, despite the fact that over the years very many homosexuals must have served in the armed forces. He does, however, make clear the apprehension of senior service authorities as to what could happen if the existing policy were revoked or varied . . .

The first factor relied on by Sir John, morale and unit effectiveness, was the subject of searing criticism by Mr Pannick. He submitted that the effect of a homosexual member of any military unit would depend on the character, ability and personality of the member involved. He pointed out that many homosexuals had successfully served in the services over the years. He drew attention to the experience of other disciplined forces such as the police. He submitted that inappropriate behaviour by homosexual members of the armed forces could be effectively regulated. He submitted that the ministry should not be deterred from doing what fairness and good sense demanded by apprehensions of irrational and prejudiced behaviour on the part of others.

Mr Pannick also criticised the second factor relied on by Sir John. He pointed out that any service member behaving inappropriately towards an under-age member of the service could be disciplined and punished in the same way as in society at large. He rejected the suggestion that homosexuals were less able to control their sexual impulses than heterosexuals. Again he suggested that the policy of the ministry was pandering to ignorant prejudice.

Mr Pannick accepted, of course, that members of the services could in many situations find themselves living together in conditions of very close proximity, although he pointed out that one of the applicants (by reason of his seniority) and another of the applicants

(by reason of her particular occupation) were in no foreseeable situation likely to share accommodation with anyone. The lack of privacy in service life was, he suggested, a reason for imposing strict rules and discipline, but not a reason for banning the membership of any homosexual. He drew attention to the experience of other disciplined services. He pointed out that each of the applicants had worked in the armed forces for a number of years without any concern being expressed or complaints made about inappropriate behaviour. Each of them had earned very favourable reports. The same, it was said, was true of many other homosexual members of the services.

Above all, Mr Pannick criticised the blanket nature of the existing rule. He placed great emphasis on the practice of other nations whose rules were framed so as to counter the particular mischiefs to which homosexual orientation or activity might give rise. He pointed out that other personal problems such as addiction to alcohol, or compulsive gambling, or marital infidelity were dealt with by the service authorities on a case by case basis and not on the basis of a rule which permitted no account to be taken of the peculiar features of the case under consideration.

The arguments advanced by Mr Pannick are in my opinion of very considerable cogency. They call to be considered in depth, with particular reference to specific evidence of past experience in this country, to the developing experience of other countries and to the potential effectiveness or otherwise of a detailed prescriptive code along the lines adopted elsewhere in place of the present blanket ban. Such a reassessment of the existing policy is already, as I have noted, in train, and I note that the next Select Committee quinquennial review of the policy is to receive a departmental paper of evidence covering all the matters canvassed on this appeal. What the outcome of that review will be, I do not know.

The existing policy cannot in my judgment be stigmatised as irrational at the time when these applicants were discharged. It was supported by both Houses of Parliament and by those to whom the ministry properly looked for professional advice. There was, to my knowledge, no evidence before the ministry which plainly invalidated that advice. Changes made by other countries were in some cases very recent. The Australian, New Zealand and Canadian codes had been adopted too recently to yield much valuable experience. The ministry did not have the opportunity to consider the full range of arguments developed before us. Major policy changes should be the product of mature reflection, not instant reaction. The threshold of irrationality is a high one. It was not crossed in this case.

R v Ministry of Defence, ex p Smith is authority for the proposition that, where 'fundamental' or 'constitutional' rights are at stake, the test of irrationality will be intensified. Even this intensified test of irrationality, however, was subsequently found by the European Court of Human Rights not to be sufficient to meet the demands of the European Convention. Article 13 of the Convention provides that 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority'. Having lost in the Court of Appeal the claimants in *ex p Smith* took their case to the European Court of Human Rights. In *Smith*

and Grady v United Kingdom (1999) 29 EHRR 493 the European Court declared (at [138]) that:

> the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 [right to respect for private and family life] of the Convention.

For this reason, the Court of Human Rights held that the judgment of the Court of Appeal in *ex p Smith* violated the claimants' rights under Article 13 of the Convention: even an intensified test of *Wednesbury* unreasonableness is not an 'effective remedy' in these circumstances, the Court held.

Article 13 ECHR is not domestically incorporated under the Human Rights Act 1998. It may be thought that this would have limited the impact in domestic judicial review law of the Court's decision in *Smith and Grady*. Since the coming into force of the Human Rights Act, however, the House of Lords has held that, in cases concerning Convention rights, standards of proportionality should be used instead of notions of *Wednesbury* unreasonableness. It is to this issue that we now turn.

(c) Proportionality

In 1980 the Committee of Ministers of the Council of Europe adopted a recommendation to Member States (No R(80)2) 'concerning the exercise of discretionary powers by administrative authorities'. One of the principles which it recommended should be followed in the exercise of discretionary power was that the administrative authority:

> maintains a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues.

This is the principle of 'proportionality', which has become central in the jurisprudence both of the European Court of Justice and of the European Court of Human Rights. Respect for the principle of proportionality requires that an authority exercising a power which necessarily has a disadvantageous effect on private rights or interests, if able to choose between alternative measures, should adopt the least onerous and should not impose a sanction, restriction or penalty that is disproportionate in severity or extent to the aim pursued. When applying Community law our courts must have regard to the principle of proportionality as embodied in that law (see eg, *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418).

On the other hand, our courts were initially wary of accepting the principle of proportionality as a distinct ground of review in domestic cases. While there were a few cases that followed a line of reasoning analogous to proportionality (see eg, *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052) and while arguments of proportionality were increasingly raised and addressed in the courts, outwith the context of Community law the courts were deeply reluctant to add proportionality to the grounds of judicial review. The reasons for this were outlined by Lord Donaldson MR in the Court of Appeal and by Lord Ackner in the House of Lords in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 (note, however, that others of their Lordships in *Brind* spoke in terms more favourable to the adoption of proportionality as a ground of judicial review, albeit that none of their Lordships considered that *Brind* was the appropriate case to introduce such a reform). Lord Donaldson reminded us (at 722) that:

> it must never be forgotten that [judicial review] is a *supervisory* and not an *appellate* jurisdiction . . . Acceptance of 'proportionality' as a separate ground for seeking judicial review . . . could easily and speedily lead to courts forgetting the supervisory nature of their jurisdiction and substituting their view of what was appropriate for that of the authority whose duty it was to reach that decision.

Lord Ackner agreed. He suggested that the use of a proportionality test would inevitably require the court to make 'an inquiry into and a decision upon the merits' of the matter and would, as such, amount to a 'wrongful usurpation of power' (at 762).

The European Court of Human Rights uses the notion of proportionality in a particular way. This may be explained with reference to *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 (see above). Smith and Grady argued that the investigations into their personal lives that led to their administrative discharge from the armed services infringed their rights under Article 8 ECHR. Article 8 is in the following terms:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

It will be seen that the structure of Article 8 is as follows: paragraph 1 contains the rights protected (ie, the right to respect for private and family life, home and correspondence). Paragraph 2 contains the requirements that must be met for

state or public interference with these rights to be justified. Three requirements must be met: (a) the interference must be 'in accordance with the law', (b) the interference must be 'necessary in a democratic society' and (c) the interference must be for a certain prescribed aim, such as national security, public safety, etc. In terms of its structure, Article 8 is typical of the Convention: Articles 9 to 11 (concerning the rights to freedom of thought, expression and assembly) are structured identically (see further chapter 11). It is with regard to the second of these requirements that proportionality comes into play: the European Court of Human Rights interprets the test of necessity in a democratic society as, in essence, a test of proportionality. The Court asks if there is a 'pressing social need' justifying the interference. On the facts of *Smith and Grady* the Court ruled that there was not, and that Article 8 was violated as a result. As we saw above, the Court then went on to rule that, because the test of irrationality employed by the Court of Appeal did not enable that court to examine whether the interference with Article 8 rights was *necessary* (only whether it was *reasonable*), judicial review on grounds of irrationality failed to provide an 'effective remedy' within the meaning of Article 13.

The decisive move to allow arguments of proportionality to be made in domestic courts in cases concerning Convention rights came in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532. It is to be noted that this development was not strictly required by the Human Rights Act 1998. This is for two reasons: first, Article 13 is not one of the Convention rights that is domestically incorporated under that Act and secondly, proportionality is a ground of review that, as we have seen, was developed by the *Court* of Human Rights in its *case law*. The *text* of the Convention itself does not use the term. The Convention itself talks of necessity in a democratic society, of course, but it is the Court that has chosen to interpret that notion through the lens of proportionality. The Human Rights Act does not incorporate the case law of the Court of Human Rights into domestic law. It incorporates only the text of the Convention rights themselves. What the Human Rights Act says about the case law of the Court of Human Rights is that domestic courts 'must take [it] into account' (s 2(1)). While such case law must be *taken into account*, it does not necessarily have to be *followed*. Nonetheless, in *Daly* the House of Lords ruled that domestic courts should follow the European Court of Human Rights in adopting proportionality as a ground of review in cases concerning Convention rights.

R (Daly) v Secretary of State for the Home Department [2001] UKHL 26, [2001] 2 AC 532

The applicant, a prisoner, stored in his cell correspondence with his solicitor about his security categorisation. Like all prisoners, he was subject to a standard cell searching policy set out in a Security Manual issued as an instruction to prison governors by the Secretary of State. The policy required that prisoners

be excluded during cell searches to prevent intimidation and to prevent prisoners from acquiring a detailed knowledge of search techniques, and provided that officers were to examine, but not read, any legal correspondence in the cell to check that nothing had been written on it by the prisoner, or stored between its leaves, which was likely to endanger prison security.

The House of Lords unanimously held that a prisoner retained, along with the rights of access to a court and to legal advice, the right to communicate confidentially with a legal adviser under the seal of legal professional privilege; that such rights could be curtailed only by clear and express words and then only to the extent reasonably necessary to meet the ends which justified the curtailment; that a policy of requiring a prisoner's absence whenever privileged legal correspondence held by him in his cells was examined, by giving rise to the possibility that an officer might improperly read it and to the inhibiting effect such possibility would have on the prisoner's willingness to communicate freely with his legal adviser, amounted to an infringement of the prisoner's right to legal professional privilege; that the reasons advanced for that infringement, namely the need to maintain security, order and discipline in prisons and to prevent crime, might justify the exclusion during examination of privileged correspondence of an individual prisoner who was attempting to intimidate or disrupt a search, or whose past conduct had shown that he was likely to do so, but not a policy of routinely excluding all prisoners, whether intimidatory or not; and that, therefore, the policy was unlawful.

The test of review to be adopted in such cases was set out in the opinion of Lord Steyn, with which all their Lordships hearing the appeal agreed.

Lord Steyn: . . . The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

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

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Jowell, 'Beyond the rule of law: towards constitutional judicial review' [2000] *PL* 671 [his Lordship cited further academic authorities to similar effect]. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are

perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in *Smith* the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 . . . [T]he intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] *PL* 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so.

Daly is authority for the proposition that, in cases concerning Convention rights, our courts are to apply the test of proportionality set out in Lord Steyn's opinion. We have already seen, in addition, that domestic courts should apply a test of proportionality in appropriate cases concerning Community law. Outwith these two contexts, however, it remains the case that proportionality is not an established ground of review. In purely domestic contexts, courts should continue to apply *Wednesbury* unreasonableness or irrationality, and not proportionality. This has been confirmed by both the Court of Appeal in England and the Inner House of the Court of Session in Scotland: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397 and *Somerville v Scottish Ministers* [2006] CSIH 52. For an apparently contrary view, albeit one that predates these authorities, see Lord Slynn in *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295, at [51]. Further important remarks about the limits of, and the appropriate use of, proportionality as a ground of judicial review are contained in *R (Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, [2006] 2 WLR 719, [26]–[34] and [68].

As *Daly* demonstrates, in interpreting Convention rights and working out their implications and limits the courts have a new constitutional role to

perform, in the difficult enterprise of reconciling the interests of society with the rights and freedoms of the individual. A court may have to undertake this task albeit that the legislature, or the executive, has chosen to strike the balance in a particular way between the rights of the individual and the interests of society. One question that arises in this context is whether the court should show some 'deference' to such decisions where they have been made by an elected legislature or a democratic government.

The European Court of Human Rights allows a 'margin of appreciation', a certain freedom of action, to state authorities, recognising that they have a greater awareness of local circumstances than an international court does, which may justify a restriction of Convention rights. In *Hatton v United Kingdom* (2003) 37 EHRR 28 at [97] the European Court reiterated 'the fundamentally subsidiary role of the Convention':

> The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.

(See further [98]–[103] and [123] of the judgment.) The doctrine of the margin of appreciation is not applicable in the domestic context, but our courts concede to the legislature and executive 'a discretionary area of judgment within which policy choices may legitimately be made' (Lord Steyn in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 at [36]. 'In some circumstances', said Lord Hope in *R v DPP, ex p Kebilene* [2000] 2 AC 326, 381:

> it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.

This restraint upon judicial intervention is commonly expressed as a requirement to show 'deference' to the decision-maker, but in *R (Prolife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 at [75], Lord Hoffmann remarked that the question is rather one of deciding, as a matter of law, 'which branch of government has in any particular instance the decision-making power and what the legal limits of that power are'. Accordingly, he continued (at [76]), 'when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law.' (See too Lord Walker at [144].) A similar analysis was applied by Lord Bingham in *A v Secretary of State for the Home Department* [2005] 2 AC 68 at [29] (see further on this case chapter 11). (Compare the approach of Lord Steyn in 'Deference: a tangled story' [2005] *PL* 346 and see further Edwards, 'Judicial

deference under the Human Rights Act' (2002) 65 *MLR* 859; Jowell, 'Judicial deference: servility, civility or institutional capacity?' [2003] *PL* 592 and Clayton, 'Judicial deference and "democratic dialogue"' [2004] *PL* 33.)

The greater the 'deference', or the greater the discretionary area of judgment accorded to the decision-maker, the less likely it is that the new proportionality test will yield results that would not have been obtained under the older standards of *Wednesbury* unreasonableness. This is illustrated in the following case.

R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606, [2002] QB 1391

Louis Farrakhan, the leader of a religious, social and political group in the United States known as the 'Nation of Islam', wished to travel to the United Kingdom to speak at a number of public engagements. The Secretary of State decided that Farrakhan should be excluded from the United Kingdom on the basis that his presence here would pose a significant threat to community relations, in particular to relations between the Muslim and Jewish communities, and a potential threat to public order for that reason. Farrakhan sought judicial review of this decision. The judge at first instance (Turner J) held that the Secretary of State had failed to demonstrate objective justification for excluding Farrakhan and quashed the decision to exclude him. The Court of Appeal unanimously allowed the Secretary of State's appeal, the judgment of the court being handed down by Lord Phillips MR. The judgment listed a series of factors the court had taken into account in terms of what it called 'the margin of discretion'.

Lord Phillips MR: . . . Miss Carss-Frisk [Counsel for the Secretary of State] submitted that there were factors in the present case which made it appropriate to accord a particularly wide margin of discretion to the Secretary of State. We agree. We would identify these factors as follows. First and foremost is the fact that this case concerns an immigration decision. As we have pointed out, the European Court of Human Rights attaches considerable weight to the right under international law of a state to control immigration into its territory. And the weight that this carries in the present case is the greater because the Secretary of State is not motivated by the wish to prevent Mr Farrakhan from expressing his views, but by concern for public order within the United Kingdom.

The second factor is the fact that the decision in question is the personal decision of the Secretary of State. Nor is it a decision that he has taken lightly. The history that we have set out at the beginning of this judgment demonstrates the very detailed consideration, involving widespread consultation, that the Secretary of State has given to his decision.

The third factor is that the Secretary of State is far better placed to reach an informed decision as to the likely consequences of admitting Mr Farrakhan to this country than is the court.

The fourth factor is that the Secretary of State is democratically accountable for this decision . . .

The other factor of great relevance to the test of proportionality is the very limited extent to which the right of freedom of expression of Mr Farrakhan was restricted. The reality is that it was a particular forum which was denied to him rather than the freedom to express his views. Furthermore, no restriction was placed on his disseminating information or opinions within the United Kingdom by any means of communication other than his presence within the country. In making this observation we do not ignore the fact that freedom of expression extends to receiving as well as imparting views and information and that those within this country were not able to receive these from Mr Farrakhan face to face.

. . . We have already indicated that to ascertain the reasons for Mr Farrakhan's exclusion it is appropriate to have regard to all the correspondence on the subject written by or on behalf of the Secretary of State. The Secretary of State's decision had turned upon his evaluation of risk – the risk that because of his notorious opinions a visit by Mr Farrakhan to this country might provoke disorder. In evaluating that risk the Secretary of State had had regard to tensions in the Middle East current at the time of his decision. He had also had regard to the fruits of widespread consultation and to sources of information available to him that are not available to the court. He had not chosen to describe his sources of information or the purport of that information. We can see that he may have had good reason for not disclosing his sources but feel that it would have been better had he been less diffident about explaining the nature of the information and advice that he had received.

We consider that the merits of this appeal are finely balanced, but have come to the conclusion that the Secretary of State provided sufficient explanation for a decision that turned on his personal, informed, assessment of risk to demonstrate that his decision did not involve a disproportionate interference with freedom of expression.

(d) Procedural impropriety and unfairness

The grounds of review considered thus far relate to the substance of public or governmental decisions. The final ground of judicial review concerns fair procedures. In the *GCHQ* case Lord Diplock referred to this ground of review as 'procedural impropriety'. 'Breach of the rules of natural justice' is an older expression covering the same ground. There are two established rules of natural justice: the 'rule against bias' and the 'duty to hear the other side', alternatively and more straightforwardly known as the 'duty to act fairly'. We shall consider each in turn.

(i) Bias

If the decision-maker has a pecuniary interest in the matter to be decided he or she is automatically disqualified from making the decision. This was settled in the classic case of *Dimes v Grand Junction Canal Proprietors* (1852) 3 HLC 759 and applies even if no allegation of the decision-maker actually being biased can be made. That other direct interests, in addition to pecuniary interests, may likewise lead to automatic disqualification for bias was demonstrated by the decision of the House of Lords in *R v Bow Street Stipendiary Magistrate, ex p*

Pinochet (No 2) [2000] 1 AC 119. The case concerned the relationship of Lord Hoffmann to a party (Amnesty International Charity Ltd) related to another (Amnesty International) that had intervened in litigation before him. Even though no allegation of actual bias was made against his Lordship the House of Lords held that the decision of which he had been part could not stand.

In addition to cases of automatic disqualification, a decision-maker may be disqualified from making a decision where the 'fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility' of bias (*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, at [103] (Lord Hope); see also *R (Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13, [2005] 1 WLR 688). This is known as apparent bias.

The rule against bias may cause difficulties in administrative or governmental circumstances where the decision-maker has been elected to the position whereby it may make a decision on the basis of a manifesto or campaign commitment to resolve certain issues in a particular way. Take, for example, a planning authority, composed of democratically elected councillors who have been elected on a manifesto commitment to support – or to block – certain sorts of development. To what extent may such electoral commitments constitute bias? This problem was addressed in *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign* [1996] 3 All ER 304. The judgment makes clear that the normal test for bias (as now articulated by Lord Hope in *Porter v Magill*, although at the time the *Kirkstall Valley* case was decided the test was slightly different) should be applied in the normal way in such a context: 'In the case of an elected body the law recognises that members will take up office with publicly stated views on a variety of policy issues', said Sedley J. In such cases, he continued, 'the court will be concerned to distinguish . . . legitimate prior stances or experience from illegitimate ones'. The judge ruled that, on the facts, the claimants had failed to demonstrate bias.

These matters have been affected by the regime of Convention rights introduced into our law by the Human Rights Act 1998. Article 6(1) of the European Convention on Human Rights, which is domestically incorporated under the Act, provides that 'In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal'. There are many circumstances in which our governmental system provides for decisions to be made by ministers or administrators rather than by an 'independent and impartial tribunal'. Under the planning system, for example, the final decision on the most complex and controversial planning applications – on matters such as whether Heathrow airport should have a new terminal, or whether there should be a new high-speed rail link between London and the Channel Tunnel, and so forth – will be made by the Secretary of State. The one thing that the Secretary of State clearly is not is an independent and impartial tribunal. In *R (Alconbury) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295, the House of Lords held that this aspect of Britain's planning system did not violate Article 6. The simplest solution would have been for their

Lordships to rule that Article 6 is not engaged in these circumstances: that a decision on a planning application is not the determination of a 'civil right' for the purposes of Article 6 (after all, developers submitting planning applications can hardly be said to be 'on trial', and the right contained in Article 6 is described in the Convention as the right to a fair trial). This elegant solution was effectively unavailable to the House of Lords, however, because of the case law of the European Court of Human Rights, which has vastly expanded the scope of Article 6 so as to include within it decisions such as those at stake in the planning process (for critical analysis, see Gearty (2001) 64 *MLR* 129). While the House of Lords is not technically bound by this case law, their Lordships knew that had the claimants lost in the House of Lords on this ground they would surely have mounted a successful appeal to the European Court in Strasbourg. Accordingly, the House of Lords ruled that Article 6 was not violated because, first, the decision-making of the Secretary of State was subject to judicial review and, secondly, the Secretary of State's decision-making in this context was closely related to sensitive questions of national environmental and social policy, in respect of which the Secretary of State should be accountable primarily to Parliament rather than to the courts (see eg, Lord Slynn at [48], Lord Nolan at [60], Lord Hoffmann at [68] and Lord Clyde at [139]–[144]).

What, however, if the decision-maker is making a straightforwardly administrative decision, rather than one that impacts upon sensitive policy concerns? Does the decision-maker then need to be 'independent and impartial'? This issue arose in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, in which the House of Lords chose not to distinguish *Alconbury* but to follow it. Mrs Begum was homeless. The local authority offered her a secure tenancy of a two-bedroom flat. Mrs Begum did not want to live in the area in which the flat was located. She requested a review, as she was legally entitled to do. As provided in the relevant statutory regulations, the reviewing officer was someone who was not involved in the original decision to allocate the flat and was senior to the officers who had been so involved. The reviewing officer rejected Mrs Begum's reasons for refusing the flat as unreasonable. Mrs Begum argued that the review violated her rights under Article 6, in that the reviewing officer was not 'independent and impartial'. The House of Lords unanimously held that Article 6 was not violated. Two reasons were furnished in the opinions of the Law Lords: first, that the reviewing officer was subject to judicial supervision (via a statutory appeal on a point of law – the equivalent for present purposes of judicial review) and secondly, that, as Lord Hoffmann expressed it (at [43]), 'regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament'. The courts, he said (at [59]), should be 'slow to conclude that Parliament has produced an administrative scheme which does not comply with Convention rights'.

What their Lordships were seeking to avoid in this case was the prospect of Convention rights being used to undermine the United Kingdom's well

established system of administrative justice in the welfare state. Benefits such as housing are administered under complex statutory schemes by local authorities. While the administration of such schemes is, of course, subject to statutory appeals and to judicial review, it has always been Parliament's intention and it has always been deemed to be in the interests of good administration for these schemes to be administered by professionals employed by local authorities (or, in the case of other aspects of social security, by government departments) and not by independent and impartial figures. As in *Alconbury*, the most elegant way of ruling that these schemes do not violate Article 6 would have been for their Lordships to rule that Article 6 is simply not engaged but, as we have seen, that would be to run counter to the (deeply controversial) case law of the Court of Human Rights on this issue. The result is that their Lordships felt that they had no option but to accept that Article 6 is engaged, albeit that they then had to find a way of holding that it was not violated. The solution in *Alconbury* relied on notions of democratic accountability for contested policy questions (hence Lord Hoffmann's reference to 'democratic accountability' above). From a constitutional point of view, that seems fair enough. But in *Begum* a different solution was required – the reviewing officer can hardly be said to have been engaged in decision-making on delicate matters of policy and, in any event, she was not democratically accountable: she was an officer of the local authority, not a minister or a councillor. Hence Lord Hoffmann's additional references (above) to 'efficient administration and the sovereignty of Parliament'. Now, it is hardly the scheme of the Human Rights Act that fundamental constitutional rights should be enjoyed only if and insofar as they do not impede efficient administration or the sovereignty of Parliament, but Lord Hoffmann was backed into a corner in ruling in these terms because any alternative result would either (as Lord Bingham expressed it at [5]) bring about 'the emasculation (by over-judicialisation) of administrative welfare schemes' or would be destined to be overturned by the European Court of Human Rights.

(ii) Duty to act fairly

A public authority is manifestly guilty of procedural impropriety if, in exercising a statutory power, it fails to comply with procedural safeguards – for instance, a duty to consult those affected – incorporated in the Act. Power-conferring statutes do not, however, always expressly provide safeguards against unfair treatment of the individual, and the common law may then 'supply the omission of the legislature' (Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 194) and impose standards of procedural fairness on the decision-maker. 'However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures': Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 574.

The duty to act fairly requires decision-makers to give to persons affected a fair opportunity to make representations, and to take those representations into account, before reaching a decision. The duty was for a time considered to arise only if the decision to be taken was of a judicial or 'quasi-judicial' character and to have no application to purely executive action not involving a 'duty to act judicially', but this limitation was eradicated by the House of Lords in *Ridge v Baldwin* [1964] AC 40. Liberated by this decision, the courts have extended the requirements of the duty to act fairly to a wide range of administrative decision-making.

R v Norfolk County Council Social Services Department, ex p M [1989] QB 619 (Waite J)

K, a thirteen-year-old girl, complained that M had committed indecent acts against her. M was arrested but denied the truth of K's allegations and the police decided to take no further action for lack of evidence. At a case conference convened by the social services department of the local authority, after a brief and one-sided investigation which took no account of K's disturbed history and emotional problems and the possibility that her accusations might be a fantasy or fabrication, the conference recorded a finding of guilt against M and decided that his name should be entered on the authority's child abuse register as an abuser. Although access to the register was restricted, it was open to certain employees of the authority and members of the public, including prospective employers and other persons with powers of choice or decision capable of working to M's disadvantage. Indeed the council took the further step of informing M's employers, who suspended him pending an internal inquiry. M sought judicial review of the decision to place his name on the register:

> **Waite J:** . . . I accept that a case conference deliberating whether or not to place a name on the register as an abuser is not acting judicially so as to make the rules of natural justice automatically applicable to its procedures as though it had been functioning as a tribunal. Nevertheless the consequences of registration for M were in my judgement sufficiently serious . . . to impose on the council a legal duty to act fairly towards him. The council's case conference acted unfairly and in manifest breach of that duty when it operated a procedure which denied him all opportunity of advance warning of their intention, or of prior consultation, or of being heard to object, or of knowing the full circumstances surrounding their decision.

This was not a case in which any legal right of M was infringed by his name being put on the register, but the decision was injurious to his interests in his good name, peace of mind and employment prospects.

The requirements of natural justice vary according to the subject matter. In *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC

531, 560, Lord Mustill addressed the question of what fairness required of a decision-maker:

> My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgement. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

Fairness is not to be ossified as a set of rigid rules which must be followed as a matter of course. It may or may not, for example, require an oral hearing, or a right to be legally represented, or a right to cross-examine witnesses, or the giving of reasons for a decision. On these variables see, respectively, *Lloyd v McMahon* [1987] 1 AC 625, *R v Board of Visitors of HM Prison the Maze, ex p Hone* [1988] 1 AC 379, *Bushell v Secretary of State for the Environment* [1981] AC 75 and *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531. A court will consider the whole process by which a decision is reached and, rather than focusing on particular details, decide whether the individual concerned has, in the end, been fairly treated.

There are some classes of case in which the duty to act fairly is given a particularly narrow construction by the courts, so as to impose only a minimal restraint on the public authority. For example, in a number of cases the courts have taken the view that the ordinary standards of fairness must give way to the judgement of a minister in matters of national security, for instance when a person is deported from the United Kingdom on this ground. See eg, *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 1 WLR 766 and *R v Secretary of State for the Home Department, ex p Cheblak* [1991] 1 WLR 890 (both cases are considered in detail in chapter 11). Protecting confidentiality may, likewise, reduce the extent of the law's safeguarding of procedural fairness: see *R v Gaming Board, ex p Benaim and Khaida* [1970] 2 QB 417.

Legitimate expectations

When do the rules of natural justice apply? When will the courts impose a duty to act fairly on a decision-maker? It is clear that if a decision affects the legal rights or interests of a party then the duty to act fairly will apply. In addition, since *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, it has also been the case that the duty to act fairly will apply when a party has a 'legitimate expectation' that this will be so. In *Schmidt* Lord Denning MR ruled (at 170), that:

> an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

Even if a decision will affect no existing right or legally recognised interest, the decision-maker may be bound to consult or allow a hearing to a party who has a 'legitimate expectation' that that will be done. In *R v Board of Inland Revenue, ex p MFK Underwriting Agents* [1990] 1 WLR 1545, 1569–70, Bingham LJ ruled as follows:

> If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it.

Conduct giving rise to a legitimate expectation may be an agreement or undertaking, a regular practice (such as one of regular consultation of affected parties), or an announcement of procedures to be followed.

R v British Coal Corporation, ex p Vardy [1993] ICR 720 (DC)

British Coal, a nationalised industry, proposed to close down ten collieries on the grounds that they were operating at a loss and that there was no realistic prospect that they would operate at a profit in the foreseeable future. The coalminers' unions did not accept that all ten pits met these criteria for closure. The President of the Board of Trade exercised control over pit closures by British Coal by means of his power to provide or withhold the funds needed for redundancy payments and other expenses resulting from closure. In this instance he decided to make funds available to enable British Coal to close the ten pits.

Under section 46(1) of the Coal Industry Nationalisation Act 1946 British Coal was required to establish, in agreement with coalminers' unions, machinery for consultation on pit closures. In 1985 a new agreement on procedure for closures, known as the 'modified colliery review procedure', had been reached in accordance with this section. It included provision for reference to

an independent review body, which would report on proposals for closure after hearing arguments on both sides. The decisions of the Coal Board and of the minister to proceed with the closures of the ten pits were taken without regard to the review procedure. Mineworkers at the ten pits and their unions applied for judicial review of the decisions.

Glidewell LJ: . . . In my judgement the agreement of 1985 to establish the mechanism known as the modified colliery review procedure and the fact that the mechanism was constantly used thereafter . . . gave to the [unions] and their members . . . a legitimate expectation. This expectation was that, when British Coal proposed to close any pit or pits, they would consult the relevant unions by using the review procedure, including the independent review body, if the unions so wished, and would not withdraw the use of that consultative mechanism without first informing the unions of their intention to do so and giving them a proper opportunity to comment and object. Moreover, if British Coal wished to take this step, section 46(1) of the Act of 1946 obliged them to initiate consultations about an alternative procedure. This in my judgement is a classic example of legitimate expectation.

The decisions announced by both the President of the Board of Trade and British Coal . . . ignored British Coal's obligation under section 46(1) and completely failed to satisfy the legitimate expectation of the mineworkers' unions and their members that the review procedure would continue to be followed unless and until notice to the contrary had been given.

The decisions were therefore unlawful. It was also held that in deciding not to follow the review procedure, thereby depriving the unions and the workforce of any independent scrutiny of the present and likely future profitability or loss-making capacity of each of the ten pits, the minister and British Coal had acted irrationally. For this reason, also, the decisions could not stand.

In the cases considered so far, what the party expected was to be consulted. (Another example of this is the *GCHQ* case itself: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.) This may be termed a *procedural* expectation: what the party expected was that a particular procedure would be followed. But what if a party legitimately expected not that a particular procedure would be followed but that a certain decision would not be made at all? What if a party expected a *substantive* outcome? Our courts have generally been extremely reluctant to hold that public authorities should be bound by such expectations. The thrust of the case law is that, whatever it is you legitimately expect (ie, whether you expect to be consulted or whether you expect that a certain substantive decision will not be made), the only protection that the law will give to your expectation is that the decision-maker will be required to act fairly – to observe and apply the rules of natural justice (see *R v Secretary of State for the Home Department, ex p Hargreaves* [1997] 1 WLR 906). The general position is that a public authority will be judicially required not to frustrate a party's substantive legitimate expectation only where it would be irrational or *Wednesbury* unreasonable for it to do so. This is the general position. But there are exceptions – as illustrated by the following case.

R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213 (CA)

Miss Coughlan was a severely ill and disabled woman in long-term care in Mardon House, a purpose-built care home managed by the health authority. She and other patients had been moved from a National Health Service hospital to Mardon House in 1993, having agreed to this upon an assurance by the health authority that Mardon House would be their home for life. In 1998 the authority decided to close Mardon House and transfer responsibility for the care of the patients to a local authority social services department. It was accepted that this decision could not be impugned on grounds of irrationality.

Miss Coughlan brought proceedings for judicial review of the health authority's decision to close Mardon House. Her case that the decision was flawed rested on a number of grounds, one of which was that the 'home for life' promise made to her had given rise to a legitimate expectation and that to frustrate it would be an abuse of power.

> **Lord Woolf:** . . . In the ordinary case there is no space for intervention [by a court] on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations. . . . If it does not, . . . the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations.

The approach to be taken, said Lord Woolf, 'recognises the primacy of the public authority both in administration and in policy development but it insists . . . upon the adjudicative role of the court to ensure fairness to the individual'. Such fairness must 'include fairness of outcome'. A promise would be more likely to have binding effect if made 'to a category of individuals who have the same interest' than if 'made generally or to a diverse class, when the interests of those to whom the promise is made may differ or, indeed, may be in conflict'. Accordingly:

> most cases of an enforceable expectation of a substantive benefit . . . are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract.

In the present case the promise was limited to a few individuals and what was promised was of great importance to Miss Coughlan. Whether the decision could nevertheless be justified by an overriding public interest was to be determined, not by the health authority, but by the court, which was not persuaded

that any such overriding consideration had been established. The court concluded that the decision to close Mardon House constituted unfairness amounting to an abuse of power. In addition, the court agreed with the judge in the court below that the decision was a breach of Miss Coughlan's right to respect for her home under Article 8 of the European Convention on Human Rights (not yet, at that time, given domestic legal effect by the Human Rights Act 1998). (For comment on this case see Craig and Schønberg [2000] *PL* 684 and Roberts (2001) 64 *MLR* 112.)

Coughlan illustrates that the courts will occasionally give substantive protection to a legitimate expectation even where the authority has not acted *Wednesbury* unreasonably. It also illustrates, however, that the courts will do this only exceptionally. The exceptional circumstances which were held to justify this result in *Coughlan* were the extraordinary importance of what had been promised, the fact that the promise was limited to a small number of individuals, and the fact that there would be no consequences other than financial consequences for the authority in holding them to their promise.

3 Scope and limits of judicial review

(a) Scope of judicial review

Judicial review is available only against certain persons or bodies. English law and Scots law differ markedly from one another in how they delimit the scope of judicial review. In English law judicial review is available only against persons or bodies performing public functions. Scots law has set itself against a public/private distinction in this regard. In Scots law a decision will be judicially reviewable if it can be said that there is a 'tri-partite relationship' between (1) the source of the decision-making power, (2) the decision-maker and (3) the person or persons affected by the decision (see *West v Secretary of State for Scotland* 1992 SC 385). Judicially reviewable bodies in English law clearly include ministers and their departments, local authorities and non-departmental public bodies. In addition the English courts, led by the Court of Appeal's decision in *R v Panel on Take-overs and Mergers, ex p Datafin plc* [1987] QB 815, have extended the judicial review jurisdiction to certain 'self-regulating' organisations constituted in the private sector but with some form of 'governmental' function. Although not set up by the government or themselves entrusted with statutory powers, bodies such as these carry out their regulatory functions in each case as an integral part of a system of governmental control supported by statutory powers and sanctions. That said, however, not all 'regulatory' bodies are subject to judicial review under this approach: English courts have declined to review the exercise of regulatory responsibilities by the Chief Rabbi, the managers of an independent school, the Football Association, the Jockey Club and the Insurance Ombudsman Bureau, the functions performed by these bodies being based on agreement or voluntary

submission or not having a sufficiently 'governmental' character. In some of these cases (and, perhaps, in all of them), Scots law would include these bodies within the scope of judicial review. A golf club, for example, was recently held by the Court of Session to be judicially reviewable, whereas this outcome would be unlikely in English law: see *Crocket v Tantallon Golf Club* 2005 SLT 663 and cf *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909.

The matter is complicated by the fact that, in both English and Scots law, not every act of a potentially judicially reviewable body falls within the judicial review jurisdiction, for these bodies may take action on the plain of private law, for instance in engaging employees or making commercial contracts. The ordinary remedies of private law must then be pursued. (See eg, *R v BBC, ex p Lavelle* [1983] 1 WLR 23 and *Blair v Lochaber District Council* 1995 SLT 407.)

A different sort of restriction on the scope of judicial review relates to the subject matter of decisions that may be reviewed. Here, the courts in England and Scotland take the same general approach. The subject matter of a discretionary power may be of a kind that severely limits the scope of judicial review, as when the decision depends essentially on political judgement, for instance, in a matter of national economic policy (*R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1991] 1 AC 521), or on the requirements of national security (*Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, on which see chapter 11), or if the decision concerns the allocation of limited financial resources (*R v Cambridge Health Authority, ex p B* [1995] 1 WLR 898, but cf *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392, [2006] 1 WLR 2649, on which see Syrett [2006] *PL* 664).

(b) Standing

Only those who have sufficient standing in law – *locus standi* – can bring proceedings for judicial review. Again, this is a matter that is dealt with differently in English and Scots law, with the English law of standing being considerably more generous than Scots law. We will consider English law first. Lord Denning said in *R v Paddington Valuation Officer, ex p Peachey Property Corpn* [1966] 1 QB 380, 401: 'The court would not listen . . . to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done'. The Senior Courts Act 1981, section 31(3), provides that the court shall not grant permission to bring a claim for judicial review 'unless it considers that the [claimant] has a sufficient interest in the matter to which the [claim] relates'.

The sufficiency of the claimant's interest is not considered in isolation: account is taken of the nature of the duty imposed on the public authority and the subject matter of the claim. In *IRC v National Federation of Self Employed*

and Small Businesses (the '*Fleet Street Casuals*' case) [1982] AC 617, 630, Lord Wilberforce said:

> There may be simple cases in which it can be seen at the earliest stage that the person applying for judicial review has no interest at all, or no sufficient interest to support the application: then it would be quite correct at the threshold to refuse him leave to apply. The right to do so is an important safeguard against the courts being flooded and public bodies harassed by irresponsible applications. But in other cases this will not be so. In these it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest *in the matter to which the application relates.*

If the claimant is not a mere busybody and appears to have an arguable case, the court will generally grant permission to proceed with the claim for judicial review without a full examination of the claimant's standing, leaving this to be resolved when the substance of the case is unfolded at the subsequent hearing of the claim.

The interest of the claimant in the matter 'need not be any recognisable legal interest and need not involve any assertion of any infringement of the rights of the [claimant]' (Hobhouse LJ in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, 356). Lord Fraser said in the *Fleet Street Casuals* case (above) that the claimant must have a 'reasonable concern' with the matter to which the claim relates. The case itself establishes that a taxpayer will not normally have such a reasonable concern or sufficient interest in the dealings of the Inland Revenue with other taxpayers. On the other hand, in *R v Her Majesty's Treasury, ex p Smedley* [1985] QB 657, where the question in issue was the legality of certain payments to be made by the Treasury to the European Community, the Court of Appeal was of the opinion that since this question was a serious and urgent one, the claimant did have standing to raise it, 'if only in his capacity as a taxpayer'. In *R v Secretary of State for Foreign Affairs, ex p Rees-Mogg* [1994] QB 552 there was (surprisingly, perhaps?) no dispute as to the claimant's standing to challenge the Government's proposed ratification of the Treaty on European Union, and the Divisional Court considered the claim on its merits although the claimant was (rather like Mr Smedley) only a citizen with 'a sincere concern for constitutional issues'. In *Broadmoor Special Hospital Authority v Robinson* [2000] QB 775, 787 Lord Woolf MR said: '"Sufficient interest" has been approached by the courts in a generous manner so that almost invariably if an applicant can establish a case which deserves to succeed, standing will not constitute a bar to the grant of a remedy'. (Cf *R (Bulger) v Secretary of State for the Home Department* [2001] 3 All ER 449: standing may still be denied on grounds of principle.)

The courts may be disposed to take a liberal view of standing to enable matters of public importance to be raised (see *R v Felixstowe Justices, ex p Leigh* [1987] QB 582; *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1), and an 'increasingly liberal approach' to standing was noted by the Divisional Court in *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 WLR 386, in holding that the claimants, a non-partisan pressure group which campaigned to increase the amount and quality of British aid to developing countries, had a sufficient interest to challenge the minister's decision to provide financial support for the construction of the Pergau Dam in Malaysia from the aid budget although, as Dawn Oliver has noted, the decision 'did not adversely affect the interests of any individuals' (*Common Values and the Public-Private Divide* (1999), p 32). Other pressure groups such as the Child Poverty Action Group, Greenpeace, the Joint Council for the Welfare of Immigrants and Help the Aged have also succeeded in establishing their standing to bring proceedings for judicial review in 'public interest challenges' on behalf of their clients or as promoters of public causes. While standing was denied to the pressure group in *R v Secretary of State for the Environment, ex p Rose Theatre Trust Co* [1990] 1 QB 504, the case is out of line with the developing trend of the case law and in any event had the distinguishing feature that the group in question had been formed ad hoc, for the specific purpose of saving the Rose Theatre. (For a critical assessment of these developments see Harlow, 'Public law and popular justice' (2002) 65 *MLR* 1.)

It is to be noted that if a legal challenge relates to the violation of a 'Convention right' under the Human Rights Act 1998, a claimant must show that he or she is a 'victim' of the alleged violation (s 7(1)). This is a more stringent obligation than satisfying the 'sufficient interest' test in judicial review.

Like the victim test under the Human Rights Act, the test for standing to petition for judicial review in Scots law is harder to pass than the sufficient interest test in English law. In Scots law a petitioner must have both 'title' and 'interest'. 'Title' means that the petitioner must be a party 'to some legal relation which gives him some right which the person against whom he raises the action either infringes or denies' (*D & J Nicol v Trustees of the Harbour of Dundee* 1915 SC (HL) 7). 'Interest' has been interpreted relatively narrowly and, in particular, has been interpreted against special interest groups seeking what might be termed 'representative standing': see eg, *Scottish Old People's Welfare Council, Petitioners* 1987 SLT 179 (ruling that Scottish Age Concern did not have standing to seek judicial review of the legality of administrative guidance concerning the payment of cold weather allowances to elderly people). See also *Rape Crisis Centre v Secretary of State for the Home Department* 2000 SC 527 (ruling that the petitioners lacked title to seek judicial review of the minister's decision to admit Mike Tyson, a convicted rapist, into the United Kingdom so that he could take part in a boxing match in Glasgow). For criticism of the narrowness of the Scots law approach, see Lord Hope [2001] *PL* 294.

(c) Ouster clauses

Statutes have sometimes provided expressly for the exclusion of judicial review. Such 'ouster' or 'privative' clauses are strictly construed by the courts in order to preserve, to the fullest possible extent, the right of the citizen to challenge the legality of action affecting his or her interests. A particularly strong judicial counterstroke was delivered in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, in which the House of Lords was confronted by a statutory provision that the 'determination' by the Commission of any application made to it under the Act 'shall not be called in question in any court of law'. It was held that an error of law made by the Commission in rejecting an application had the result that its purported determination was a nullity and that the court was not prevented from granting a declaration to that effect, for 'determination' must be construed to mean a determination which the Commission, directing itself correctly in law, had power to make and not a purported determination which lay outside its powers. This construction of the statutory ouster provision drained it of practical effect.

Ouster provisions will ordinarily be ineffective to exclude judicial review, not only when the decision under challenge resulted from an error of law (as in *Anisminic*), but further when the decision is a nullity by reason of 'any other error which would justify the intervention of the court on judicial review including a breach of the requirements of fairness' (Lord Woolf MR in *R v Secretary of State for the Home Department, ex p Fayed* [1998] 1 WLR 763, 771). *Fayed*'s case was itself one in which the ouster provision there in question, that the decision of the Secretary of State on an application for naturalisation 'shall not be subject to appeal to, or review in, any court' (British Nationality Act 1981, s 44(2)), was held not to affect 'the obligation of the Secretary of State to be fair or . . . interfere with the power of the court to ensure that requirements of fairness are met' (at 774).

Some ouster clauses, instead of taking the *Anisminic* form, are more limited in scope, expressly allowing questions of invalidity to be raised in court in a prescribed time and manner and on specified grounds. Such clauses are commonly in the form exemplified by the Wildlife and Countryside Act 1981. Section 53 of this Act obliges county councils to keep under review the definitive maps of public rights of way prepared for their areas and to make by order such modifications of the map as are required by, for example, new evidence of rights of way. Schedule 15 to the Act says that notice must be given when an order is made and makes provision for the hearing of objections and confirmation of the order by the Secretary of State. Paragraph 12 of the Schedule provides:

> (1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 . . . or that any of the requirements of this Schedule have not been complied with in relation to it, he may within

> 42 days from the date of publication of the notice [of confirmation of the order] make an application to the High Court under this paragraph.
>
> (2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order . . .
>
> (3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever.

Here the machinery of application to the High Court is intended to provide an exclusive remedy and the privative clause in paragraph 12(3) is effective to prevent challenge at any other stage – for instance, while the procedure for objections, hearings and confirmation is taking place or after the forty-two-day time limit – by judicial review. (*R v Cornwall County Council, ex p Huntington* [1994] 1 All ER 694. See also *R v Secretary of State for the Environment, ex p Ostler* [1977] QB 122.) Clauses of this kind take account of the requirements of administrative convenience and efficiency without denying relief to aggrieved persons, though the time limit for challenge is often unduly short.

On the Government's (mainly unsuccessful) attempt to introduce an extraordinarily wide-ranging ouster clause in the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and on the stringent criticism it attracted, see above, p 67 and see further Woolf (2004) 63 *CLJ* 317 and Rawlings (2005) 68 *MLR* 378.

(d) Judicial review of prerogative powers

It was formerly held that while the courts could determine the existence and extent of any prerogative, and whether its use had been restricted by statute (above, pp 467–72), they might not question or review the grounds on which, in a particular case, a prerogative power had been exercised. Judges in a number of cases disclaimed competence to review prerogative acts, as when Lord Denning MR said in *Blackburn v A-G* [1971] 1 WLR 1037, 1040 that ministers in negotiating and signing a treaty: 'exercise the prerogative of the Crown. Their action in so doing cannot be challenged or questioned in these courts'. On the other hand, there were indications in the case law that judicial review was not wholly excluded, as when Lord Devlin, in *Chandler v DPP* [1964] AC 763, 810, equated prerogative with other discretionary powers, saying that the courts could intervene to correct 'excess or abuse'. In *R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864, a case subsequently marked as a turning point, it was held by the Divisional Court that the actions of a public body set up by the Government – under the prerogative, as the court saw it – to make awards of compensation to victims of criminal offences could be the subject of judicial review. It remained for the House of Lords to put the law on a new basis in the *GCHQ* case.

Council of Civil Service Unions v Minister for the Civil Service (the '*GCHQ*' case) [1985] AC 374 (HL)

In 1983 the Prime Minister (as Minister for the Civil Service) issued an instruction that the conditions of service of civil servants employed at Government Communications Headquarters (GCHQ), a military and signals intelligence centre, should be revised so as to exclude the right of trade union membership. The instruction was given under article 4 of the Civil Service Order in Council 1982, an Order made by virtue of what was assumed by the court to be a prerogative power, that of regulating the conduct of the civil service. The minister's action was taken without prior consultation with trade unions representing staff at GCHQ.

The unions applied for judicial review, seeking a declaration that the instruction was invalid. They argued that the prerogative power to vary the terms and conditions of employment of civil servants was subject to review by the courts, and further that the GCHQ staff had a legitimate expectation, arising from a well-established practice of consultation before their conditions of service were altered, that the minister would not make such an alteration without first consulting the staff or their trade union representatives.

Glidewell J accepted these arguments and granted a declaration that the instruction was invalid. The Court of Appeal set aside the declaration and the unions appealed to the House of Lords. There it was argued for the minister that the instruction was not open to review because the power to issue it had its source in the prerogative. This argument was rejected by all of their Lordships. Lords Fraser and Brightman were persuaded to this conclusion because the power exercised in this case had been *delegated* to the minister by the prerogative Order in Council and it must be an implied condition of any such delegation that the power should be exercised fairly – a matter appropriate for review. The majority, on the other hand, were of the opinion that even a *direct* exercise of prerogative power was in principle reviewable:

> **Lord Scarman:** . . . I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. Without usurping the role of legal historian, for which I claim no special qualification, I would observe that the royal prerogative has always been regarded as part of the common law, and that Sir Edward Coke had no doubt that it was subject to the common law: *Prohibitions del Roy* (1607) 12 Co Rep 63 and the *Proclamations' Case* (1611) 12 Co Rep 74. In the latter case he declared, at p 76, that 'the King hath no prerogative, but that which the law of the land allows him'. It is, of course, beyond doubt that in Coke's time and thereafter judicial review of the exercise of prerogative power was limited to inquiring into whether a particular power existed and, if it did, into its extent: *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508. But

this limitation has now gone, overwhelmed by the developing modern law of judicial review. . . . Just as ancient restrictions in the law relating to the prerogative writs and orders have not prevented the courts from extending the requirement of natural justice, namely the duty to act fairly, so that it is required of a purely administrative act, so also has the modern law . . . extended the range of judicial review in respect of the exercise of prerogative power. Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.

Lord Diplock: . . . It was the prerogative that was relied on as the source of the power of the Minister for the Civil Service in reaching her decision of 22 December 1983 that membership of national trade unions should in future be barred to all members of the home civil service employed at GCHQ.

My Lords, I intend no discourtesy to counsel when I say that, intellectual interest apart, in answering the question of law raised in this appeal, I have derived little practical assistance from learned and esoteric analyses of the precise legal nature, boundaries and historical origin of 'the prerogative', or of what powers exercisable by executive officers acting on behalf of central government that are not shared by private citizens qualify for inclusion under this particular label. It does not, for instance, seem to me to matter whether today the right of the executive government that happens to be in power to dismiss without notice any member of the home civil service upon which perforce it must rely for the administration of its policies, and the correlative disability of the executive government that is in power to agree with a civil servant that his service should be on terms that did not make him subject to instant dismissal, should be ascribed to 'the prerogative' or merely to a consequence of the survival, for entirely different reasons, of a rule of constitutional law whose origin is to be found in the theory that those by whom the administration of the realm is carried on do so as personal servants of the monarch who can dismiss them at will, because the King can do no wrong.

Nevertheless, whatever label may be attached to them there have unquestionably survived into the present day a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority but nevertheless have consequences on the private rights or legitimate expectations of other persons which would render the decision subject to judicial review if the power of the decision-maker to make them were statutory in origin. From matters so relatively minor as the grant of pardons to condemned criminals, of honours to the good and great, of corporate personality to deserving bodies of persons, and of bounty from moneys made available to the executive government by Parliament, they extend to matters so vital to the survival and welfare of the nation as the conduct of relations with foreign states and – what lies at the heart of the present case – the defence of the realm against potential enemies. . . .

My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review.

Qualifications of the availability of review that are indicated in the above passages are that the exercise of the prerogative power must relate to a subject matter that is 'justiciable' (Lord Scarman) and must affect the 'private rights or

legitimate expectations of other persons' (Lord Diplock). Lord Roskill was in agreement with Lords Scarman and Diplock in being unable to see 'any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory'. He made some additional remarks on the subject of the 'justiciability' of the power:

> **Lord Roskill:** . . . But I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

The prerogative power exercised in this case was not of a kind to fall within Lord Roskill's 'excluded categories' and their Lordships were in agreement that the minister's action was in principle open to review. They were also agreed that in the circumstances the GCHQ staff had, prima facie, a legitimate expectation that they would be consulted, as on all previous occasions, about the change to be made to their conditions of service.

It was held, however, that the appellants' legitimate expectation and the duty of fairness arising from it were overriden by the requirements of national security. The Government claimed that it was on the ground of national security that the decision had been made to change the conditions of service at GCHQ. Their Lordships accepted the Government's claims and, for this reason, held against the unions. It has been persuasively argued that in coming to this conclusion 'the Law Lords were too easily satisfied by some very exiguous evidence': Drewry (1985) 38 *Parliamentary Affairs* 371, 380. (See further on the *GCHQ* case and on other case law concerning national security, chapter 11.)

(There has been extensive commentary on this case and the conclusions of the Law Lords have attracted criticism on a variety of grounds: particular attention should be given to the rulings on justiciability and national security. See, for example, Drewry (1985) 38 *Parliamentary Affairs* 371; Ewing [1985] *CLJ* 1; Griffith [1985] *PL* 564; Lee [1985] *PL* 186; Morris [1985] *PL* 177; Wade (1985) 101 *LQR* 153; Walker [1987] *PL* 62.)

The barrier of justiciability erected in the *GCHQ* case has not foreclosed a continuing if cautious advance in judicial review of the exercise of prerogative powers. In *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] QB 811 it was held by the Court of Appeal that the discretionary

power to issue a passport, considered by the court to belong to the prerogative, was open to review. It was a matter 'affecting the rights of individuals and their freedom of travel' (per Taylor LJ) and raised issues no less justiciable than those commonly arising in the courts in immigration cases. In *R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349, the question was whether the exercise of the prerogative of mercy might in some circumstances be reviewable, notwithstanding the fact that it had been included in Lord Roskill's catalogue of non-justiciable prerogative powers in the *GCHQ* case. The Divisional Court concluded that, within limits to be determined from case to case, judicial review of this prerogative was possible (see, to like effect, *Lewis v Attorney General of Jamaica* [2001] 2 AC 50).

4 Conclusion: the advance of judicial review

Recent decades have witnessed a significant expansion of recourse to judicial review, of the readiness of the courts to intervene in administrative decision-making and in the development of the principles of review. In the following passage Martin Loughlin reflects upon the tension between the idea of administration and the idea of law, describing the main perspectives on the nature and resolution of that tension.

Martin Loughlin, 'The Underside of the Law: Judicial Review and the Prison Disciplinary System' (1993) 46 *CLP* 23, 25–6

The traditional – and predominant – view of administrative law which has emerged in this country might be labelled the Whig view. [Reference is made here to, inter alios, Dicey, Lord Hewart, *The New Despotism* (1929) and Sir William Wade, *Administrative Law* (6th edn 1988; see now 9th edn 2004).] It is a view which not only focuses on the centrality of courts in administrative law but which also views courts as the guardians of liberty. This Whig view is rooted in a profound distrust of all executive power and it tends to equate progress – the onward march of liberty – with the growth in the number of administrative decisions which are subjected to review by the courts. Courts are special primarily because they are the repositories of certain customary values. What underpins this Whig view, then, is the belief in the common law as 'the golden metwand' which maintains a balance between the individual and the state. Within this image, law is not to be seen as a theoretical science founded on reason but is based on 'artificial reason' which is rooted in experience. The common law – our customary inheritance – embodies immutable ideas of right and justice which the judiciary, in oracular fashion, are called upon to proclaim.

Throughout this century, this traditional view has been subjected to challenge. The pace of social change, the great extension of the sphere of influence of the executive, and the changing character of law all serve to undermine the view that the judiciary, through their access to the accumulated wisdom of the common law, possess a unique appreciation of how the business of government ought to be conducted. The challengers to the Whig

> view may, rather crudely, be placed into two broad camps; the de-mythologisers and the modernisers – the radicals and the reformers. The radical challenge seeks to undermine the Whig view largely by exposing the sham and hypocrisy of legal rhetoric; in effect, they seek to strip the mask of justice from the face of power. Law, in this radical view, is essentially an expression of power relations in society: 'laws are merely statements of a power relationship and nothing more' (Griffith ['The Political Constitution' (1979) 42 *MLR* 1], p 18). In a reversal of the Whig view, the de-mythologisers see the courts, not as the guardians of liberty, but as the bastions of privilege. The values of the common law are the values of an old order which, with the emergence of democracy, must change. Our courts, being absorbed in the culture of the common law, do not provide a solution to the quest for administrative justice but, far from it, must be viewed as part of the problem. [Reference is made here to, inter alios, JAG Griffith, *The Politics of the Judicary* (4th edn 1991; see now 5th edn 1997).]
>
> Aspects of the radical critique can also be identified in the analysis of the reformers. The reformers recognise that the foundations of a modern legal order cannot be rooted simply in the acceptance of the authority of the judiciary as carriers of traditional wisdom. The pace of social, economic and technological change has been such as to devalue much of that customary wisdom. The reformist solution, however, is to seek to modernise the common law tradition; to reinterpret that tradition in the language of rights. Rights rather than remedies, principles not precedents are what is required. The modernisers reject the radical claim; they believe that reason – not power – lies at the heart of law. Law is based on principle not policy. Above all, the reform or modernising movement is a rationalising movement; it seeks to expose the skeleton of rights enmeshed within the corpus of the common law. [Reference is made here to, inter alios, R Dworkin, *Law's Empire* (1986) and TRS Allan: see his *Law, Liberty, and Justice* (1993) and *Constitutional Justice* (2001).]

The growth of judicial activism and the deeper penetration of review since the 1960s may be attributed to a continual accrual of broad statutory powers to the executive, together with an increasingly powerful judicial perception of the limitations of ministerial responsibility to Parliament. In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 567, Lord Mustill drew attention to the latter of these factors:

> In recent years . . . the employment in practice of . . . specifically Parliamentary remedies has on occasion been perceived as falling short, and sometimes well short, of what was needed to bring the performance of the executive into line with the law, and with the minimum standards of fairness implicit in every Parliamentary delegation of a decision-making function. To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago.

For a defence of the continuing importance and effectiveness of ministerial responsibility to Parliament, see A Tomkins, *Public Law* (2003), ch 5.

The awakening from 'the long sleep of public law' (Lord Justice Sedley, *Freedom, Law and Justice* (1999), p 11) and the increasingly interventionist temper of the judges in matters of public administration have attracted a variety of responses. The question raised is a fundamental one of the role of the judges in the constitution and their relation to Parliament and the executive. On this question see, for example, Sedley, 'The sound of silence: constitutional law without a constitution' (1994) 110 *LQR* 270; Woolf, '*Droit public* – English style' [1995] *PL* 57; Laws, 'Law and democracy' [1995] *PL* 72; Jowell, 'Restraining the state: politics, principle and judicial review' (1997) 50 *CLP* 189; Steyn, 'The weakest and least dangerous department of government' [1997] *PL* 84; JAG Griffith, *The Politics of the Judiciary* (5th edn 1997).

Nevil Johnson is among those who have misgivings about an activist judiciary ('The judicial dimension in British politics' (1998) 21 *West European Politics* 148, 164):

> The wider the judicial role becomes, the more likely it is that the judges will be drawn into determining political questions, no matter what intellectual contortions may be performed in trying to deny this. Yet, it is the accountability of elected politicians that has been at the heart of modern British theories of government, and it is that theory, along with the authority of Parliament, which will be in competition with the judicialisation of politics.

5 Liability of the Crown

We move now from matters of judicial *review* to matters of *liability*. As we saw above, the principal purpose of judicial review is not to allow claimants to sue public authorities for damages: rather, it is to allow the courts to review the legality of the exercise of public powers. While judicial review is now the most significant court procedure in public law, it is not the only one. From time to time litigants will wish not merely to seek a review of the legality of government actions and decisions, but will desire remedies in private law – remedies which will often include damages. Where a litigant claims that the government or another public authority has acted in breach of contract or has acted negligently, for example, it will not be judicial review procedure that the litigant needs to employ. Rather, the litigant will wish to sue, arguing that the government or public authority is liable in the law of contract or tort.

Questions of liability in public law are divided into two: first we consider the special position of the Crown. This will generally be relevant when a litigant wishes to proceed against a department or minister of central government. In the next section we will examine the principles of liability against other public authorities – especially local authorities. As we shall see, there has been substantial and significant case law in recent years on the liability of public authorities in negligence.

There is one further complicating feature that needs to be borne in mind when considering proceedings against, and the liability of, the Crown: this is one of the areas of public law that is most different as between English and Scots law. English law was traditionally more protective of the Crown than was Scots law. However, two factors have conspired to dilute the differences at the expense, unfortunately, of the integrity and former advantages that were enjoyed by litigants in Scots law. The first is that, in a variety of cases, Scots law has been re-interpreted to bring it into line with English law, meaning that litigants wishing to proceed against the Crown in Scots law have found fresh hurdles placed in their way (see eg, *Macgregor v Lord Advocate* 1921 SC 847 (relying on English authorities to hold that the Crown could not be sued in tort, despite Scots authorities to the contrary) and *Lord Advocate v Dumbarton District Council* 1988 SLT 546 (IH), [1990] 2 AC 580 (HL), with the House of Lords overruling the Inner House of the Court of Session on the extent of the Crown's immunity from statute). The second is that, when the English law of Crown proceedings was reformed by the Crown Proceedings Act 1947, the legislation, some of which applied to Scotland as well as to England, was written in such a way as to ignore the differences that had existed between English and Scots law in this area, making the Scots law position both more complex and more protective of the Crown than it had formerly been. The Crown Proceedings Act 1947 was designed to make it easier to proceed against the Crown, yet its effect in Scotland was in a number of respects precisely the opposite – in particular as regards the (non-) availability of interdict (ie, injunction) against the Crown (see *McDonald v Secretary of State for Scotland* 1994 SC 234). Only in 2005 did the House of Lords move to remedy this problem (see *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC (HL) 41; see in greater detail, Tomkins, 'The Crown in Scots law', in A McHarg and T Mullen (eds), *Public Law in Scotland* (2006), ch 13).

As far as English law is concerned, until 1947 the citizen was under many disabilities, both procedural and substantive, as a litigant against the Crown. The procedural disabilities were associated with the archaic mode of proceeding by petition of right. A claim by petition of right required the leave of the Crown, granted by the Sovereign on the advice of the Attorney General, and the Crown benefited from an array of procedural privileges. The most serious defect in the substantive law was the Crown's immunity from liability in tort ('the King can do no wrong'), and it was the need to remedy this defect that led to the enactment of the Crown Proceedings Act 1947. The Act effected a broader reform of the law, abolishing (with limited exceptions) the procedure of petition of right (s 13), removing most of the disabilities of the private litigant, and approximating Crown proceedings to ordinary civil proceedings between citizens. Despite these far-reaching reforms of the law and procedure, some rules remain that are peculiar to Crown liability, while actions by and against the Crown retain certain distinctive features. (The petition of right procedure was unknown in Scots law – see the Crown Suits (Scotland) Act 1857 – and Scots law, unlike English law, did not traditionally consider that 'the King can do no wrong'.)

Under the Crown Proceedings Act 1947 the court may, in general, make any such order against the Crown as it has power to make 'in proceedings between subjects' (s 21(1)) and in particular may award a sum of money (whether a debt due or damages). Although there can be no order for execution of judgment against the Crown, the court will issue a certificate of any order made by it and the appropriate government department is required to pay to the claimant the sum certified as being payable (s 25).

Section 21(1) of the Crown Proceedings Act preserves the immunity which the Crown enjoyed at English common law from injunctions and orders of specific performance, but provides that in lieu of such orders the court may grant a declaratory order (declaration). The crucial difference between the two remedies, however, is that, unlike injunctions, there is no such thing as an interim declaration. Section 21 extends to Scotland. In Scotland, however, until 1947 the Crown did not enjoy an immunity from interdict – this is one of the respects in which the 1947 Act failed adequately to take the differences between English and Scots law into account. Section 21(1) applies only to 'civil proceedings'. This phrase has now been interpreted in both English and Scots law as excluding judicial review proceedings: thus, notwithstanding section 21(1), injunctions are available against the Crown in judicial review (see *M v Home Office* [1994] 1 AC 377 and *Davidson v Scottish Ministers* [2005] UKHL 74, 2006 SC (HL) 41).

Section 21(2) of the Act provides that the court shall not grant any injunction or other order against an *officer* of the Crown (including a minister and any Crown servant) if the effect would be 'to give any relief against the Crown which could not have been obtained in proceedings against the Crown'. This provision was for a time understood to disallow the grant of an injunction against a minister in any case in which he or she had acted in an official capacity (see *Merricks v Heathcoat-Amory* [1955] Ch 567; *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] 2 AC 85, 146–8). Fortunately this view was repudiated by the House of Lords in *M v Home Office* (above). Scots law was brought into line with *M v Home Office* in *Davidson v Scottish Ministers* (above).

The restrictions on remedies imposed by section 21 must give way in appropriate cases to European Community law, which requires that effective protection should be given to Community rights. This was made clear by the European Court of Justice in its ruling in Case C-213/89, *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603, 644, in which it was held that:

> a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.

(a) Contractual liability

Section 1 of the Crown Proceedings Act 1947 provides:

> Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant of His Majesty's fiat, by petition of right, . . . then, subject to the provisions of this Act, the claim may be enforced as of right, and without the fiat of His Majesty, by proceedings taken against the Crown for that purpose in accordance with the provisions of this Act.

The government is different from private contracting parties by reason of its responsibilities for the public interest – a difference which is expressed in certain rules affecting its capacity to bind itself by contract. In particular the government – like other public authorities – may not contract in such a way as to fetter the exercise of its public powers or the discharge of its public duties. This rule most commonly applies to discretionary powers conferred by statute and was crisply expressed in relation to the Crown by Woolf J in *R v IRC, ex p Preston* [1983] 2 All ER 300, 306:

> the Crown cannot put itself in a position where it is prevented from performing its public duty. . . . If it seeks to make an agreement which has that consequence, that agreement is of no effect.

(This proposition was upheld in the House of Lords: [1985] AC 835, 862.) On the other hand the making of a contract, so far from being an unlawful fettering of discretionary powers, is normally a legitimate exercise of discretion: it is only if a contract is incompatible with the purposes for which a power was given that it offends against the rule.

The rule against fettering of discretion is not limited, in its application to the Crown, to statutory discretionary powers. The Crown has an ultimate responsibility for the public welfare which may demand the exercise of its prerogative or common law powers, even though such necessary action runs counter to specific contractual undertakings previously given. How is this conflict of public and private interests to be resolved?

Rederiaktiebolaget Amphitrite v The King [1921] 3 KB 500 (Rowlatt J)

During the First World War the British Government was operating a 'ship for ship' policy, by which neutral ships were not allowed to leave British ports unless replaced by other ships of the same tonnage. The suppliants in a petition of right were a Swedish steamship company which had sought and been given an express assurance that if their ship, the *Amphitrite*, brought a cargo of approved goods to a British port, she would be allowed to leave, notwithstanding the 'ship for

ship' policy. The *Amphitrite* discharged her cargo of approved goods at Hull but, despite the undertaking given, was detained. The company, having sold the ship to avoid further loss, claimed damages from the Crown for breach of contract. Rowlatt J gave judgment for the Crown:

> **Rowlatt J:** . . . I have not to consider whether there was anything of which complaint might be made outside a Court, whether that is to say what the Government did was morally wrong or arbitrary; that would be altogether outside my province. All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State.

The broad rule of 'executive necessity' affirmed by Rowlatt J in this case has caused disquiet. Denning J in *Robertson v Minister of Pensions* [1949] 1 KB 227 sought to limit its application, saying that the 'defence of executive necessity' would avail the Crown only 'where there is an implied term to that effect or that is the true meaning of the contract'. Certainly the rule does not give the government *carte blanche* to renounce its contracts. It is generally accepted – as by Rowlatt J himself in the above passage – that it does not apply to ordinary commercial contracts, such as are made by the government in great number. The undertaking given by the Government in the *Amphitrite* case was of a very unusual kind, and in the conditions of war a court would naturally have been unwilling to restrict the government in making decisions that might be dictated by unexpected emergencies. The rule is probably to be understood as meaning that the Crown is not bound by a contractual undertaking which proves to be incompatible with the necessary exercise of its powers in a matter of compelling public interest. Even so limited, the rule is open to question. Is the Crown not sufficiently protected by its immunity from orders of specific performance?

A rare instance of the application of the *Amphitrite* principle was *Crown Lands Commissioners v Page* [1960] 2 QB 274, in which the Court of Appeal held that a lease by the Crown must be treated as impliedly subject to the 'proper exercise in the future of the Crown's executive authority'; therefore no covenant of quiet enjoyment could be implied in favour of the tenant which would limit the Crown's future exercise of its discretionary powers.

In practice the government seldom needs to invoke the rule of executive necessity, for a standard condition of government contracts, known as the 'break clause', which is generally included in government contracts of substantial value, allows the government to terminate the contract at any time in its discretion. The break clause is not open to the reproach of unfairness which attends the rule of executive necessity, or at least not to the same extent, for the clause includes provision for compensation of the contractor in respect of work already done and for wasted expenditure.

(b) Tortious liability

Petition of right was not available in English law against the Crown for claims in tort, this immunity being derived from the maxim 'the King can do no wrong', which was understood as excluding not only the personal liability of the Sovereign but the vicarious liability of the Crown for the torts of its servants (on the extension of this immunity to Scotland, see *Macgregor v Lord Advocate* 1921 SC 847). An action could be brought against a Crown servant who had personally committed the tort and the Crown would then normally – if the tort was committed in the course of employment – undertake the defence of the case and make an *ex gratia* payment of any damages awarded. If it was not possible to identify a particular Crown servant who was responsible for the tort, the Crown might cooperate by nominating an official against whom the action might be brought, but this device became unworkable when the courts refused to admit the personal liability of Crown servants who had themselves committed no tort. (See *Adams v Naylor* [1946] AC 543; *Royster v Cavey* [1947] KB 204.)

Parliament might have reformed the law by simply enacting in general terms that the Crown should henceforth be liable in tort. This was not done. Instead, section 2(1) of the Crown Proceedings Act 1947 provides that the Crown shall be liable in tort to the same extent as if it were 'a private person of full age and capacity', under three heads:

> (a) in respect of torts committed by its servants or agents;
> (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
> (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.

Section 2(2) adds one further ground, in providing that the Crown may be liable for breach of statutory duty, provided that the duty 'is binding also upon persons other than the Crown and its officers'.

Although these four categories cover almost the whole ground of tortious liability, there are some few instances of liability which fall outside them, so that a residue of Crown immunity appears to survive. This can be illustrated by

reference to *Collins v Hertfordshire County Council* [1947] KB 598, in which the managers of a hospital were held liable for the death of a patient which occurred because the hospital operated a negligent system for the provision of dangerous drugs. The duty which rested on the hospital, to maintain a safe system, was not one which would fall within any of the categories of liability in the Crown Proceedings Act if the defendant in such a case should be the Crown. Doubtless in some cases of this kind the Crown, while not itself in breach of any duty, would be vicariously liable for the negligent act of a servant under section 2(1)(a), but it might not always be possible to establish that any particular Crown servant had committed a tort.

Proceedings under any of the four heads may be brought only if the liability arises in respect of Her Majesty's Government in the United Kingdom; a certificate issued by a Secretary of State that any alleged liability does not so arise is declared to be conclusive (s 40(2)(b), (3)). An action was defeated by such a certificate in *Trawnik v Lennox* [1985] 1 WLR 532, a case which arose from actions of the British military authorities in Germany.

Section 2(l)(a), above, provides for the vicarious liability of the Crown for torts of its 'servants or agents'. Whether any person is to be considered a servant of the Crown for the purpose of vicarious liability is a matter primarily for the common law, but section 2(6) provides that the Crown is not to be liable for the act of any 'officer' of the Crown (defined in section 38(2) as including 'any servant of His Majesty' and, accordingly, a minister of the Crown) unless the officer was directly or indirectly appointed by the Crown and paid wholly out of moneys provided by Parliament or certain other central government funds. The main effect of this provision is to exclude the vicarious liability of the Crown for torts committed by the police (who are paid in part out of local tax).

The question of the Crown's vicarious liability will arise most often in relation to the tort of negligence, making it necessary to decide whether the Crown's servant or agent owed a duty of care to the claimant. Such a duty may be owed by officers performing public functions, as in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, and in principle a duty may attach to those giving official information or advice (cf *Hedley Byrne & Co v Heller & Partners* [1964] AC 465). But the question of the existence of a duty of care is decided by the courts in the light of public policy, which will often be found to argue against the imposition of liability for negligence in the exercise of public powers. In particular, the courts show a marked reluctance to import a duty of care into discretionary decision-making by ministers or officials, and 'the more that general policy factors have to be taken into account in making the decision the less suitable is the case for adjudication by the courts' (per Browne-Wilkinson V-C in *Lonrho plc v Tebbit* [1991] 4 All ER 973, 984). See further on these matters, below.

(The domestic law on these matters may be contrasted with principles of state liability under European Community law: see above, pp 312–15.)

(c) Liability in restitution

The leading case on the Crown's liability in restitution is the *Woolwich* case.

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70 (HL)

The Inland Revenue Commissioners (the Revenue) had claimed payment of certain sums of money by way of tax from the building society (Woolwich). Woolwich, while disputing its liability to the tax, had paid the sums claimed. In proceedings for judicial review Woolwich then successfully challenged the validity of the regulations on which the claims for tax had been based, so establishing that the claims had been unlawful. The Revenue thereupon repaid the capital sums, but without interest.

Woolwich brought proceedings against the Revenue for interest on the sums repaid. It was argued for the Revenue that no interest was payable, on the ground that, even though Woolwich had not been liable to pay the tax, the repayment of the capital was not legally due and had been made voluntarily. It was admitted that if Woolwich had a valid claim for repayment of the capital on the principles of restitution, interest would be recoverable. No immunity from liability in restitution could be or was asserted by the Crown, and the House of Lords was concerned with the application of the common law principles of restitution to the circumstance of payment in response to an unlawful demand of taxation from the Crown:

Lord Goff of Chieveley: . . . I now turn to the submission of Woolwich that your Lordships' House should, despite the authorities to which I have referred, reformulate the law so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a prima facie right in restitution to the repayment of the money. This is the real point which lies at the heart of the present appeal . . .

The justice underlying Woolwich's submission is, I consider, plain to see. Take the present case. The revenue has made an unlawful demand for tax. The taxpayer is convinced that the demand is unlawful, and has to decide what to do. It is faced with the revenue, armed with the coercive power of the state, including what is in practice a power to charge interest which is penal in its effect. In addition, being a reputable society which alone among building societies is challenging the lawfulness of the demand, it understandably fears damage to its reputation if it does not pay. So it decides to pay first, asserting that it will challenge the lawfulness of the demand in litigation. Now, Woolwich having won that litigation, the revenue asserts that it was never under any obligation to repay the money, and that it in fact repaid it only as a matter of grace. There being no applicable statute to regulate the position, the revenue has to maintain this position at common law.

Stated in this stark form, the revenue's position appears to me, as a matter of common justice, to be unsustainable; and the injustice is rendered worse by the fact that it involves, as

> Nolan J pointed out [1989] 1 WLR 137, 140, the revenue having the benefit of a massive interest-free loan as the fruit of its unlawful action. I turn then from the particular to the general. Take any tax or duty paid by the citizen pursuant to an unlawful demand. Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right.

Lord Goff went on to consider possible objections to 'the simple call of justice' and found them unpersuasive. On the contrary, he found a number of reasons which reinforced the justice of Woolwich's case and concluded:

> I would therefore hold that money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right. As at present advised, I incline to the opinion that this principle should extend to embrace cases in which the tax or other levy has been wrongly exacted by the public authority not because the demand was ultra vires but for other reasons, for example because the authority has misconstrued a relevant statute or regulation. It is not however necessary to decide the point in the present case, and in any event cases of this kind are generally the subject of statutory regimes which legislate for the circumstances in which money so paid either must or may be repaid.

Lords Browne-Wilkinson and Slynn agreed that money paid to the Revenue pursuant to an ultra vires demand was recoverable. Lords Keith and Jauncey delivered dissenting speeches. In this case, as the Law Commission observed, the House of Lords 'overturned the traditional common law rule on overpaid levies, which allowed recovery only on grounds recognised by the private law, and substituted a new public law rule providing that such levies are prima facie recoverable' (Law Com No 227, Cm 2731/1994, para 1.8; see further Beatson (1993) 109 *LQR* 401).

6 Liability of public authorities

Public authorities not enjoying the 'shield of the Crown' – not being government departments or Crown servants – have never been immune from liability in tort and may sue or be sued in ordinary civil proceedings.

(a) Contractual liability

In principle an incorporated public body has capacity to make contracts for any purpose that falls within its competence as defined by the relevant statute (putting aside bodies incorporated under the prerogative). In the case of local authorities, a general power to make contracts derives from section 111(1) of the Local Government Act 1972, authorising an authority in England or Wales

to 'do any thing . . . which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions'. A like provision exists in respect of local authorities in Scotland. Power to enter into 'public-private partnership' agreements (engaging private resources for local authority purposes) is given by the Local Government (Contracts) Act 1997, and various other statutes confer powers on local authorities to make specific classes of contract. An authority is not permitted to contract otherwise than for such authorised purposes: a contract made for an ultra vires purpose is null and void, as was the loan guarantee contract entered into by the local authority in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306. (In certain circumstances the other party to such an ultra vires contract is protected by the provisions of the Local Government (Contracts) Act 1997.)

Section 135 of the Local Government Act 1972 provides that a local authority *may* make standing orders to regulate the making of contracts and *must* make such orders with respect to contracts for the supply of goods or materials or the execution of works. Standing orders relating to contracts for goods, materials or works must provide for competition for such contracts and must regulate the procedure for inviting tenders. Standing orders are internal rules to be complied with by those acting for the authority, but section 135(4) provides that a contractor shall not be bound to inquire whether standing orders have been observed and that non-compliance 'shall not invalidate any contract entered into by or on behalf of the authority'.

The pursuit of collateral policies in local authority purchasing is restricted by section 17 of the Local Government Act 1988, which specifies a number of 'non-commercial matters' which must be excluded from the contracting process. In their contracting procedures local authorities, like central government bodies, are bound to observe the requirements of the European Community Directives on procurement and the regulations implementing these in the United Kingdom. The common law also imposes restrictions, for example in the rule against fettering of discretion (*Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; cf *R v Lewisham London Borough Council, ex p Shell UK Ltd* [1988] 1 All ER 938).

(b) Tortious liability

The tortious (or, in Scotland, the delictual) liability of public authorities has in recent years been the subject of several high-profile appeals to the House of Lords. This is a difficult and relatively fast-moving area of law, on which European Community law and, even more so, European human rights law has exerted considerable influence. It is an area of law that has become contested and controversial. The Law Commission is currently examining it: at the time of writing its most recent report on this area was *Remedies against Public Bodies: a Scoping Report* (October 2006). (The basic principles of this area of law are broadly the same in English and in Scots law – for a recent decision in

Scots law, applying many of the (English) House of Lords authorities considered below, see *Mitchell v Glasgow City Council* 2005 SLT 1100.)

The starting point in considering the tortious liability of public authorities (other than the Crown) is double-edged: on the one hand, there is no general cloak of immunity for public authorities, but on the other hand there is no general right to damages for harm caused by an ultra vires act of a public authority. The JUSTICE–All Souls report on *Administrative Justice* (1988) recommended that a remedy for wrongful administrative action should be introduced by legislation, 'which might take some such form as the following' (para 11.83):

> Subject to such exceptions and immunities as may be specifically provided, compensation in accordance with the provisions of this Act shall be recoverable by any person who sustains loss as a result of either:
>
> (a) any act, decision, determination, instrument or order of a public body which materially affects him and which is for any reason wrongful or contrary to law; or
> (b) unreasonable or excessive delay on the part of any public body in taking any action, reaching any decision or determination, making any order or carrying out any duty.

It is added that 'wrongful' and 'public body' would need to be carefully defined. (Note, however, the reservations as to this far-reaching proposal expressed by Lord Woolf, *Protection of the Public: A New Challenge* (1990), pp 57–8.) To date, no such remedy has been enacted into law.

One area of difficulty in considering the liability in tort of public authorities is the relationship in determining the limits of such liability between public law concepts (ultra vires, irrationality, etc) and private law concepts (duty of care, breach of duty, etc). Formerly, it appeared that a negligence action could succeed against a public authority only if the authority had acted *Wednesbury* unreasonably (see eg, *Home Office v Dorset Yacht* [1970] AC 1004, per Lord Diplock). Latterly, the courts appear to have relaxed this rule (see, especially, *Barrett v Enfield London Borough Council* [2001] 2 AC 550, considered below). However, public law concepts have not been rendered wholly irrelevant when considering questions of liability in tort and, in particular, in negligence. Where the decision of the public authority is characterised as being 'non-justiciable', for example, the authority will not be liable in negligence. Matters of justiciability will be determined with reference to public law concepts.

Where it is argued that a public authority is liable in negligence (or, indeed, in other torts) the detail of the statutory scheme under which the authority was acting will be central to the determination of liability. A critical question will be whether the authority was exercising a statutory duty or a statutory power. Different lines of authority now apply in each of these categories. The leading cases with regard to statutory duties are *X v Bedfordshire County Council* [1995] 2 AC 633 and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (but

see also *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, which is particularly important on vicarious liability). We shall turn to *X* and *Barrett* in a moment. The leading authorities with regard to statutory powers are *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. These latter cases make it clear that it continues to be the case that litigants are very unlikely to be able to show that a public authority has acted negligently in the exercise of a statutory power unless they can show that the authority has acted *Wednesbury* unreasonably.

We turn now to the case law concerning negligence and statutory duties. In *X v Bedfordshire County Council* (above) several claimants argued that their local authorities had acted negligently inter alia in not investigating serious allegations of parental abuse and neglect and in failing to commence appropriate measures of child protection. The local authorities applied to have the claims struck out. The House of Lords ruled in favour of the local authorities. Negligence is composed of three elements, all of which need to be proved before liability will be imposed: first, there needs to be a duty of care, secondly there needs to be a breach of duty and thirdly the breach of duty needs to have caused recoverable, non-remote damage. (This is the case in all actions for negligence, whether against public authorities or not.) In *X v Bedfordshire Country Council* the House of Lords focused on the first of these elements. Their Lordships held that it would not be 'fair, just and reasonable' to impose a duty of care on local authorities in respect of their responsibilities under child protection legislation (for the 'fair, just and reasonable' test, see *Caparo Industries v Dickman* [1990] 2 AC 605, 617–18). A variety of overlapping reasons was offered in support of this conclusion: (1) a duty of care was a blunt instrument that would cut across the whole statutory scheme; (2) the statutory scheme was inter-disciplinary, involving multi-party, collective decision-making (potentially including parents, teachers, social workers, educational psychologists, the police and others), giving rise to a problem of who, in particular, should owe any duty of care; (3) imposing liability would lead to problems of apportionment of responsibility; (4) alternative remedies were available, such as complaints to the local government Ombudsmen; (5) imposing a duty of care would risk encouraging defensive administration (whereby decision-makers make decisions principally in order to escape liability, rather than making decisions which are necessarily in the best interests of the parties); and (6) a finding of liability would impose a burden on scarce public resources, both financial and human.

Barrett v Enfield London Borough Council (above) was a negligence case about a child who was already in local authority care. Relying on decisions such as *X v Bedfordshire County Council* the local authority applied to have Mr Barrett's claim struck out. The House of Lords ruled that the claim should not be struck out. *X v Bedfordshire County Council* was distinguished. Their Lordships ruled that the public policy considerations on which the House had relied in *X* in deciding that it would not be fair, just and reasonable to impose a duty of care in the circumstances of that case 'did not have the same force in respect of

decisions taken once the child was in care'. Their Lordships ruled that *Barrett* should be allowed to proceed to full trial. The key issue at that trial, their Lordships thought, would be whether the local authority had breached its duty of care to Mr Barrett.

Now, it may be that the differences between *X* and *Barrett* can be explained simply by the differences in the facts of the two cases: the children in *X* were not in care whereas Mr Barrett was. This, however, seems implausible. There is a bigger shift taking place here than this explanation gives credit for. For one thing, *Barrett* marks a more substantial step away from the equation in *Home Office v Dorset Yacht* between public law and private law concepts. To the extent that *X v Bedfordshire* can be read as authority for the proposition that, in matters affecting discretionary policy, public authorities will not owe a duty of care (and it may be that, in any event, this was always too broad a summary of their Lordships' decision in *X*), this proposition clearly now needs to be qualified. As Lord Hutton expressed it in his opinion in *Barrett* (at 583):

> the fact that the decision which is challenged was made within the ambit of a statutory discretion and is capable of being described as a policy decision is not in itself a reason why it should be held that no claim for negligence can be brought in respect of it . . . It is only where the decision involves the weighing of competing public interests or is dictated by considerations which the courts are not fitted to assess that the courts will hold the issue is non-justiciable.

Additionally, there is some significance to be attached to the fact that the focus in *Barrett* was on the breach of duty issue rather than the duty of care issue. This shift was at least partly attributable to certain rulings of the European Court of Human Rights. In *Osman v United Kingdom* (1998) 29 EHRR 245, that court had ruled that a decision to strike out a negligence action against the police violated the right to a fair trial under Article 6. (The decision to strike the case out was taken on the basis, established in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, that the police enjoy an immunity in such actions as they owe no duty of care to the victims of crime.) The decision in *Osman* was roundly condemned, the European Court of Human Rights being (rightly) accused of misunderstanding the nature of the striking out action (see eg, Gearty, 'Unravelling *Osman*' (2001) 64 *MLR* 159). *Osman* was decided after *X v Bedfordshire* but before *Barrett v Enfield*. Like *Osman*, both *X* and *Barrett* were striking out applications. It is clear that, in *Barrett*, their Lordships were concerned that a similar result to that in *Osman* could ensue in these cases. This may explain something of the turn from the focus on whether there is a duty of care to questions instead of breach of duty: whereas the former may be addressed at the preliminary stage of an application to strike out, the latter will ordinarily require a full trial.

As it turned out, it may be that their Lordships' concern in *Barrett* was unnecessary. In the light of the extensive criticism of its decision in *Osman*, the

European Court of Human Rights changed its approach to striking out cases and Article 6. Having lost in the House of Lords the claimants in *X v Bedfordshire* took their case to Strasbourg. The Court of Human Rights ruled in its judgment in the case (*Z v United Kingdom* (2002) 34 EHRR 3) that in *Osman* it had misunderstood the nature of the striking out action and that, in the present case, there had been no violation of Article 6. The Court of Human Rights went on to rule that there had been a violation of Article 13 (the right to an effective remedy). (See Gearty, '*Osman* unravels' (2002) 65 *MLR* 87.) The impact of *Barrett* is considerable. It is not a one-off, but has been regularly followed in subsequent case law. Its effect is that claimants in negligence actions against public authorities are now much less likely to lose at the preliminary, striking-out stage, as the courts are much more reluctant to rule that public authorities owe no duty of care. This does not necessarily mean that claimants are winning vastly more cases than previously, of course, as the imposition of a duty of care is not the same as – and is but the first step towards – a finding of liability. Breach of duty and causation of non-remote damage still need to be proven on the facts. (For a full analysis of *X* and *Barrett*, see Craig and Fairgreave, '*Barrett*, negligence and discretionary powers' [1999] *PL* 626.)

A public authority may have the defence to an action in tort that the act done was authorised by statute. For instance, an authority is not liable in tort for a nuisance resulting from its performance, without negligence, of a statutory duty. If, on the other hand, a nuisance is caused by the authority in exercising a public power, it will ordinarily be liable if the power could have been exercised without causing the nuisance. (See eg, *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42.)

Damages for a tort committed by a public authority or officer are assessed on ordinary principles, but exemplary damages may be awarded if the authority was guilty of 'oppressive, arbitrary or unconstitutional action' in performing public functions. (*Rookes v Barnard* [1964] AC 1129, 1225–6. See also *Holden v Chief Constable of Lancashire* [1987] QB 380; *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122.)

In addition to negligence, there is a separate tort of breach of statutory duty. Even though ministers and other public authorities are under a large number and range of statutory duties, it is rare for an action for breach of statutory duty to succeed (apart from in some cases concerning industrial accidents). The courts will generally not allow an action for breach of statutory duty to proceed unless two conditions are met: first, that Parliament evinced an intention that the statutory duty in question should be actionable in this way and secondly that the duty was intended to confer a benefit only on a particular group and not on the public at large (see eg, *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619).

A further tort – misfeasance in public office – provides a remedy for abuse of power by a public officer. The elements of the tort, as identified by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1,

are that a public officer caused injury or loss to the claimant by an unlawful act, either ('targeted malice') with the intention of causing such injury or ('untargeted malice') knowing that the act was unlawful and that it would probably injure the claimant, or being reckless, in deliberate disregard of a serious risk that injury to the claimant would result from the conduct known to be unlawful. (See also *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395.)

On the considerable impact of European Community law on questions of liability against the state and against public authorities, see chapter 5 (above, pp 312–15).

See generally on this area of law D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) and C Harlow, *State Liability: Tort Law and Beyond* (2004).

7 Tribunals

In *R v Secretary of State for the Home Department, ex p Saleem* [2001] 1 WLR 443, 457–8, Hale LJ observed:

> There are now a large number of tribunals operating in a large number of specialist fields. Their subject matter is often just as important to the citizen as that determined in the ordinary courts. Their determinations are no less binding than those of the ordinary courts: the only difference is that tribunals have no direct powers of enforcement and, in the rare cases where this is needed, their decisions are enforced in the ordinary courts. . . . In this day and age a right of access to a tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the ordinary courts.

Tribunals are properly to be regarded, said the Franks Committee, 'as machinery provided by Parliament for adjudication rather than as part of the machinery of administration' (*Administrative Tribunals and Enquiries*, Cmnd 218/1957, para 40). Three points are indicated by this statement: almost all tribunals are created by statute; they are intended to be independent of the administration; their function is to adjudicate on matters in dispute. A few tribunals (eg employment tribunals and rent assessment committees) are set up to determine disputes between one citizen and another; the great majority adjudicate on disputes between the individual and a public authority concerning the rights or obligations of the individual under a statutory scheme. In this chapter our business is with tribunals of the latter kind.

In 2005–06 there were over seventy different administrative tribunals in Britain (excluding some that were rarely convened or moribund) and in that year they decided about 700,000 cases (see the *Annual Report of the Council on Tribunals*, HC 1210 of 2005–06, Appendix J). Many of these were multiple bodies sitting in different parts of the country (eg there were fifty-six Valuation Tribunals in England in 2006). The two oldest tribunals are the General and

Special Commissioners of Income Tax, dating from the beginning of the nineteenth century; among the newest are the Information Tribunal and the Competition Appeal Tribunal. The busiest tribunals are the unified Social Security and Child Support Appeals Service Tribunals, which cleared 262,816 cases in 2005–06. Some tribunals, on the other hand, rarely sit.

Most tribunals – and those of present concern to us – are appellate bodies, set up to hear appeals from decisions of ministers, officials, regulatory bodies or lower tribunals. We should notice, however, that some tribunals have a 'first-instance' jurisdiction to deal with applications for licences or other benefits (eg the Traffic Commissioners and the Civil Aviation Authority). Broadly speaking, it is an appellate tribunal's function to decide whether the administrative authority came to the right conclusion on the facts, correctly applied the relevant statutory provisions and also, in many cases, whether it properly exercised a discretion entrusted to it.

Appeals may be taken to specialised tribunals on a great variety of matters. As noted in the Leggatt Report (*Tribunals for Users: One System, One Service* (2001), para 1.16), the subjects they deal with 'cover the whole range of political and social life, including social security benefits, health, education, tax, agriculture, criminal injuries compensation, immigration and asylum, rents, and parking'. In many of these cases it might have been decided to entrust the courts with jurisdiction, but as the Franks Committee remarked (para 38):

> tribunals have certain characteristics which often give them advantages over the courts. These are cheapness, accessibility, freedom from technicality, expedition and expert knowledge of their particular subject. It is no doubt because of these advantages that Parliament, once it has decided that certain decisions ought not to be made by normal executive or departmental processes, often entrusts them to tribunals rather than to the ordinary courts.

This is not to say that the government will necessarily have chosen to set up a tribunal as a more appropriate forum than a court; the choice may rather have been, as Prosser notes ((1977) 4 *British Journal of Law and Society* 39, 44) 'between appeal to tribunals and no appeal'. Alan Boyle remarks that the use of tribunals has been 'essentially selective' and that it is 'left to governments to make the selection on whatever criteria' they choose: 'only certain areas of governmental decision-making have been surrendered into the hands of independent tribunals' (in G Richardson and H Genn (eds), *Administrative Law and Government Action* (1994), p 84).

Since tribunals deal with such varied subject matter it is not surprising that they have differed greatly in their constitution, membership and working arrangements. A few tribunals are one-person bodies (eg parking adjudicators and traffic commissioners) but the majority are composed of a chairperson, usually a lawyer, and two other appropriately qualified members. As Lord Hope remarked in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 at [22]: 'One of the strengths of the tribunal system as it has

been developed in this country is the breadth of relevant experience that can be built into it by the use of lay members to sit with members who are legally qualified'.

The Franks Committee said that the public acceptability of adjudications by tribunals was a vital element in sustaining that 'consent of the governed' on which government in this country fundamentally rests. If public acceptability was to be assured, they added, the working of tribunals must be marked by the characteristics of *openness, fairness and impartiality (Administrative Tribunals and Enquiries*, Cmnd 218/1957):

> 24. Here we need only give brief examples of their application. Take openness. If these procedures were wholly secret, the basis of confidence and acceptability would be lacking. Next take fairness. If the objector were not allowed to state his case, there would be nothing to stop oppression. Thirdly, there is impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?
>
> 25. To assert that openness, fairness and impartiality are essential characteristics of our subject-matter is not to say that they must be present in the same way and to the same extent in all its parts. Difference in the nature of the issue for adjudication may give good reason for difference in the degree to which the three general characteristics should be developed and applied. Again, the method by which a Minister arrives at a decision after a hearing or enquiry cannot be the same as that by which a tribunal arrives at a decision. . . . [W]hen Parliament sets up a tribunal to decide cases, the adjudication is placed outside the Department concerned. The members of the Tribunal are neutral and impartial in relation to the policy of the Minister, except in so far as that policy is contained in the rules which the tribunal has been set up to apply.

The need to defend the principle of impartial adjudication by independent tribunals has been a constant theme in the reports of the supervisory body, the Council on Tribunals. In its *Annual Report* for 1989–90, for instance, it expressed disquiet at a tendency for the government to substitute internal departmental review in place of a right of appeal to an independent tribunal:

> 1.3 Recent legislative proposals (some of them now enacted) have suggested to us that the avenue of appeal to a properly constituted and independent tribunal, which we have consistently advocated as the most appropriate course to test the correctness and fairness of administrative decision-making, is being compromised to a worrying degree. The causes are no doubt various, but a common and underlying motivation would appear to be the effort to economise on the resources devoted to appeal procedures. We wholly support the need for efficiency within appeal procedures, but are unequivocally opposed to measures which provide on grounds of economy inadequate safeguards for appellants and the public at large.
>
> 1.4 At the risk of over-simplification and repetition of the familiar, it is worth bearing in mind that the virtues of the tribunal mechanism of appeal lie in its independence and the

> public perception of that independence; and in the application in practice of the principles of openness, fairness and impartiality advocated by the Franks Committee Report (Cmnd 218) in 1957, which have always underpinned our work. The right of an individual complainant to put his grievance to a body known to be and readily capable of being perceived as independent and, where necessary, to test the validity of a decision complained of is, in principle, not only the fairest way of disposing of the issues but also the most comprehensive way of ensuring that an individual with a grievance can be satisfied that his case has been fairly considered – even if it fails on the issue in dispute.

(See also paras 2.16–2.30; *Annual Report* (1990–91), paras 3.25–3.27; *Annual Report* (1991–92), paras 2.28–2.30; *Annual Report* (1995–96), para 2.6.)

The Council on Tribunals has declared that 'the principal hallmark of any tribunal is that it must be independent' and 'be enabled to reach decisions according to law without pressure either from the body or person whose decision is being appealed, or from anyone else' (*Tribunals: their Organisation and Independence*, Cm 3744/1997, para 2.2). As well as the Franks Committee's trinity of openness, fairness and impartiality, there are other standards for the evaluation of tribunals. The JUSTICE–All Souls Report listed those of 'efficiency, expedition and economy' (*Administrative Justice* (1988), para 9.6), while Roy Sainsbury elaborated and added to the Franks criteria in his proposal of a standard of 'administrative justice', embracing 'accuracy of decision-making, impartiality, participation, accountability, independence, and promptness' ('Social security appeals: in need of review?' in W Finnie et al (eds), *Edinburgh Essays in Public Law* (1991)). As may be supposed, these standards are not always fully met; in particular, the Council on Tribunals has from time to time drawn attention to delays in the hearing of cases by some tribunals. The judgement of the Leggatt Report (*Tribunals for Users: One System, One Service* (2001), Overview, para 2) was that 'their quality varies from excellent to inadequate'.

A further important standard is that of accessibility. An individual aggrieved by an adverse administrative decision should be informed of any right to challenge it before a tribunal and should not be denied the opportunity of effective challenge by lack of means. Ideally, no doubt, the procedure of tribunals should be sufficiently simple and informal to allow ordinary citizens to conduct their own cases; but even if attainable, this is not enough. Hazel Genn's study of tribunal procedures, decision-making and outcomes led her to a bleak conclusion ('Tribunals and informal justice' (1993) 56 *MLR* 393, 409):

> One of the conclusions of the study was that despite the appearance of informality in tribunal hearings, the inherently adversarial nature of proceedings, the necessarily 'legalistic' nature of tribunal decision-making, the predictable inability of litigants convincingly to advocate their own cases, and the limited ability of tribunals to compensate for these disadvantages, results in hearings that may fail to do justice to the cases that come before them. In simple terms this means that cases with merit are lost by default.

Many tribunals apply complicated bodies of law and their decisions may be of great importance to the individual, for instance, as affecting a person's livelihood, educational prospects, right to live in the United Kingdom or even personal liberty (Mental Health Review Tribunals). Fairness – and high standards of decision-making – will only be assured if there is adequate provision for legal advice and assistance, and in the more complex cases legal representation may be indispensable. The Community Legal Service system provides public funding for 'legal help' (advice and assistance) for tribunal appellants if they satisfy financial eligibility tests and free legal advice may be sought from voluntary sector advice agencies and law centres. Publicly funded representation is not, however, generally available but is provided for certain classes of tribunal proceedings (eg proceedings before the Asylum and Immigration Tribunal and Mental Health Review Tribunals). It has been shown that legal or other specialist representation increases the likelihood of success at tribunal hearings (Lord Chancellor's Department, *The Effectiveness of Representation at Tribunals* (1989)), and the Council on Tribunals in 1990 reaffirmed its 'settled view that publicly funded advice and, where appropriate, representation should be available to those of modest means who appear before tribunals': *Annual Report* (1989–90), para 1.36. On the other hand the Leggatt Report expressed the conviction 'that representation not only often adds unnecessarily to cost, formality and delay, but it also works against the objective of making tribunals directly and easily accessible to the full range of potential users'. (See para 4.21.) The Government has not been persuaded of the need for funding to be generally available at tribunal proceedings.

The procedures for adjudication by tribunals should ensure fairness, clarity, efficiency and as much informality as is compatible with orderly proceedings. In 1991 the Council on Tribunals published a Report on *Model Rules of Procedure for Tribunals* (Cm 1434), presenting a set of model rules as 'a store from which Departments and tribunals may select and adopt what they need' (*Annual Report* (1990–91), para 2.4) when drafting or revising rules of procedure. The model rules have contributed to the diffusion of good practice and have helped to bring about a degree of uniformity and simplification of procedural rules.

Roy Sainsbury, reflecting on the criterion of 'accountability' in relation to tribunals (in W Finnie *et al* (eds), *Edinburgh Essays in Public Law* (1991), p 342), says that it requires 'that individuals receive a comprehensible explanation of the decision-making process and of the final decisions reached'. Accountability, he adds, 'serves a dual purpose':

> First, it is desirable, *per se*, that individuals understand why certain decisions have been taken about them in order that they can be convinced of their acceptability. And secondly, if decision-makers carry out the decision-making process in the knowledge that they must account for their decisions, then they will be encouraged to be diligent and assiduous in the task.

The giving of reasons has additional importance in paving the way for challenges to decisions in further proceedings.

Section 10 of the Tribunals and Inquiries Act 1992 provides that, subject to specified exceptions, tribunals named in Schedule 1 to the Act (which are under the supervision of the Council on Tribunals) are obliged, on request, to furnish a statement, either written or oral, of the reasons for their decisions. In addition the procedural rules of many tribunals have required reasons to be given whether or not they are requested. In *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478, Megaw J said, with reference to the duty to give reasons (then imposed by section 12 of the Tribunals and Inquiries Act 1958):

> Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.

(See further *R v Mental Health Review Tribunal, ex p Pickering* [1986] 1 All ER 99; *R v Criminal Injuries Compensation Board, ex p Cook* [1996] 1 WLR 1037, 1052–3; *R (H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, [2003] 1 WLR 127.)

Under the Human Rights Act 1998, section 6, it is unlawful for tribunals, as public authorities, to act in a way which is incompatible with Convention rights, unless constrained to do so by statutory provision. Accordingly a tribunal must not make a decision that infringes a Convention right of an appellant, as for instance the right to liberty, or to respect for private and family life, or the right to education. A tribunal's own constitution and processes must be in conformity with Article 6(1) of the Convention (right to a fair and public hearing by an independent and impartial tribunal) in so far as the tribunal has to determine an appellant's civil rights or obligations. In particular, the arrangements for the appointment and tenure of tribunal members and for the administration of a tribunal and the conduct of hearings must be such as to give confidence in the tribunal's impartiality and independence. (Cf *Scanfuture UK Ltd v Secretary of State for the Department of Trade and Industry* [2001] ICR 1096.)

Decisions of tribunals are in principle open to judicial review (but note the markedly peremptory ouster clause in section 67(8) of the Regulation of Investigatory Powers Act 2000, which provides that decisions of the tribunal established by that Act, 'including decisions as to whether they have jurisdiction', shall not be 'subject to appeal or be liable to be questioned in any court'). The availability of review should not, however, be accepted as a generally adequate substitute for an appeal system. The Council on Tribunals expressed the view that 'wherever . . . it can be shown that the absence of an appeal procedure is leading to the widespread use of judicial review as a substitute, there must be a strong presumption that some form of appeal ought to be provided' (*Annual Report* (1992–93), para 1.52). There has often been statutory provision for an appeal, usually to the High Court on a point of law. A general provision was made by section 11 of the Tribunals and Inquiries Act 1992, allowing for such appeals from decisions of a number of listed tribunals; others might be added

by orders made under the Act. Sometimes the initial appeal has been to a higher tribunal, with the possibility of a further appeal to a court. The Leggatt Report found the structure of appeal routes from tribunals to be 'haphazard, having developed alongside the unstructured growth of the tribunals themselves'.

A general supervision over most tribunals has been exercised by the Council on Tribunals, established in 1958. The Council is required by the Tribunals and Inquiries Act 1992 to keep under review and report on the constitution and working of the tribunals specified in Schedule 1 to the Act. It must be consulted before procedural rules are made for any of the scheduled tribunals. The Council noted in its *Annual Report* for 1988–99 that its statutory functions were 'almost entirely advisory and persuasive' and further were 'largely confined to advising on procedural matters relating to specified tribunals' and certain inquiries, and continued (para 1.58):

> In practice, for many years our work has extended beyond these narrow confines. In particular, much of our most fruitful effort has been directed towards advising Departments at an early stage upon whether new adjudicative appeal procedures are required and on what form those procedures should take. It would be difficult to overestimate the significance of this work: it hardly needs emphasising that getting mechanisms right – that is, establishing a properly constituted tribunal or other adjudicative body with the right kind of support and the right kind of procedural regulations – is a more economic and efficient way of proceeding than correcting shortcomings in these matters when advice is sought at a late (sometimes a too late) stage. Yet none of this is reflected in our statutory functions. The reasons for this, in so far as they may be sought in the immediate past, merit review.

In May 2000 the Lord Chancellor appointed Sir Andrew Leggatt to conduct a wide-ranging, independent review of tribunals. Among other matters he was to consider how to ensure that arrangements for the handling of disputes were 'fair, timely, proportionate and effective', as part of 'a coherent structure, together with the superior courts, for the delivery of administrative justice', and assess whether the administrative and practical arrangements, including representation, met the needs of users and the requirements of the European Convention on Human Rights. The Leggatt Report, *Tribunals for Users: One System, One Service* (2001) proposed that the administration of tribunals should be organised in a single Tribunals Service, providing support services for all tribunals, and work should be set in hand to adopt common procedures and arrangements for case management. There should be a single route for all appeals from first-tier tribunals to a second tribunal tier and from the second tier to the Court of Appeal. The Report made almost 300 detailed recommendations, covering such matters as appointments of tribunal members, training, case management, procedural rules, giving of reasons and measurement of performance. The Government's response to the Leggatt recommendations was set out in the White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243/2004), which envisaged 'a major consolidation, integration and simplification of the provision of tribunal services'. A new, unified tribunal system for England would be created, bringing

together, at the outset, many of the largest tribunal organisations administered by central government (eg the Asylum and Immigration Tribunal, the Social Security and Child Support Tribunals and the Mental Health Review Tribunals in England) in a single Tribunals Service providing common administrative support. The Tribunals Service was established in April 2006 as an executive agency within the Department for Constitutional Affairs. Some of the tribunals included in the new service had already been located within the Department for Constitutional Affairs while the others were transferred from their previous sponsoring departments. Most other existing tribunal jurisdictions (unless devolved), will become part of the Tribunal Service over the next few years, as will new ones created in the future. This change, besides bringing improved flexibility and administrative efficiency, is intended to emphasise the independence of tribunals, which will not be administered by departments whose decisions they will be reviewing. (Decisions of the Secretary of State for Constitutional Affairs are not of the kind that are taken on appeal to tribunals.)

The further reforms proposed by the Government required legislation and were incorporated in the Tribunals, Courts and Enforcement Bill, introduced in the House of Lords and given its second reading on 29 November 2006. The bill provides for a structure of two new tribunals, a First-tier Tribunal and an Upper Tribunal, to which the jurisdiction of existing tribunals may be transferred by the Lord Chancellor. (The Asylum and Immigration Tribunal, which has a unique single-tier structure, along with Employment Tribunals, remain separate but will benefit from the common administrative support system.) Each tribunal will be divided into chambers to which different specialist jurisdictions will be allocated, those doing similar work being assigned to the same chamber. The legally qualified members of the tribunals are to be called judges. Apart from some *ex officio* members, judges and other members of the First-tier Tribunal will be appointed by the Lord Chancellor, normally after selection by the Judicial Appointments Commission. Appointments to the Upper Tribunal are to be made by the Queen on the recommendation of the Lord Chancellor, again normally after selection by the Commission.

The bill provides for appeal on a point of law, with permission, from a decision of the First-tier Tribunal to the Upper Tribunal, and similarly from a decision of the Upper Tribunal to the Court of Appeal in England, Wales and Northern Ireland or the Court of Session in Scotland. The Upper Tribunal is to have a judicial review jurisdiction, transferred to it from the High Court or the Court of Session, in respect of certain classes of tribunal decisions.

A new non-departmental body, the Administrative Justice and Tribunals Council, is to replace the existing Council on Tribunals. It will have a wider remit, keeping the administrative justice system as a whole under review, advising on means to make it more accessible, fair and efficient.

(See further M Harris and M Partington (eds), *Administrative Justice in the 21st Century* (1999).)

Part IV
Liberty

11

Liberty and the constitution

Contents

This chapter examines the extent to which, and the ways in which, British constitutional law protects various aspects of personal liberty – of what may be called 'civil liberties'. This is a very large topic, as well as being a critically important one, and we have had to be selective. In our selections we have tried to focus on issues that are both topical in early twenty-first century Britain and representative of the overall field. We start with a survey of the relevant sources of law. In the next section we move on to examine the regime of Convention rights that was introduced into UK law by the Human Rights Act 1998. In doing so we

pay particular attention to the impact of Convention rights in areas touching upon matters of national security and counter-terrorism. This section may be read as a case study of the way in which the Human Rights Act has worked thus far. The chapter closes with two further case studies of the way in which liberty is protected in Britain. These case studies, concerning freedom of expression and freedom of assembly, consider both common law and statute and seek to place the Human Rights Act in the context of an analysis of the overall strengths and limitations of the constitutional protections of liberty in Britain. If one thing is clear, it is that, while the Human Rights Act is undoubtedly significant, it should not be the sole focus of our attention, even in this area of constitutional law.

1 Sources of protection

(a) Common law

The common law's traditional approach to the protection of rights, exemplified in such leading cases as *Entick v Carrington* (1765) 19 St Tr 1029 (on which, see pp 78–9), centres upon the notion of 'residual liberty'. According to this approach we are free to do anything that is not legally prohibited. As Sir Robert Megarry V-C expressed it in *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 'everything is permitted except what is expressly forbidden' (see above, p 80). Even liberty in its most basic sense of freedom from physical restraint is seen as having this residual character: the writ of habeas corpus, for protecting the individual from unlawful restriction of his or her liberty, may be unavailing if the restriction can be justified in terms of statutory provision such as the Immigration Act 1971, Schedule 2, paragraph 16, the Mental Health Act 1983, sections 2, 3 or 4, the Terrorism Act 2000, section 41, or the Prevention of Terrorism Act 2005, sections 4 or 5.

This approach may be contrasted with a constitutional order in which liberty is protected by force of a *positive* list of rights – a list of statements to the effect that no matter what the state or the government claims to be able to do, there are some matters that are protected, such that the state or the government may not interfere with them at all (or, at least, such that the state or the government may interfere with them only on strictly limited conditions). This is the approach that is now taken in UK law under the authority of the Human Rights Act 1998. Even before the passage of this Act, however, certain cases had begun to explore the possibility that, inherent in the common law, there may be individual, fundamental or constitutional rights that may be relied upon to delimit lawful state or governmental action. An early instance was *Hubbard v Pitt* [1976] QB 142, in which Lord Denning, in a dissenting judgment, would have vindicated 'the right to demonstrate and the right to protest on matters of public concern'. In *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 361, Lord Scarman said with reference not to the common law but

to a statutory provision (section 10 of the Contempt of Court Act 1981, which gives to publishers of newspapers and others a qualified immunity from compulsion to disclose their sources of information), that:

> [Counsel for the *Guardian*] described the section as introducing into the law 'a constitutional right'. There being no written constitution, his words will sound strange to some. But they may more accurately prophesy the direction in which English law has to move under the compulsions to which it is now subject than many are yet prepared to accept.

(See further on the Contempt of Court Act 1981, below.)

Since the mid-1990s judicial references to 'constitutional rights' and to 'constitutional statutes' have multiplied. 'In the present state of its maturity', said Laws LJ in *Thoburn v Sunderland City Council* [2003] QB 151 at [62], 'the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental'. In a widely cited judgment, for example, Steyn LJ ruled in *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198, 210 that 'the principle of our law that every citizen has a right of unimpeded access to the court . . . must rank as a constitutional right'. And in *R v Ministry of Defence, ex p Smith* [1996] QB 517 the Court of Appeal accepted that judicial scrutiny of administrative discretion under the doctrine of irrationality (or *Wednesbury* unreasonableness: see chapter 10) should be intensified in what was described as 'the human rights context'. The *principal* use to which the notion of common law 'constitutional rights' has been put is, as in the *Leech* case, that of statutory interpretation. The position was summarised (as we saw in chapter 2) in Lord Hoffmann's important dictum in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 (HL) (emphasis added):

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. *Fundamental rights cannot be overridden by general or ambiguous words.* This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. *In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.* In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

That there are limits to the extent to which the common law will recognise rights as being 'constitutional' in character was laid down in *Watkins v Home*

Office [2006] UKHL 17, [2006] 2 AC 395, in which the House of Lords reversed a judgment of the Court of Appeal which had held that, in the words of Lord Bingham, 'if there is a right which may be identified as a constitutional right, then there may be a cause of action in misfeasance in a public office for infringement of that right without proof of damage'. The House of Lords reinstated the rule – which can be traced back for more than 300 years – that the tort of misfeasance in a public office requires special damage. Lord Rodger of Earlsferry stated (at [58]–[64]) that:

> the Court of Appeal's decision is noteworthy for the novel use which it makes of the concept of a 'constitutional right' . . . For such an innovation to be workable, it would have to be possible to identify fairly readily what were to count as 'constitutional rights' for this purpose . . . There is, however, no magic in the term 'constitutional right' . . . It is in the sphere of interpretation of statutes that the expression 'constitutional right' has tended to be used, more or less interchangeably with other expressions [his Lordship cited *ex p Leech* (above) and related case law]. The term 'constitutional right' works well enough, alongside equivalent terms, in the field of statutory interpretation. But, even if it were otherwise suitable, it is not sufficiently precise to define a class of rights whose abuse should give rise to a right of action in tort without proof of damage . . . In using the language of 'constitutional rights', the judges were, more or less explicitly, looking for a means of incorporation [of the European Convention on Human Rights] *avant la lettre*, of having the common law supply the benefits of incorporation without incorporation. Now that the Human Rights Act is in place, such heroic efforts are unnecessary.

Other constitutional rights and liberties to have been recognised by judicial decisions are the right to life, 'the most fundamental of all human rights' (*R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855); the right to freedom of expression (*Derbyshire County Council v Times Newspapers* [1993] AC 534, on which see further below); the right to refuse to answer police questions (*Rice v Connolly* [1966] 2 QB 414); and the right of a person in custody to consult a solicitor – 'one of the most important and fundamental rights of a citizen' (Hodgson J in *R v Samuel* [1988] QB 615, 630) and a common law right as well as being protected by section 58(1) of the Police and Criminal Evidence Act 1984 (*R v Chief Constable of South Wales, ex p Merrick* [1994] 1 WLR 663). To these we may add the privilege against self-incrimination, 'deep rooted in English law' (Lord Griffiths in *Lam Chi-ming v R* [1991] 2 AC 212, 222), although 'statutory interference with the right is almost as old as the right itself' (Lord Mustill in *R v Director of Serious Fraud Office, ex p Smith* [1993] AC 1, 40, and see the Criminal Justice and Public Order Act 1994, sections 34–39 and also *Saunders v United Kingdom* (1996) 23 EHRR 313). We have already met with 'the two fundamental rights accorded . . . by the rules of natural justice or fairness': the right to a hearing and to absence of personal bias in decisions affecting an individual's legal rights (*O'Reilly v Mackman* [1983] 2 AC 237, 279): see chapter 10. (See also the case law concerning the use that

domestic courts could make before the enactment of the Human Rights Act of the terms of the European Convention on Human Rights: chapter 5 (above, pp 270–1)).

A v Secretary of State for the Home Department (No 2) [2005] UKHL 71, [2006] 2 AC 221, represents something of both the strengths and the limitations of the common law's protection of liberty. In a resounding judgment a panel of seven Law Lords unanimously ruled that, in Lord Bingham's words (at [52]), 'The principles of the common law . . . compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice'. Their Lordships were not, however, prepared to rule that the Secretary of State, the security services or the police would be acting unlawfully if they acted on information derived from torture in another country – if, for example, an individual was arrested and detained in the United Kingdom as a result of information extracted by torture in another jurisdiction, that would not necessarily be unlawful. The value of their Lordships' principal ruling, on the exclusion of third party torture evidence, was substantially undermined by the standard of proof a majority of the Law Lords thought appropriate. The majority (Lords Hope, Rodger, Carswell and Brown) ruled that such evidence should be excluded only if it is established, on a balance of probabilities, that it was obtained by torture. The judges in the minority were scathing about this aspect of the ruling: Lord Bingham described it (at [59]) as 'a test which, in the real world, can never be satisfied' and Lord Nicholls stated that (at [80]) it will, in practice, 'largely nullify the principle . . . that courts will not admit evidence procured by torture'. His Lordship went on to say, bluntly, that 'That would be to pay lip-service to the principle' and that 'That is not good enough'. The judges in the minority (Lords Bingham, Nicholls and Hoffmann) would have preferred a standard of proof whereby once a party to proceedings had plausibly shown that evidence may have been procured by torture, such evidence should not be admitted unless and until the court or tribunal had inquired into the matter and had positively satisfied itself that it had not been so obtained.

As the *A* case suggests, we must not exaggerate the achievement of the courts in the defence of constitutional rights. Judicial vindication of individual rights has not been consistently evident, for example, in cases concerning immigrants or refugees (see eg, *R v Secretary of State for the Home Department, ex p Swati* [1986] 1 WLR 477; *Rajput v Immigration Appeal Tribunal* [1989] Imm AR 350; *R v Secretary of State for the Home Department, ex p Abdi* [1996] 1 WLR 298) and has very frequently faltered when countered by pleas of 'national security' (see below). Judicial decisions have sometimes drastically curtailed or diluted the rights of the individual against the state: see eg, *Duncan v Jones* [1936] 1 KB 218 (below, p 801, freedom of expression and police powers) and *Liversidge v Anderson* [1942] AC 206 (below, p 757, personal freedom and executive discretion). Judges, as JAG Griffith remarks, 'are concerned to preserve and to

protect the existing order' and he cautions us against looking to them as 'the strong, natural defenders of liberty' (*The Politics of the Judiciary* (5th edn 1997), p 342). Griffith continues:

> In the societies of our world today judges do not stand out as protectors of liberty, of the rights of man, of the unprivileged, nor have they insisted that holders of great economic power, private or public, should use it with moderation. Their view of the public interest, when it has gone beyond the interest of governments, has not been wide enough to embrace the interests of political, ethnic, social or other minorities. Only occasionally has the power of the supreme judiciary been exercised in the positive assertion of fundamental values. In both democratic and totalitarian societies, the judiciary has naturally served the prevailing political and economic forces.

If we take this view of the judiciary as being closely identified with the governing élite in society, and as disposed to support established interests, we will not have confidence in the courts as resolute protectors of individual rights. Yet Griffith acknowledges that the judges have played a part in sustaining liberty and the rule of law (pp 337–39), while warning that we must not expect too much of them. Other writers are more optimistic in looking to the common law, shaped by the judges, for the elaboration and defence of constitutional rights. (See eg, TRS Allan, *Law, Liberty, and Justice* (1993), ch 6 and Sir John Laws, 'Is the High Court the guardian of fundamental constitutional rights?' [1993] *PL* 59. For a critical overview of this position, see A Tomkins, *Our Republican Constitution* (2005), ch 1.)

(b) Statute

The single most important statute concerning liberty in Britain is now the Human Rights Act 1998, which we consider in detail in section 2 of this chapter. It should not be thought, however, that the Human Rights Act is the only statute relevant to the topic of liberty. The extension of the franchise is a matter governed by statute: Acts for this purpose were passed in 1832, 1867, 1884, 1918 and 1928: see now the Representation of the People Act 1983. Rights to freedom of information and to data protection are likewise governed by statute (see eg, the Freedom of Information Act 2000, the Freedom of Information (Scotland) Act 2002 and the Data Protection Act 1998). A range of important statutes prohibits various forms of discrimination. Parliament first legislated in the field of race relations in the mid-1960s (see the Race Relations Acts of 1965 and 1968) and in the field of sex discrimination in the early 1970s (see the Equal Pay Act 1970 and the Sex Discrimination Act 1975, which remains in force). Current legislation on non-discrimination additionally includes the Race Relations Act 1976, the Race Relations (Amendment) Act 2000 and the Disability Discrimination Acts 1995 and 2005. Much of this legislation will be amended, once it comes fully into force, by the Equality Act 2006. Among other matters

the 2006 Act establishes a new Commission for Equality and Human Rights and extends prohibitions of discrimination on grounds of religion and sexual orientation.

In addition, specific provisions in numerous other Acts have conferred or confirmed important rights: for instance, the Police and Criminal Evidence Act 1984, section 28, provides that an arrest is not lawful unless the person arrested is informed that he is under arrest and of the ground for the arrest. (A like requirement previously existed at common law: *Christie v Leachinsky* [1947] AC 573.)

While statute is a source of protection of liberty in numerous instances, it may also be a threat to liberty. The Police and Criminal Evidence Act 1984 extended the powers of the police as regards stop and search, arrest, detention and search and seizure. The Public Order Act 1986 extended the powers of the police to regulate protest (see further below, pp 811–18). The Official Secrets Act 1989 made inroads into the extent to which the right to freedom of expression could be enjoyed (see further below, p 786). The Criminal Justice and Public Order Act 1994, the Crime and Disorder Act 1998, the Regulation of Investigatory Powers Act 2000, the Civil Contingencies Act 2004 and the Serious Organised Crime and Police Act 2005, as well as numerous other statutes, have each had a substantial impact on various civil liberties and human rights. On top of all of this, of course, is the considerable range of counter-terrorism legislation that has been passed in recent years (on which, see below).

(c) Statutory interpretation

The common law provides no defensive shield for fundamental rights against the unequivocal provision of statute (compare sections 3 and 4 of the Human Rights Act 1998, considered in chapter 2 (above, pp 62–6)). Indeed, the courts have given effect to the proscriptions of statute even when these were not expressly stated but appeared more or less unambiguously from the scheme and purpose of the Act (see eg, *Re London United Investments plc* [1992] Ch 578: privilege against self-incrimination held to have been impliedly displaced by statute). On the other hand, the judges have held it to be consistent with a proper respect for statute to apply certain presumptions of parliamentary intent in the interpretation of statutes when the statutory language is unclear or ambiguous or leaves the matter in question undetermined. These presumptions give effect to a principle that rights and liberties recognised by the common law (as the judges have developed it) are not to be overridden as a by-product of statutory language which is not clearly directed to bringing about that result. Parliament, it is supposed, must have intended to leave such rights and liberties intact unless a contrary intention is clearly expressed or is a *necessary* (not merely a 'possible' or 'reasonable') implication of the terms of the statute. Likewise, as Purchas LJ observed in *Hill v Chief Constable of South Yorkshire* [1990] 1 WLR 946, 952, a statute which gives rights to interfere with the liberty

of the citizen 'ought to be construed strictly against those purporting to exercise those rights'. See now on this matter the dictum of Lord Hoffmann in *ex p Simms* (above).

This judicial tendency was formerly most evident in that 'particular vigilance' in which lawyers were trained in the field of the protection of property rights (Lord Radcliffe in *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75, 118): see, for example, *Central Control Board v Cannon Brewery Co Ltd* [1919] AC 744, 752. But the courts have also been able to protect, against indirect or accidental displacement by statute, such rights as personal liberty, freedom of movement, access to the courts, the right to communicate confidentially with a legal adviser under legal professional privilege, and the right not to be punished for an act which was not an offence at the time it was done. (See *DPP v Bhagwan* [1972] AC 60 (right of British subject to enter United Kingdom); *Waddington v Miah* [1974] 1 WLR 683 (non-liability to retrospective penalty); *R v Hallstrom, ex p W* [1986] QB 1090 (liberty of the subject); *R (Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 (legal professional privilege).)

Here as elsewhere, however, the judicial record has not been consistent, for the courts have on occasion strained the language of statute in favour of the power-wielding authority and so as to restrict the individual's zone of freedom. Two recent examples stand out: *R v Z* [2005] UKHL 35, [2005] 2 AC 645 and *R (Haw) v Secretary of State for the Home Department* [2006] EWCA Civ 532, [2006] 3 WLR 40.

R v Z [2005] UKHL 35, [2005] 2 AC 645

Section 3 of the Terrorism Act 2000 provides that 'an organisation is proscribed if (a) it is listed in Schedule 2 to the Act or (b) it operates under the same name as an organisation listed in that Schedule'. The consequences of proscription could hardly be more serious: section 11 of the Act makes it a criminal offence, punishable by up to ten years' imprisonment, to belong or even to profess to belong to a proscribed organisation. A number of defendants were charged with being members of the Real Irish Republican Army ('Real IRA'), contrary to section 11. They argued in their defence that the Real IRA was not proscribed, as it was not listed in Schedule 2 to the Terrorism Act. Whereas the 'Irish Republican Army' (IRA) was proscribed, as was the 'Continuity Army Council', the Real IRA was not. The trial judge accepted the defence and acquitted the defendants on that ground. The Attorney General for Northern Ireland referred the matter to the Court of Appeal of Northern Ireland, which ruled, contrary to the trial judge, that a person does commit an offence under section 11 if he or she belongs, or professes to belong, to the Real IRA. On appeal to the House of Lords their Lordships unanimously agreed with the Court of Appeal. The House of Lords noted that the Real IRA was distinguished from other

organisations in other contexts: the Northern Ireland (Sentences) Act 1998 provides for the accelerated release of certain prisoners convicted of terrorist offences, but not if the prisoners are supporters of a specified organisation. Four such organisations have been specified by the Secretary of State: the Continuity IRA, the Real IRA, the Irish National Liberation Army and the Loyalist Volunteer Force. In this context, care has been taken to distinguish the IRA from the Continuity IRA and from the Real IRA, both of which have been recognised as different for these purposes from the IRA itself. Nonetheless, the House ruled that in the context of the Terrorism Act 2000 the inclusion on the list of proscribed organisations of the IRA was to be read as including the Real IRA. Counsel for the defendants conceded that the Real IRA is a terrorist organisation deserving of proscription but he insisted that the task of the courts is to interpret the provision that Parliament has actually enacted and not (in the words of Lord Bingham at [16]) 'to give effect to an inferred intention of Parliament not fairly to be derived from the language of the statute'. Lord Carswell defended the decision of the House of Lords by referring (at [49]) to the 'mischief' rule of interpretation: namely, that the courts will have regard not only to the language of the statute, but also to the mischief which the statute was intended to remedy. Parliament had intended that the Real IRA be proscribed, even if it had not stated so expressly, and the Act should be interpreted accordingly. Is such a method of interpretation appropriate in the criminal context or, indeed, when fundamental rights such as the right to liberty and to security of the person are at stake?

R (Haw) v Secretary of State for the Home Department [2006] EWCA Civ 532, [2006] 3 WLR 40

Brian Haw had been conducting a demonstration in Parliament Square in Westminster since 2001. Living on the pavement and displaying a large number of placards he had been demonstrating, first, about sanctions against Iraq and, more recently, about the British Government's policy in Iraq. In 2002 Westminster City Council sought an injunction requiring Mr Haw to move his placards on the basis that they were an obstruction to the highway (see further on this aspect of the right to protest below, p 814). The application for an injunction failed: the court held that Mr Haw's demonstration neither caused an obstruction to the highway nor gave rise to any fear that a breach of the peace might arise. The court held, on these grounds, that the demonstration was lawful: see *Westminster County Council v Haw* (2002) 146 SJLB 221.

In 2005 Parliament passed the Serious Organised Crime and Police Act. Sections 132–38 of that Act seek to give to the Metropolitan Police a significant measure of control over demonstrations which take place within a designated area in the vicinity of Parliament. The Act does not forbid such demonstrations

but, by section 133(1), it requires any person who intends to organise a demonstration in the area to apply to the police for authorisation to do so. Under section 132(1):

> Any person who (a) organises a demonstration in a public place in the designated area, or (b) takes part in a demonstration in a public place in the designated area, or (c) carries on a demonstration by himself in a public place in the designated area, is guilty of an offence if, when the demonstration starts, authorisation for the demonstration has not been given.

Under section 132(6), 'section 14 of the Public Order Act 1986 (imposition of conditions on public assemblies) does not apply in relation to a public assembly which is also a demonstration in a public place in the designated area'.

Shortly after the Act came into force Mr Haw sought a declaration that the regime in sections 132–8 of the Act did not apply to him, on the basis that his demonstration did not 'start' (within the meaning of section 132(1)) while the 2005 Act was in force. On the contrary, his demonstration had started several years previously and was continuing when the 2005 Act came into force. The Divisional Court, by a majority, agreed that the Act did not apply to Mr Haw's demonstration (see [2006] QB 359). The Secretary of State appealed to the Court of Appeal, which allowed the appeal. The judgment of the Court of Appeal was handed down by the Master of the Rolls:

> **Sir Anthony Clarke, MR:** . . . The claimant's case is that on its true construction the Act does not, as enacted, apply to his demonstration because his demonstration started before the Act came into force . . .
>
> The question is one of construction of the Act. Like all questions of construction, this question must be answered by considering the statutory language in its context, which of course includes the purpose of the Act. The search is for the meaning intended by Parliament. The language used by Parliament is of central importance but that does not mean that it must always be construed literally. The meaning of language always depends upon its particular context . . .
>
> There is undoubted force in the reasoning of the majority [of the Divisional Court] because of the express reference to the start of the demonstration in sections 132(1) and 133(2) and (4) and because of the contrast between the demonstration starting and being carried on. On the other hand, it is, to put it no higher, a puzzle as to why Parliament should have wished to control demonstrations which started after the relevant commencement date but not demonstrations which started before . . .
>
> We have reached the conclusion that the Parliamentary intention was clear. It was to regulate all demonstrations within the designated area, whenever they began. In reaching this conclusion we have been much influenced by a point which was not put to the Divisional Court . . . It depends upon section 132(6) of the Act and upon the terms of section 14 of the Public Order Act 1986 ('the 1986 Act').

> By section 132(6) . . . section 14 of the 1986 Act does not apply to a public assembly 'which is also a demonstration in a public place in the designated area'. There is no doubt that the respondent's demonstration is such a demonstration and it is not suggested otherwise. In the context of the argument in this appeal, the critical point is that the disapplication of section 14 of the 1986 Act is not limited to demonstrations which started after the commencement or coming into force of the Act but applies to all demonstrations, whether they started before or after the commencement or coming into force of the Act . . .
>
> Section 14 of the 1986 Act is the section which gives the police power to impose conditions in relation to demonstrations generally, provided that they consist of two or more people. The purpose of section 132(6) of the Act was to replace section 14 of the 1986 Act with the provisions of sections 132 to 138 of the Act in the case of demonstrations in the designated area, whenever they started. It is, in our judgment, inconceivable that Parliament would have repealed section 14 with respect to demonstrations which had already started, if it did not intend to apply the provisions of sections 132 to 138 of the Act to such demonstrations.
>
> We have considered whether such a construction is impermissible having regard to the principle of doubtful penality . . . We entirely accept the general principle stated by Simon Brown LJ in *R v Bristol Magistrates Court ex parte E* [1999] 1 WLR 390, 397 . . . that a person should not be penalised except under clear law. Equally we are mindful of the importance of the liberty of the individual. However, whether or not there is 'clear law' depends in this context upon the true construction of the relevant statute. We have reached the conclusion that in the case of the Act, once the intention of Parliament is ascertained from the language used, construed in its context, there is in the relevant sense clear law.

Is this judgment consistent with the principle enunciated by Purchas LJ in *Hill v Chief Constable of South Yorkshire* (above), that a statute interfering with the liberty of the citizen 'ought to be construed strictly'?

(d) Delegated legislation

The courts do not owe to the subordinate legislation of governmental bodies the deference shown to Acts of Parliament. A power of legislation delegated by Parliament to the executive is taken as not extending to the violation of fundamental rights unless Parliament has clearly provided otherwise. A court will accordingly hold subordinate legislation invalid if, without such parliamentary authorisation, its provisions infringe a fundamental or 'constitutional' right.

R v Lord Chancellor, ex p Witham [1998] QB 575 (DC)

Acting under section 130 of the Supreme Court Act 1981, the Lord Chancellor made the Supreme Court Fees (Amendment) Order 1996, S1 1996/3191. Article 3 of the order repealed provisions in a previous order which had

relieved litigants in person who were in receipt of income support from the obligation to pay the fees prescribed for issuing a writ. The applicant for judicial review, who was in receipt of income support, wished to bring proceedings for malicious falsehood and libel. Legal aid not being available for such proceedings, he proposed to sue as a litigant in person; but since he could not afford to pay the court fee, was unable to proceed with his claim. Other persons on very low income would similarly be prevented, in consequence of article 3, from taking certain categories of proceedings in the courts. The court found that the effect of the order was 'to bar absolutely many persons from seeking justice from the courts'.

Laws J: . . . The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law affords to it. Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. . . .

In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose *vires* in main legislation specifically confers the power to abrogate. General words will not suffice. . . . [His Lordship noted that section 130 of the Supreme Court Act 1981 made no specific reference to the position where a person is prevented from access to the court because unable to pay the fee prescribed by order.]

It seems to me, from all the authorities to which I have referred [inter alia, *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198], that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right. . . . [His Lordship said that Parliament might give such permission in express terms, then questioned whether it might also be done by necessary implication, and continued:] [F]or my part I find great difficulty in conceiving a form of words capable of making it plain beyond doubt to the statute's reader that the provision in question prevents him from going to court (for that is what would be required), save in a case where that is expressly stated. The class of cases where it could be done by necessary implication is, I venture to think, a class with no members.

. . . [Counsel for the Lord Chancellor] says that the statute's words are unambiguous [and] are amply wide enough to allow what has been done. . . . That submission would be good

> in a context which does not touch fundamental constitutional rights. But I do not think that it can run here. Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door. That has not been done in this case.

In a brief concurring judgment Rose LJ said:

> There is nothing in the section or elsewhere to suggest that Parliament contemplated, still less conferred, a power for the Lord Chancellor to prescribe fees so as totally to preclude the poor from access to the courts. Clear legislation would in my view be necessary to confer such a power and there is none.

The court accordingly granted a declaration that article 3 of the 1996 Order was unlawful. The Lord Chancellor subsequently made orders which restored the previous exemption provisions.

In insisting that the 'constitutional right' of access to the courts could be overridden only by specific provision (or 'express words') in an Act of Parliament, Laws J perhaps went too far. Subsequently in *R v Lord Chancellor, ex p Lightfoot* [2000] QB 597, 627–8 Simon Brown LJ said that even in the absence of express words to that effect, a constitutional right might be abrogated 'by irresistible inference from the statute read as a whole'. As we have seen, this view was confirmed by the House of Lords in *ex p Simms* (above).

2 Liberty and the Human Rights Act 1998

The general scheme of the Human Rights Act 1998 (HRA) was outlined in chapter 5 (see above, pp 271–8). In addition, the impact of the Act on the sovereignty of Parliament was considered in chapter 2 (above, pp 62–6) and its impact on domestic judicial review law was examined in chapter 10 (above, pp 672–82). What we are concerned with in this section, which should be read in the light of what was said in these previous chapters (and especially in chapter 5), is the Act's impact on the protection of liberty under the British constitution. It may be said that the enactment of the Human Rights Act confirmed a transformation, which, as we have seen, was already beginning to take place in the common law, from individual liberties to positive rights. As Sedley LJ observed in *Redmond-Bate v DPP* [2000] HRLR 249, 257, the Act has brought about (or has reinforced) a 'constitutional shift' away from the conception of rights as mere residual liberties:

> A liberty, as AP Herbert repeatedly pointed out, is only as real as the laws and bylaws which negate or limit it. A right, by contrast, can be asserted in the face of such restrictions and must be respected, subject to lawful and proper reservations, by the courts.

(a) The Convention rights

Before we go any further we need to set out the terms of the Convention rights that are incorporated into domestic law under section 1 of the HRA. These are set out in Schedule 1 to the Act, as follows:

Human Rights Act 1998, Schedule 1

Article 2: Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

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

Article 3: Prohibition of torture

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

Article 4: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term 'forced or compulsory labour' shall not include:

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

Article 5: Right to liberty and security

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

   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

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

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

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

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

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

Article 6: Right to a fair trial

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

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

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

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7: No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8: Right to respect for private and family life

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

Article 9: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10: Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of

health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11: Freedom of assembly and association

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

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

Article 12: Right to marry and found a family

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

Article 14: Prohibition on discrimination

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

Article 1 of the First Protocol: Protection of property

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

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

Article 2 of the First Protocol: Right to education

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

Article 3 of the First Protocol: Right to free elections

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

Article 1 of the Thirteenth Protocol: Abolition of the death penalty

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

Three sets of observations may be made about these Convention rights: first, we note the differences between absolute and qualified rights; secondly, we consider the extent to which the Convention rights impose positive obligations; and thirdly we examine the scope of the protection afforded under the Human Rights Act.

(i) Absolute and qualified rights

The Convention rights set out in Schedule 1 to the Human Rights Act replicate the corresponding Articles of the European Convention in their full extent, including the exceptions and qualifications that are expressed in a number of those Articles. Some of the Convention rights may be described as absolute, in the sense that they may not in any circumstances be overridden or abridged by the authorities of the state. Among these rights are Article 2, the right to life; Article 3, the right not to be subjected to torture or to inhuman or degrading treatment or punishment; Article 4(1), the right not to be held in slavery or servitude; Article 5(1), the right to liberty and security of person; and Article 7, the right not to be convicted or punished under retroactive criminal law. That said, however, account must always be taken of the terms in which the right is formulated in the Article that confers it and, in particular, of any specified limits of the right, in order to discover its dimensions or scope. For instance, Article 5(1) allows the detention of persons – in accordance with procedures prescribed by law – on six specified grounds. Note also the terms of Articles 2(2) and 7(2). Within their defined limits, however, such rights may be absolutely protected from restriction.

Article 6, the right to a fair trial, encompasses a number of ancillary rights such as the right to a public hearing and the presumption of innocence in criminal proceedings. While the fundamental right to a fair trial is absolute, the several constituent rights in Article 6 are not, and may have to be balanced against wider interests of the community. (See *Brown v Stott* [2003] 1 AC 681, 704, 708, 719, 728.)

Even if a Convention right is expressed in unqualified terms there is a role for the courts in determining its scope. In respect of Article 3, for instance, it will be for the court to determine whether ill-treatment of an individual attributable to a public authority is of such severity as to be 'inhuman or degrading' (see eg, *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2004] QB 36, and see further below).

Where *positive* obligations arise by implication from Convention Articles (on which see below), these are not absolute: they are to be 'interpreted in a way which does not impose an impossible or disproportionate burden on

the authorities': *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800.

Some Convention rights are not absolute but 'qualified', in that they may be restricted by the state on specified grounds. Particular notice should be taken of the qualifications expressed in the second paragraphs of Articles 8 to 11. These paragraphs allow the exercise of the respective rights and freedoms to be restricted by authorities of the state if three conditions are met: namely, if the restriction is prescribed by law; if it is 'necessary in a democratic society'; and if it serves a certain, prescribed aim or objective, as listed in the respective Article. (On the meaning of the phrase 'necessary in a democratic society' and on its connection to notions of proportionality, see chapter 10.) Each of the paragraphs in question admits, as grounds for restriction of the respective rights, the interest of public safety and the need to protect health or morals or the rights and freedoms of other persons. National security and the prevention of disorder or crime appear among additional grounds of limitation in Articles 8, 10 and 11 (but not in Article 9), while other grounds are specific to a single Article: for instance, Article 11(2) allows the exercise of the right to freedom of assembly and association by members of the armed forces, the police or public servants to be restricted by law. The structure of Articles 8 to 11 reflects the aim of the Convention to strike a just balance between the general interests of a democratic society and the fundamental rights of the individual, but with a particular emphasis upon the latter. (See the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252; *Klass v Germany* (1978) 2 EHRR 214, 237.) Permitted restrictions of Convention rights are to be narrowly interpreted: *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 65.

In *Sporrong v Sweden* (1982) 5 EHRR 35, para 69, the European Court said that the search for a fair balance between the demands of the general interest of the community and the individual's fundamental rights 'is inherent in the whole of the Convention'. Accordingly the above requirements are applicable not only in respect of Articles 8 to 11 but whenever a restriction of a Convention right is sought to be justified. See further *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] UKHRR 1150, [26]–[28], and consider Leigh [2002] *PL* 265.

(ii) Positive and negative obligations

The Human Rights Act makes it unlawful for a public authority in the United Kingdom to act in a way which is incompatible with a Convention right and 'act', for this purpose, includes a failure to act (HRA, s 6(1), (6)). This plainly means that a public authority is under a (negative) obligation not itself to infringe the right, but it may also be bound by a positive duty to take appropriate action to ensure that the Convention right is protected from violation, whether by the authority's own agents or by others. Article 14, for instance, provides explicitly that the right not to suffer discrimination (in the enjoyment of Convention rights) is to be 'secured'. More generally, the authorities may be

obliged to provide 'a regulatory framework of adjudicatory and enforcement machinery in order to protect the rights of the individual' (Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] Fam 430, [25]). Domestic courts, following decisions of the European Court of Human Rights, have identified a positive duty arising from Article 2 (the right to life), expressed in *Osman v United Kingdom* (1998) 29 EHRR 245, para 115, as a duty 'not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within [the state's] jurisdiction'. This duty may oblige the authorities to put in place measures to counter threatened criminal acts that put life at risk: see eg, *Venables v News Group Newspapers Ltd* above; *R (A) v Lord Saville of Newdigate* [2001] EWCA Civ 2048, [2002] 1 WLR 1249. Article 2 may also give rise to a 'procedural obligation' to conduct an effective investigation in a case in which death has resulted from neglect, negligence or the use of force in which agents of the state are alleged to have been involved: see eg, *Jordan v United Kingdom* (2003) 37 EHRR 52; *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653; *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 AC 182.

The extent to which Article 3 (the prohibition on torture, degrading and inhuman treatment) imposes positive obligations was explored by the House of Lords in the following case.

R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66, [2006] 1 AC 396

Section 95 of the Immigration and Asylum Act 1999 provides that the Secretary of State may arrange for the provision of a range of support services for asylum-seekers 'who appear to the Secretary of State to be destitute or to be likely to become destitute' within a certain period of time. Section 55 of the Nationality, Immigration and Asylum Act 2002 provides, by way of exception, that the Secretary of State may refuse support services to asylum-seekers whose claims for asylum were not made as soon as reasonably practicable after the person's arrival in the United Kingdom. (In practice this provision has restricted benefits and support services to those asylum-seekers who claimed asylum only at the port of entry: a claim made at any point after the person had passed the point of immigration control was likely to be regarded as having been made too late, unless there were special circumstances: see the opinion of Lord Hope at [39].) Section 55(5)(a) of the 2002 Act provides that 'This section shall not prevent the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights'. This provision needs to be read together with section 6(1) of the HRA, which provides that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

Mr Limbuela, a national of Angola, maintained that he arrived in the United Kingdom at an unknown airport accompanied by an agent and that on

the same day he claimed asylum at the Asylum Screening Unit at Croydon. He was provided with emergency accommodation but it was subsequently decided that he had not claimed asylum as soon as reasonably practicable and he was evicted from his accommodation. He spent two nights sleeping rough, during which time he had no money and no access to food or to washing facilities. After being advised to contact a solicitor he obtained interim relief and permission to seek judicial review. He argued that his treatment violated his rights under Article 3 (in that he was subjected to inhuman or degrading treatment). The leading speech in a unanimous House of Lords was delivered by Lord Hope.

Lord Hope: . . . [A]rticle 3 may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. The prohibition is in one sense negative in its effect, as it requires the state – or, in the domestic context, the public authority – to refrain from treatment of the kind it describes. But it may also require the state or the public authority to do something to prevent its deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article . . .

But the European Court has all along recognised that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression 'inhuman or degrading treatment or punishment': *Ireland v United Kingdom* (1978) 2 EHRR 25, 80, para 167; *A v United Kingdom* (1998) 27 EHRR 611, 629, para 20; *V v United Kingdom* (1999) 30 EHRR 121, para 71. In *Pretty v United Kingdom* 35 EHRR 1, 33, para 52, the court said:

> 'As regards the types of "treatment" which fall within the scope of article 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'

It has also said that the assessment of this minimum is relative, as it depends on all the circumstances of the case such as the nature and context of the treatment or punishment that is in issue. The fact is that it is impossible by a simple definition to embrace all human conditions that will engage article 3 . . .

The first question that needs to be addressed is whether the case engages the express prohibition in article 3. It seems to me that there can only be one answer to this question if the case is one where the Secretary of State has withdrawn support from an asylum-seeker under section 55(1) of the 2002 Act. The decision to withdraw support from someone who would otherwise qualify for support under section 95 of the 1999 Act because he is or is

likely to become, within the meaning of that section, destitute is an intentionally inflicted act for which the Secretary of State is directly responsible. He is directly responsible also for all the consequences that flow from it, bearing in mind the nature of the regime which removes from asylum-seekers the ability to fend for themselves by earning money while they remain in that category. They cannot seek employment for at least 12 months, and resort to self-employment too is prohibited. As the Court of Appeal said in *R (Q) v Secretary of State for the Home Department* [2004] QB 36, 69, para 57, the imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction. This constitutes 'treatment' within the meaning of the article . . .

It is possible to derive from the cases which are before us some idea of the various factors that will come into play in this assessment: whether the asylum-seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant . . .

It was submitted for the Secretary of State that rough sleeping of itself could not take a case over the threshold. This submission was based on the decision in *O'Rourke v United Kingdom*, (Application No 39022/97) (unreported) 26 June 2001. In that case the applicant's complaint that his eviction from local authority accommodation in consequence of which he was forced to sleep rough on the streets was a breach of article 3 was held to be inadmissible. The court said that it did not consider that the applicant's suffering following his eviction attained the requisite level to engage article 3, and that even if it had done so the applicant, who was unwilling to accept temporary accommodation and had refused two specific offers of permanent accommodation in the meantime, was largely responsible for the deterioration in his health following his eviction. As Jacob LJ said in the Court of Appeal [2004] QB 1440, 1491, para 145, however, the situation in that case is miles way from that which confronts section 55 asylum-seekers who are not only forced to sleep rough but are not allowed to work to earn money and have no access to financial support by the state. The rough sleeping which they are forced to endure cannot be detached from the degradation and humiliation that results from the circumstances that give rise to it.

As for the final question, the wording of section 55(5)(a) shows that its purpose is to prevent a breach from taking place, not to wait until there is a breach and then address its consequences. A difference of view has been expressed as to whether the responsibility of the state is simply to wait and see what will happen until the threshold is crossed or whether it must take preventative action before that stage is reached. In *R (Q) v Secretary of State for the Home Department* [2004] QB 36 the court said that the fact that there was a real risk that the asylum-seeker would be reduced to the necessary state of degradation did not of

itself engage article 3, as section 55(1) required the Secretary of State to decline to provide support unless and until it was clear that charitable support had not been provided and the individual was incapable of fending for himself: p 70, para 63. But it would be necessary for the Secretary of State to provide benefit where the asylum-seeker was so patently vulnerable that to refuse support carried a high risk of an almost immediate breach of article 3: p 71, para 68. In *R (Zardasht) v Secretary of State for the Home Department* [2004] EWHC 91 (Admin) Newman J asked himself whether the evidence showed that the threshold of severity had been reached. In *R (T) v Secretary of State for the Home Department* 7 CCLR 53 the test which was applied both by Maurice Kay J in the Administrative Court and by the Court of Appeal was whether T's condition had reached or was verging on the degree of severity described in *Pretty v United Kingdom* 35 EHRR 1.

The best guide to the test that is to be applied is, as I have said, to be found in the use of the word 'avoiding' in section 55(5)(a). It may be, of course, that the degree of severity which amounts to a breach of article 3 has already been reached by the time the condition of the asylum-seeker has been drawn to his attention. But it is not necessary for the condition to have reached that stage before the power in section 55(5)(a) is capable of being exercised. It is not just a question of 'wait and see'. The power has been given to enable the Secretary of State to avoid the breach. A state of destitution that qualifies the asylum-seeker for support under section 95 of the 1999 Act will not be enough. But as soon as the asylum-seeker makes it clear that there is an imminent prospect that a breach of the article will occur because the conditions which he or she is having to endure are on the verge of reaching the necessary degree of severity the Secretary of State has the power under section 55(5)(a), and the duty under section 6(1) of the Human Rights Act 1998, to act to avoid it.

Professor Sandra Fredman has written of this case that it shows how in a human rights framework positive duties play a 'pivotal role'. 'The House of Lords in *Limbuela*,' she adds, 'has articulated a basic value of our unwritten constitution, namely that the state is responsible for preventing destitution which arises as a consequence of the statutory regime' (see Fredman, 'Human rights transformed: positive duties and positive rights' [2006] *PL* 498, 519–20).

That there are limits, however, to the extent to which the courts will rule that Convention rights impose positive obligations on the state is illustrated by the tragic case of *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296. N, born in Uganda, sought asylum in the United Kingdom. Her claim was refused and the Secretary of State proposed to deport her. She suffered from advanced HIV/AIDS. With medical treatment her condition had stabilised such that, if the treatment continued, she could live for decades. Without continuing treatment (principally medication), however, her prognosis was 'appalling': as Lord Nicholls reported it (at [3]), 'she will suffer ill-health, discomfort, pain and death within a year or two'. As Lord Nicholls went on to say (at [4]), 'The cruel reality is that if [N] returns to Uganda her ability to

obtain the necessary medication is problematic. So if she returns to Uganda and cannot obtain the medical assistance she needs to keep her illness under control, her condition will be similar to having a life-support machine switched off.' She argued that, in these circumstances, deporting her to Uganda would be incompatible with her rights under Article 3. The House of Lords unanimously rejected this argument. Lord Nicholls ruled (at [15]–[17]) that 'Article 3 does not require contracting states to undertake the obligation of providing aliens indefinitely with medical treatment lacking in their home countries . . . Article 3 cannot be interpreted as requiring contracting states to admit and treat AIDS sufferers from all over the world for the rest of their lives.' Were this an exceptional case, he suggested, 'the pressing humanitarian considerations of her case would prevail' (at [9]) but, alas, it was far from exceptional, the prevalence of AIDS worldwide, and particularly in southern Africa, being 'a present-day human tragedy on an immense scale' (at [9]).

(iii) Scope of protection

As we have seen, section 6(1) of the HRA provides that 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Section 6(1) does not apply (s 6(2)(a)) if the public authority was compelled to act as it did as a result of primary legislation or (s 6(2)(b)) if it acted so as to give effect to such legislation, *notwithstanding its incompatibility with Convention rights*. As we saw in chapter 2, incompatible primary legislation does not cease to be valid (ss 3(2)(c) and 4(6)).

The Act does not define a public authority or provide a list of persons or bodies that have this status. Rather it is left to the courts to determine whether any particular person or body qualifies as a public authority. It is plain that, for instance, ministers, government departments, local authorities, the Director of Public Prosecutions, the security services, and police, prison and immigration officers and such like are public authorities for the purposes of the Act and governmental bodies or these kinds have been characterised by writers and the courts as 'standard' or 'core' public authorities. In *Aston Cantlow Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, Lord Nicholls said that behind the 'instinctive classification' of such organisations 'as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution' (at [7], acknowledging the valuable article by Dawn Oliver, 'The frontiers of the state: public authorities and public functions under the Human Rights Act' [2000] *PL* 476). A body of this class, added Lord Nicholls, 'is required to act compatibly with Convention rights in everything it does'. Such a body is not itself capable of having Convention rights or of being the 'victim' of the breach of such a right.

Besides the core public authorities, other bodies are brought within the reach of section 6(1) by section 6(3):

> In this section 'public authority' includes:
>
> (a) a court or tribunal, and
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

Then it is provided in section 6(5):

> In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private.

Section 6(3)(b) and (5) were elucidated, in the course of proceedings on the Human Rights Bill, with the example of Railtrack (since dissolved), which had statutory public powers and functioned as a safety regulatory authority, but might also carry out private transactions, for instance in the acquisition or development of property (HL Deb vol 583, col 796, 24 November 1997). Some of the functions of such 'hybrid' or 'functional' public authorities are of a public nature but they may also engage in private activity and to that extent will fall outside section 6(1). Being non-governmental organisations they may, on the other hand, themselves enjoy Convention rights (see Article 34 of the European Convention on Human Rights and section 7(1), (7) of the HRA).

The question whether a body is a hybrid public authority in that certain of its functions are 'of a public nature' (s 6(3)(b)) is one of 'fact and degree' and the expression 'public function' is to be given a generous interpretation (*Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [65]–[66]; *Aston Cantlow Parochial Church Council v Wallbank*, above, at [11], [41]). 'Factors to be taken into account', said Lord Nicholls in the latter case (at [12]), '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'. The amenability of a body to judicial review (a question considered in chapter 10) may be a relevant factor but is not decisive. (For a critical analysis of the principles and their application in decided cases see the Joint Committee on Human Rights, *Seventh Report*, HL 39/HC 382 of 2003–04, concluding that courts have been too restrictive in deciding whether a function is 'public' in terms of section 6(3)(b), so opening a gap in the protection of Convention rights. See further Oliver, 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329; Sunkin, 'Pushing forward the frontiers of human rights protection' [2004] *PL* 643.)

While neither House of the United Kingdom Parliament is a public authority for the purposes of section 6 of the HRA (see s 6(3)), the Scottish Parliament and the Scottish Executive have no power to act incompatibly with the Convention

rights (Scotland Act 1998, ss 29(2)(d) and 57(2)). The devolved institutions in Wales and Northern Ireland are likewise core public authorities.

Section 7 of the Human Rights Act provides the avenues of redress for persons who claim that their Convention rights have been infringed by a public authority:

> 7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may:
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

The concept of a 'victim' is adopted from the European Convention (Article 34) and its jurisprudence: a person is a victim of an unlawful act for the purposes of section 7 only if he or she would have standing to bring proceedings in the European Court of Human Rights as a victim of an alleged violation of the Convention (s 7(7)). While a non-governmental organisation or a group or association of individuals may qualify as a victim, this will be so only if its own rights have been infringed by the unlawful act and it is not acting in the interest of its members or others who may be affected – unless persons whose rights have been infringed have specifically authorised it to act as their representative.

A victim need not have suffered actual detriment: a person who is a 'potential' victim as being at particular risk of a violation of his or her Convention right may have standing. For instance, a pupil at a school which practised corporal punishment could be a victim of inhuman treatment contrary to Article 3 of the Convention even though he had not as yet himself been punished in this way. (See *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293.)

In reliance on section 7 the victim of an alleged violation of a Convention right may, according to the circumstances, bring civil proceedings, or a claim for judicial review, or raise the question of violation by way of defence to civil or criminal proceedings brought by a public authority. It is provided by section 8 that a court or tribunal which finds the act of a public authority to be unlawful under section 6(1) may grant whatever relief or remedy within its powers that it considers 'just and appropriate', and in particular may award damages if satisfied that that is necessary, in all the circumstances of the case (including any other relief or remedy granted) 'to afford just satisfaction' to the victim. In deciding on damages the court must take into account the principles applied by the European Court of Human Rights in awarding compensation. It has been remarked that while remedies other than damages are fully available under the Act, 'damages are conceived of only as a subsidiary form of redress' (S Grosz, J Beatson and P Duffy, *Human Rights* (2000), para 6–19). The principles to be applied in the award of damages under section 8 are considered by Lord Millett

in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763 at [75]–[84] and, in relation to a violation of Article 6 (right to a fair trial), by Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 1 WLR 673 at [7]–[19]. See further Law Commission No 266, *Damages under the Human Rights Act 1998* (Cm 4853/2000) and Clayton [2005] *PL* 429.

The remedy for a party whose Convention rights are prejudiced in consequence of the decision of a court is by way of an appeal against the decision or, where appropriate, by a claim for judicial review (s 9(1)). In the particular event that the judicial act of a court or tribunal breaches the Convention right to liberty and security of person (Article 5 of the Convention), the victim of a resulting unlawful arrest or detention may recover damages from the Crown (s 9(3), (4)).

Section 11 of the Act provides that a person's reliance on a Convention right is not to restrict any other right or freedom that he may have under UK law.

Horizontal effect?

It is expressly provided that courts and tribunals are public authorities for the purposes of the Human Rights Act (s 6(3)(a)). Accordingly a court cannot lawfully give a judgment or make any order which is incompatible with Convention rights. It might seem to follow that the courts must, in any legal proceedings, protect the Convention rights of an individual party to the proceedings from infringement, whether by the action of a public authority or by that of a private person. In this respect the Convention rights would have a *horizontal* effectiveness in proceedings between private persons as well as being *vertically* effective against public authorities. The argument for horizontal effect also finds some support in the interpretative obligation, placed on the courts by section 3 of the Act, which is applicable to all legislation, even in cases involving private persons only (as in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, chapter 2).

The question of horizontality is strongly contested. See in particular Wade, 'Human rights and the judiciary' [1998] *EHRLR* 520; Hunt, 'The "horizontal effect" of the Human Rights Act' [1998] *PL* 423; Buxton, 'The Human Rights Act and private law' (2000) 116 *LQR* 48; Wade, 'Horizons of horizontality' (2000) 116 *LQR* 217; Bamforth, 'The true "horizontal effect" of the Human Rights Act 1998' (2001) 117 *LQR* 34.

The question was considered by the Court of Appeal in the initial (interlocutory) proceedings in *Douglas v Hello! Ltd* [2001] QB 967 in relation to the rights to respect for private life (Article 8) and freedom of expression (Article 10). Brooke LJ noted that while Article 8(1) appeared on its face to create a free-standing (horizontally effective) right, Article 8(2) and the general purport of the Human Rights Act seemed to contemplate that the right should be enforceable only against a public authority. This dilemma, he thought, might be resolved by taking account of the positive duty placed by the Convention

upon the contracting states to secure the Convention rights. This duty, founded on Article 1 of the Convention and reinforced by decisions of the European Court of Human Rights which our courts are obliged by section 2 of the HRA to take into account, might be thought to inhere not only in the legislature but in the courts themselves, when developing the common law. In this way, it might be concluded, the Convention rights are to be integrated with common law principles as these are developed by the courts. As regards freedom of expression, in particular, Sedley LJ found that its 'horizontal' applicability between private parties to litigation was confirmed by section 12 of the HRA, which is expressed as being applicable to any litigation in which relief is sought that might affect the exercise of this Convention right, and gives guidance (in section 12(4)) as to how conflicts between freedom of expression and privacy are to be resolved. (See on this case Moreham (2001) 64 *MLR* 767.)

In *Venables v News Group Newspapers Ltd* [2001] Fam 430, Dame Elizabeth Butler-Sloss P expressed the view (at [25]–[27], [111]), that while the courts have a positive obligation to protect the Convention rights of the individual, and must apply the Convention principles to existing causes of action in private law cases, that obligation 'does not . . . encompass the creation of a free-standing cause of action based directly upon the articles of the Convention'. This view is compelling and the courts have given an indirect effect to Convention rights in disputes between individuals only by 'absorbing' such rights into already existing causes of action. (See in this connection *A v B plc* [2002] EWCA Civ 337, [2003] QB 195, [4]; *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, [17]–[18], [50], [132]; note also the comment of Lord Nicholls in *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, [61].) In particular, the action for breach of confidence has been developed by the courts in such a way as to give effect to the Convention rights to personal privacy (Article 8) and freedom of expression (Article 10) (each of them having to be balanced against the other). The development was analysed and confirmed by the Court of Appeal in subsequent proceedings in *Douglas v Hello! Ltd* [2005] EWCA Civ 595, [2006] QB 125, [46]–[83].

(b) Convention rights and national security: a case study

Probably the greatest single challenge that the new regime of Convention rights has had to face thus far is that posed by the threat of terrorism and national and international security. The terrorist outrages of 11 September 2001, universally referred to as '9/11', in the United States and the wars and the accumulation of 'emergency powers' that have followed have generated a substantial volume of both legislation and case law in numerous jurisdictions, the United Kingdom included. The British Government's principal response to 9/11 was to introduce the legislation that (very quickly) became the Anti-terrorism, Crime and Security Act 2001. Bearing in mind that the United Kingdom already possessed one of the most comprehensive counter-terrorism statutes in Europe (the

Terrorism Act 2000, weighing in at 131 sections and 16 Schedules – a total of 155 pages), the 2001 Act, with its 129 sections and eight Schedules (coming to 118 pages) was a significant addition, to say the least. But it is not only a question of quantity. The range of powers contained in the 2001 Act is extraordinary: it includes provisions on terrorist property and freezing orders, on disclosure of information, on racial hatred and religiously aggravated offences, on weapons of mass destruction, on the security of pathogens and toxins, on security in the nuclear and aviation industries, on police powers of fingerprinting, personal search and seizure, on the retention of communications data, on bribery and corruption, and on the implementation of measures adopted under the third pillar of the European Union (Police and Judicial Cooperation in Criminal Matters), as well as other matters. Of these, the provisions with regard to the disclosure and retention of information were particularly controversial (see Tomkins [2002] *PL* 205, 209).

Most controversial of all the powers contained in the 2001 Act were the powers in Part IV of the Act regarding the indefinite detention without trial of persons suspected to be international terrorists – a form, for all the Government's protestations to the contrary, of internment. Certain aspects of these Part IV powers were found by the House of Lords to be unlawful (see *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, considered in detail below) and they have since been abolished and replaced with new powers to impose 'control orders': see the Prevention of Terrorism Act 2005 (see below). Remaining aspects of the Anti-terrorism, Crime and Security Act 2001, however, remain in force.

In 2006 Parliament added the Terrorism Act 2006 to its vast range of counter-terrorism measures. Among other matters this Act creates new criminal offences of encouraging or glorifying terrorism (s 1) and extends the maximum period for which persons arrested on suspicion of terrorist offences may be detained from seven to twenty-eight days (s 23). The police and the government had wanted the period of detention to be extended to ninety days but this policy was defeated in the House of Commons.

Laws such as these pose a great variety of challenges for the protection of Convention rights. Since the time of Thomas Hobbes, if not before, all governments have regarded their first responsibility to be to secure, as best they can, peace and order within the jurisdiction (see T Hobbes, *Leviathan* (1651), ch 17). If a government were to fail adequately to secure the realm against internal or external threats to national security, it would be unlikely to remain in office for long. In the face of what we are led to believe about the nature and range of current threats, such onerous responsibilities should be taken neither lightly nor for granted (see eg, the public statements made in November 2006 by the Director-General of the Security Service (MI5), Dame Eliza Manningham-Buller: see www.mi5.gov.uk/output/Page568.html). The problem, however, is that it is principally the Government that leads us to believe that the threats are severe, as it is the Government that has ownership of the country's secret

intelligence assessments. Suspicions are bound to arise that the Government is at least sometimes tempted to exaggerate the nature or the level of the threat so as to obtain greater powers for itself or so that it can argue that greater resources need to be devoted to seeking to counter the threat. The 'fiasco' (as Lord Hoffmann described it in *A v Home Secretary* (above, at [94]) over non-existent Iraqi weapons of mass destruction in the months leading up to the invasion of March 2003 has done nothing to alleviate such suspicions, of course. (See further the *Review of Intelligence on Weapons of Mass Destruction* (chaired by Lord Butler), HC 898 of 2003–04. On the struggle to subject the security and secret intelligence services to some form of parliamentary and legal accountability, see L Lustgarten and I Leigh, *In From the Cold: National Security and Parliamentary Democracy* (1994).)

Notwithstanding the undoubted importance of security, however, measures taken in its name clearly engage a number of Convention rights: the right to liberty (Article 5), the right to privacy (Article 8), freedom of expression (Article 10) and freedom of assembly (Article 11), among others, are each affected by the measures contained Britain's counter-terrorism legislation.

(i) National security before the Human Rights Act 1998

Part of the reason why this poses such a challenge to the regime of Convention rights is because courts in the United Kingdom have traditionally been notoriously weak in upholding civil liberties in the face of government claims to national security. This is a story that spans almost a century of case law, going all the way back to the First World War. An overview of six leading cases follows, by way of background to the case law that has developed, since 9/11, under the Human Rights Act.

R v Halliday, ex p Zadig [1917] AC 260. The Defence of the Realm Act 1914, section 1 conferred on the government the power 'during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm'. Regulation 14B of the Defence of the Realm (Consolidation) Regulations, made under the authority of section 1 of the 1914 Act, provided that 'where . . . it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereafter mentioned, the Secretary of State may by order require that person . . . to be interned in such place as may be specified'. The Secretary of State ordered the internment of Mr Arthur Zadig, apparently on the sole ground that Zadig had been born in Germany (he had lived in Britain for more than twenty years and had become naturalised in 1905). Zadig was charged with no criminal offence. He challenged the legality of his internment and of Regulation 14B on which it was based. Altogether thirteen judges heard Zadig's case: five in the Divisional Court, three in the Court of Appeal and five in the House of Lords. Of these, twelve held for the Government that both Zadig's internment and Regulation 14B were lawful. The

one dissentient was Lord Shaw in the House of Lords, whose opinion stands as one of the true (and rare) landmarks of the judicial protection of liberty in Britain in the face of claims to national security. In response to Zadig's various and detailed legal arguments the House of Lords was dismissive in the extreme. Lord Finlay LC ruled, for example, that 'It appears to me to be a sufficient answer' to his arguments 'that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council' (at 268). His internment was described as 'not punitive but precautionary' (at 269), and as 'expedient' in the 'interests of the nation' (at 270). Dissenting, Lord Shaw described Zadig's internment as 'a violent exercise of arbitrary power' (at 277). Noting that the Act of 1914 said nothing about persons of hostile origins and nothing about internment, his Lordship ruled that Regulation 14B could not be justified with reference to the Defence of the Realm Act and was ultra vires. (For commentary on the case, see Foxton, '*R v Halliday, ex p Zadig* in retrospect' (2003) 119 *LQR* 435 and K Ewing and C Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914–1945* (2000), ch 2.)

Liversidge v Anderson [1942] AC 206. In many ways this case is the Second World War equivalent of *ex p Zadig*. Like *Zadig*, it is concerned with internment and again like *Zadig, Liversidge v Anderson* saw a strongly worded lone dissent – this time from Lord Atkin (who was, as Atkin J, one of the twelve judges who ruled in the Government's favour in *ex p Zadig*). In the years that have passed since the Second World War it is Lord Atkin's dissent that has been championed. But this is unfair: of the two it is Lord Shaw's dissent in *ex p Zadig* that ought to be held up as the leading example of judicial liberalism in the face of government claims to national security (a point made strongly both by Foxton and by Ewing and Gearty, above). That said, the point made by Lord Atkin that the majority of their Lordships had shown themselves to be 'more executive minded than the executive' (at 244) is deservedly often repeated in commentaries on the case law considered here. There are a number of differences between *Zadig* and *Liversidge v Anderson*. In the latter case, the relevant statute, the Emergency Powers (Defence) Act 1939, section 1, expressly provided that regulations made by the Crown under that section could include regulations 'for the detention of persons whose detention appears to the Secretary of State to be expedient in the interests of the . . . defence of the realm' (s 1(2)). The relevant Regulation was Regulation 18B of the Defence (General) Regulations 1939, which provided that 'If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations . . . he may make an order against that person directing that he be detained'. Liversidge was detained on an order signed by Sir John Anderson, the Home Secretary. He sought a declaration that his detention was unlawful and damages for false imprisonment. Argument in the House of Lords focused on the words 'If the Secretary of State has reasonable cause to believe' in Regulation 18B. The majority of their Lordships ruled that the courts could not inquire whether in fact the Secretary of State had reasonable grounds for his belief that it was expedient to order a person's detention. Viscount

Maugham proclaimed that 'To my mind this is so clearly a matter for executive discretion and nothing else that I cannot myself believe that those responsible for the [Regulation] could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law' (at 220). In the exercise of this power the Secretary of State was 'answerable to Parliament', not to the courts (at 222). Lord Atkin complained that the view of the majority had altered the meaning of the words in Regulation 18B from 'If the Secretary of State has reasonable cause to believe' to 'If the Secretary of State *thinks* he has reasonable cause to believe' (at 245). He ruled that this was not what the Regulation meant and, applying this ruling to the facts of *Liversidge*, he held that the Secretary of State did not have reasonable cause to believe that it was expedient to detain him. (In the companion case of *Greene v Secretary of State for Home Affairs* [1942] AC 284, decided by the House of Lords on the same day as *Liversidge v Anderson*, Lord Atkin ruled that, on the facts of that case, the Secretary of State did have reasonable cause to believe that Greene's detention was expedient within the terms of Regulation 18B; for a detailed analysis, see AWB Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992) and see further, K Ewing and C Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914–1945* (2000), ch 8.)

R v Secretary of State for Home Affairs, ex p Hosenball [1977] 1 WLR 766. Mr Hosenball was an American citizen who had been lawfully resident in Britain and Ireland for all of his adult life. He was a journalist who worked on *Time Out* and the *London Evening Standard*. In 1976 the Home Secretary informed him that he was to be deported to the United States for the reason that he had 'obtained for publication information harmful to the security of the United Kingdom'. Hosenball asked for further particulars of what was alleged against him but was not provided with any. He was given a hearing before a special panel of three 'advisors'. At the hearing the advisors had sight of evidence from the security service that Hosenball and his lawyers were not permitted to examine. Neither was the advisors' report to the Home Secretary disclosed to Hosenball. After receiving the report the Home Secretary renewed the deportation order. The Divisional Court and the Court of Appeal unanimously rejected Hosenball's application for judicial review. Lord Denning MR ruled as follows (at 778): 'if this were a case in which the ordinary rules of natural justice were to be observed, some criticism could be directed upon it . . . But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back. Time after time Parliament has so enacted and the courts have loyally followed.' After citing *ex p Zadig* and *Liversidge v Anderson*, Lord Denning went on to note that although these were wartime authorities, 'times of peace hold their dangers too'. He concluded as follows (at 782–3): 'Great as is the public interest in the freedom of the individual and the doing of justice to

him, nevertheless in the last resort it must take second place to the security of the country itself . . . There is a conflict here between the interests of national security on the one hand and the freedom of the individual on the other. The balance between these two is not for a court of law. It is for the Home Secretary . . . He is answerable to Parliament for the way [he balances the two] and not to the courts here.' Since the 1970s Mr Hosenball has continued to enjoy an illustrious and prize-winning career as an investigative journalist, most recently for the American magazine, *Newsweek*. (The advisory panel was replaced in 1997 by the Special Immigration Appeals Commission (SIAC), following the ruling of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413 that the advisory panel system violated Article 5(4) of the Convention; see further on SIAC, below.)

Council of Civil Service Unions v Minister for the Civil Service (the '*GCHQ*' case) [1985] AC 374. We encountered this important case in the previous chapter, where it was examined for what it states about the grounds of judicial review in domestic law. Here, we are concerned with what the case has to say about national security. As will be recalled, the case concerned Mrs Thatcher's decision as Prime Minister and Minister for the Civil Service that the several thousand people working at Government Communications Headquarters (GCHQ) should not be permitted to form or to join trade unions. The Council of Civil Service Unions argued that the decision was procedurally unfair, in that Mrs Thatcher had not consulted them in advance as she was legally required to do. Notwithstanding the fact that the unions were successful in this argument, they lost the case, for the reason that Mrs Thatcher claimed in the Court of Appeal and the House of Lords that her decision was taken in the interests of national security. (This argument was not made at earlier stages of the litigation.) Lord Fraser ruled that 'The question is one of evidence. The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security' (at 402). Lord Diplock expressed the point more pithily: 'national security,' he said, 'is *par excellence* a non-justiciable question' (at 412). This line of reasoning (if that is the right word) goes back, like so much national security law, to the case law of the First World War: in *The Zamora* [1916] 2 AC 77, 107, Lord Parker stated that 'Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.'

R v Secretary of State for the Home Department, ex p Cheblak [1991] 1 WLR 890. *Cheblak*, like *Hosenball* (above) concerned the Home Secretary's powers to deport persons from the United Kingdom whose deportation is, in his view, 'conducive to the public good for reasons of national security' (Immigration Act 1971, s 3(5)). Abbas Cheblak was a writer and scholar who campaigned

for human rights in the Arab world and for a peaceful solution to the Israeli/Palestinian conflict. He had lived in Britain for sixteen years. Like Hosenball, Cheblak sought judicial review of the Home Secretary's decision to deport him. Like Hosenball, Cheblak was unsuccessful in the Divisional Court and the Court of Appeal. The Court of Appeal ruled that national security was a matter 'exclusively' for the government. In the absence of evidence of bad faith or that the Home Secretary had exceeded the limitations on his authority imposed by statute, the courts will accept that the Home Secretary had good reason to make a deportation order on national security grounds without requiring him to produce evidence to substantiate those grounds. In the light of this ruling it is remarkable that Lord Donaldson MR should have gone out of his way to state in the course of his judgment that 'Judges are exhorted by commentators to be "robust" . . . I agree that judges should indeed be "robust" and I hope that we are' (at 906). He then went on to say that 'although they give rise to tensions at the interface, "national security" and "civil liberties" are on the same side. In accepting, as we must, that to some extent the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties' (at 906–7). A decade later, the investigative journalist Nick Cohen returned to the *Cheblak* case. This is what he reported.

Nick Cohen, 'Return of the H-Block', *Observer*, 18 November 2001

In 1991, during the Gulf War . . . 50 Palestinians [were] interned because of their 'links to terrorism', and 35 Iraqi 'soldiers', captured in Britain and held as prisoners of war in a camp on the Salisbury Plain . . .

I was a reporter on the *Independent* at the time, who generally believed that the representatives of the state were honest and competent . . . [A]long with most others who watched the arrests I promised I was never going to make that mistake again. The Gulf War was one of those clarifying moments when the artifice of authority became transparent.

The internees were innocent. Not just in the legal sense of not being guilty beyond reasonable doubt, but irrefutably innocent. The Iraqi 'soldiers' weren't a fifth column. They were engineering and physics students whose scholarships came from the Iraqi military. Their arrest wasn't the great espionage coup the press had hailed. Iraqi assets in Britain had been frozen at the start of hostilities. Before he returned to Baghdad, the Iraqi ambassador sent the Bank of England the students' names and addresses. He asked that their grants be paid until the fighting was over. They were locked-up instead, and many showed their loyalty to Saddam by asking for political asylum . . .

The interned Palestinians included those rare moderates the Foreign Office dedicates so much time to finding in the Middle East. Abbas Cheblak was an advocate of Arab-Israeli rapprochement who had written a sympathetic study of the Jews of Iraq and criticised the invasion of Kuwait. The Home Office may have got a clue that MI5 had blundered when

it heard that the campaign to free him was being organised by the editor of the *Jewish Quarterly*.

The behaviour of the state confirmed that the arrests were a PR operation designed to gull a mulish press and public into thinking all was well. The 'terrorists' homes weren't searched. Interrogations were perfunctory or non-existent. Although the internees weren't told why they were in jail, MI6 leaked that MI5 was arresting people on the basis of information in files which were 20 years out of date. The case against Ali el-Saleh, a computer salesman from Bedford, seemed to be that his wife's sister had married a man whose uncle was Abu Nidal. El-Saleh and Cheblak spoke with embarrassing sadness of how they had lost their homes in Palestine and had hoped to make a new life for themselves and their children as free and grateful British citizens.

At the end of the war, the Home Office released all the detainees. It might still have deported them if there was a hint of a suspicion that they were terrorists. Ministers quietly allowed anyone who wanted to remain in Britain to do so. There was no disciplinary action against the MI5 officers involved. The judiciary, which hadn't squeaked while the principles of English law were assaulted and battered, was briefly criticised, but the complaints died away. The scandal was all but forgotten as the childish need to believe in benign authority reasserted itself.

Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153. This is the final of our six pre-HRA national security cases. It is another deportation case. Rehman appealed the Secretary of State's decision to deport him to the Special Immigration Appeals Commission (SIAC), which, as was mentioned above, replaced the previous system of advisory panels in 1997. SIAC upheld Rehman's appeal, on the basis that as a number of the Secretary of State's claims against him could not be substantiated on the facts, it could not be said that he had offended against national security. For SIAC, being a threat to national security could constitute grounds for deportation only if it could be shown that the deportee had engaged in, promoted or encouraged 'violent activity which is targeted at the UK, its system of government or its people'. The Secretary of State appealed, arguing that this was too narrow a definition of national security. In his view the United Kingdom's national security could be threatened by action targeted at an altogether different jurisdiction, even if no British subjects were directly involved. Both the Court of Appeal and the House of Lords unanimously agreed with the Secretary of State. The House of Lords further ruled that determining what measures are required to be taken in the interests of national security is a 'matter of judgment and policy' for the Secretary of State (Lord Hoffmann at [50]). Judicial oversight of executive decision-making in this area is narrowly confined to three matters: first, 'the factual basis for the executive's opinion . . . must be established by evidence'; secondly, SIAC would be able to reject the Secretary of State's opinion on the ground that it was *Wednesbury* unreasonable; and thirdly, if deportation would entail a substantial risk that the deportee would be subject in the country to

which he is deported to treatment contrary to Article 3 ECHR, the court may, on the authority of *Chahal v United Kingdom* (1996) 23 EHRR 413, order the deportation to be stopped (Lord Hoffmann at [54]; see further on this aspect of the European Court of Human Rights' ruling in *Chahal*, below). The House of Lords conceded that 'it cannot be proved to a high degree of probability that [Rehman] has carried out any individual act which would justify the conclusion that he is a danger' (Lord Hutton at [65]). Nonetheless, their Lordships ruled that SIAC was wrong to allow Rehman's appeal for the reasons it had given and the case was remitted to SIAC for redetermination. Their Lordships' opinions in *Rehman* were handed down on 11 October 2001, one month exactly after 9/11. Lord Hoffmann added the following 'postscript' to his opinion in the case (at [62]):

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

(ii) National security after the Human Rights Act 1998

We can now examine the extent to which the Human Rights Act and the case law decided under it have had an impact on matters touching upon national security. The most significant case is, without doubt, the extraordinary decision of the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68, to which we shall turn first. As we shall see in the next section, however, this is far from the only case we need to examine: confining our attention to this case alone, important though it is, would leave a seriously misleading impression.

A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68

A panel of nine Law Lords heard this case. By a majority of eight to one they ruled, overturning a unanimous Court of Appeal (see [2004] QB 335), that the indefinite detention without trial of suspected international terrorists, as provided for by Part IV of the Anti-terrorism, Crime and Security Act 2001, was unlawful as being both a disproportionate interference with the right to liberty under Article 5 ECHR and a discriminatory measure in breach of Article 14 ECHR. In the course of their opinions several of their Lordships voiced

concerns about governmental claims regarding national security that are quite different from the sorts of approaches taken in the case law considered in the previous section of this chapter. Lord Rodger stated, for example, at [177] that 'national security can be used as a pretext for repressive measures that are really taken for other reasons', while Baroness Hale stated at [226] that 'Unwarranted declarations of emergency are a familiar tool of tyranny'. Even Lord Walker, who dissented and who would have upheld the legality of the measures, conceded at [193] that 'a portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government' and that 'national security can be the last refuge of the tyrant'.

When it introduced the Anti-terrorism, Crime and Security Bill into Parliament the Government knew that the provisions concerning indefinite detention without trial would be in breach of Article 5. As a result, the government 'derogated' from Article 5 for the purposes of these provisions. Derogation from the Convention is governed by Article 15 ECHR, which provides as follows:

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
>
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, of from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision . . .

Section 1(2) of the Human Rights Act provides that the Convention rights (as defined in section 1(1)) 'are to have effect for the purposes of this Act subject to any designated derogation'. Such a designated derogation, in respect of Article 5 ECHR and the provisions concerning indefinite detention without trial, was made by the Secretary of State: see the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 3644/2001.

The regime under Part IV of the Act did not represent what the Government claimed it would ideally like to be able to do to suspected international terrorists. Ideally, the Government claimed, suspected international terrorists would be deported. This option is not always available, however, as a result of the ruling of the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. In that case the European Court held that it would be a breach of Article 3 of the Convention for a High Contracting Party to deport a person where 'substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country' (at [74]). Article 3 is non-derogable: as we have just seen, the terms of Article 15(2) make it impossible for a High Contracting Party to derogate from Article 3. This is the problem that the regime of indefinite detention without trial was meant to be the solution to.

This explains why Part IV applied only to those persons who were subject to immigration control. Nationals cannot be deported in any event.

For the House of Lords to rule (as the majority did) that the scheme of indefinite detention without trial was in breach of Article 5 their Lordships first had to deal with the legality of the derogation. If the derogation from Article 5 was lawful the Act's interference with the right to liberty could not be unlawful. It is this aspect of their Lordships' ruling that most closely touches on issues of national security, as we shall see. There is one preliminary point, however, that must be addressed first. What is the test that the courts should employ to determine whether a purported derogation is lawful? Article 15, while referred to in the Human Rights Act, is *not* one of the Convention rights incorporated into domestic law by section 1 of the HRA. Like Article 13, Article 15 was deliberately excluded. This suggests that, when considering the legality of a purported derogation, domestic courts should do no more (and no less) than apply the ordinary principles of judicial review: legality, rationality, procedural propriety and, in the context of Convention rights (as here, Articles 5 and 14 both being incorporated under the HRA), proportionality (see chapter 10). This is not the approach their Lordships took, however. Most of the Law Lords appear simply to have assumed that the criteria in Article 15 should be applied in assessing the legality of the derogation. Only Lord Scott directly addressed this issue (at [151]). While he confessed (at [152]) to having 'doubts' and 'difficulty' in understanding how the domestic courts could, in effect, enforce Article 15 when it had not been incorporated into domestic law, he set such doubts aside and considered the case on this footing on the basis that the Attorney General, arguing the Government's case, had 'expressly accepted' that this was how the case should proceed. It seems to have been a curiously generous concession on the Government's part – part of a strategy, perhaps, to keep the case away from the Court of Human Rights in Strasbourg?

It will be seen that there are two main tests contained in Article 15(1), both of which must be satisfied for a derogation to be lawful. The first is that the derogation must be made in 'time of war or other public emergency threatening the life of the nation'; the second is that the measures taken must be 'strictly required by the exigencies of the situation'. In *A*, eight of the Law Lords (ie, all except Lord Hoffmann) accepted that the derogation was made in time of public emergency threatening the life of the nation. Of these eight, all but one (Lord Walker) held that the derogating measures were not strictly necessary and were therefore unlawful. We deal with each of these points in turn.

Public emergency threatening the life of the nation. Lord Bingham ruled, 'not without misgiving (fortified by reading the opinion of . . . Lord Hoffmann)' (at [26]) for the Secretary of State on this point for two main reasons: first, because under the case law of the European Court of Human Rights states are given a very wide margin of appreciation in determining whether there is such a public emergency and secondly, because 'great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question' (at [29]). Lord

Bingham expressly relied on Lord Hoffmann's opinion in *Rehman* (above) in support of this position. Lord Hope stated that, while he was 'content . . . to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and Parliament' and that while the 'judgment that has to be formed on these issues lies outside the expertise of the courts . . . it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency' (at [116]). Upon such an examination there was, in Lord Hope's view, 'ample evidence . . . to show that the government were fully justified in taking the view . . . that there was an emergency threatening the life of the nation' (at [118]). Lord Scott was more guarded: he stated that 'For my part I do not doubt that there is a terrorist threat to this country . . . But I do have very great doubt whether the "public emergency" is one that justifies the description of "threatening the life of the nation". Nonetheless, I would, for my part, be prepared to allow the Secretary of State the benefit of the doubt on this point and accept that the threshold criterion of Article 15 is satisfied' (at [154]). Baroness Hale ruled in the following terms, at [226]:

> The courts' power to rule on the validity of the derogation is [one] of the safeguards enacted by Parliament in this carefully constructed package. It would be meaningless if we could only rubber-stamp what the Home Secretary and Parliament have done. But any sensible court, like any sensible person, recognises the limits of its expertise. Assessing the strength of a general threat to the life of the nation is, or should be, within the expertise of the Government and its advisers. They may, as recent events have shown, not always get it right. But courts too do not always get things right. It would be very surprising if the courts were better able to make that sort of judgment than the Government. Protecting the life of the nation is one of the first tasks of a Government in a world of nation states. That does not mean that the courts could never intervene. Unwarranted declarations of emergency are a familiar tool of tyranny. If a Government were to declare a public emergency where patently there was no such thing, it would be the duty of the court to say so. But we are here considering the immediate aftermath of the unforgettable events of 11 September 2001. The attacks launched on the United States on that date were clearly intended to threaten the life of that nation. SIAC were satisfied that the . . . material before them justified the conclusion that there was also a public emergency threatening the life of this nation. I, for one, would not feel qualified or even inclined to disagree.

Lord Hoffmann was the only one of their Lordships to come to a different view on this point. His opinion on the matter was expressed in remarkably forthright terms, at [91]–[97]:

> What is meant by 'threatening the life of the nation'? The 'nation' is a social organism, living in its territory (in this case, the United Kingdom) under its own form of government and subject to a system of laws which expresses its own political and moral values. When one

speaks of a threat to the 'life' of the nation, the word life is being used in a metaphorical sense. The life of the nation is not coterminous with the lives of its people. The nation, its institutions and values, endure through generations. In many important respects, England is the same nation as it was at the time of the first Elizabeth or the Glorious Revolution. The Armada threatened to destroy the life of the nation, not by loss of life in battle, but by subjecting English institutions to the rule of Spain and the Inquisition. The same was true of the threat posed to the United Kingdom by Nazi Germany in the Second World War. This country, more than any other in the world, has an unbroken history of living for centuries under institutions and in accordance with values which show a recognisable continuity . . .

The Home Secretary has adduced evidence . . . to show the existence of a threat of serious terrorist outrages . . . [D]espite the widespread scepticism which has attached to intelligence assessments since the fiasco over Iraqi weapons of mass destruction, I am willing to accept that credible evidence of such plots exists. The events of 11 September 2001 in New York and Washington and 11 March 2003 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one.

But the question is whether such a threat is a threat to the life of the nation. The Attorney General's submissions and the judgment of the Special Immigration Appeals Commission treated a threat of serious physical damage and loss of life as necessarily involving a threat to the life of the nation. But in my opinion this shows a misunderstanding of what is meant by 'threatening the life of the nation'. Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: 'Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours.'

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

For these reasons I think that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed . . .

His Lordship then concluded his opinion with the following statement, at [97]:

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.

While others of their Lordships in *A* cited Lord Hoffmann's opinion in *Rehman*, Lord Hoffmann himself chose not to. We may ask: are his opinions in the two cases reconcilable? If not, what caused him so violently to change his mind and so vehemently to speak out? Later in this chapter we shall examine another Lord Hoffmann opinion, in a further case concerning protests about the Iraq war, that was decided after *A* (*R v Jones (Margaret)* [2006] UKHL 16, [2006] 2 WLR 772, below, pp 771–2). When we come to that case we shall see that his attitude to questions of national security and personal liberty appear to have changed once again: an early indication, perhaps, that Lord Hoffmann's distinctive approach in *A* is not likely to be precedent setting? We may also ask: how did he *know*? How did Lord Hoffmann know that the threat faced by the United Kingdom, while serious, does not threaten the life of the nation? We may ask the same question of Lord Hope (see above): how did Lord Hope know that the life of the nation was threatened? After all, none of their Lordships saw the 'closed material', presumably containing intelligence assessments and the like, which had been examined by SIAC. Bear in mind that the Home Secretary had informed Parliament in October 2001 that 'there is no immediate intelligence pointing to a specific threat to the United Kingdom' (HC Deb vol 372, col 925, 15 October 2001) and had repeated in March 2002 that 'it would be wrong to say that we have evidence of a particular threat' (see Lord Bingham, at [21]). The question is the more pressing because the majority of their Lordships did not actually need to answer it at all. Given that a majority held that the measures taken (in terms of indefinite detention without trial) were, in any event, not strictly required, why could not the House of Lords do as the Joint Committee on Human Rights had done in its various parliamentary reports on the 2001 Act, and leave the question open as to whether the United Kingdom faced a public emergency threatening the life of the nation? The House of Lords could have quashed the derogation order and made a declaration of incompatibility in respect of the relevant provisions of the Act without having to decide this question at all.

Strictly required. It is to the 'strictly required' point that we can now turn. On this matter their Lordships were considerably more persuasive than, with respect, they were with regard to the previous issue. There were two flaws with the Government's scheme, both of which undermined its claim that detention without trial was 'strictly required' within the meaning of Article 15(1). The first was that while the Government conceded that the threat from international terrorism was not limited to non-nationals, the power to detain without trial was so limited (see eg, Lord Bingham, at [32]). If measures short of indefinite detention without trial were sufficient for British citizens suspected of involvement in or support for international terrorism, then so too were they sufficient for non-nationals. The second was that all those detained under the scheme were 'free to leave' the United Kingdom if they chose to do so – indeed, as we have seen, the Government claimed that it wanted the detainees to leave and would have deported them if it had been legal to do so. A number of those

detained did indeed leave the United Kingdom for other countries. One left for France, where he was subsequently released. Yet, if the detainees were such a threat to the United Kingdom that their indefinite incarceration was required, why allow them to leave for and be released in other countries, where they would be relatively free to plot their treachery? These twin irrationalities within the scheme fatally undermined it. As Baroness Hale expressed it, at [228], [231]:

> There is every reason to think that there are British nationals living here who are international terrorists within the meaning of the Act; who cannot be shown to be such in a court of law; and who cannot be deported to another country because they have every right to be here. Yet the Government does not think that it is necessary to lock them up. Indeed, it has publicly stated that locking up nationals is a Draconian step which could not at present be justified. But it has provided us with no real explanation of why it is necessary to lock up one group of people sharing exactly the same characteristics as another group which it does not think necessary to lock up . . . The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the foreigners. It is not strictly required by the exigencies of the situation.

Discrimination. The final aspect of their Lordships' ruling in *A* concerned discrimination. We saw above why the Government presented the measures in Part IV as 'immigration measures' that could apply only to persons subject to immigration control (ie, to non-nationals). While the Court of Appeal accepted this analysis, the majority of the House of Lords did not. For the majority of their Lordships the appropriate comparator with the detainees was not those with no right of abode who are not suspected international terrorists but those with a right of abode who are suspected international terrorists (see eg, Lord Bingham at [53]–[54] and Lord Nicholls at [76]). Seen in this light the measures in Part IV were discriminatory and were, accordingly, held to be in breach of Article 14 ECHR as well as being in breach of Article 5.

(See further on the *A* case the four case notes on the decision at (2005) 68 *MLR* 654, by Hickman, Tierney, Dyzenhaus and Hiebert; see also Lord Lester [2005] *PL* 249, Tomkins [2005] *PL* 259 and Feldman [2005] *CLJ* 271.)

(iii) Analysis and subsequent events

Professor Feldman ([2005] *CLJ* 271, 273) described the decision of the House of Lords in *A* as 'perhaps the most powerful judicial defence of liberty since *Leach v Money* (1765) 3 Burr 1692 and *Somersett v Stewart* (1772) 20 St Tr 1' and claimed that it 'will long remain a benchmark in public law'. In the light of the case law, from *Zadig* to *Rehman*, surveyed above, the decision in *A* is indeed remarkable. Three factors, however, ought to qualify our assessment of its importance and impact. The first is that there was nothing in their Lordships' opinions that had not already been argued for, extremely powerfully, by a series of committees reviewing the operation of the 2001 Act. The parliamentary Joint

Committee on Human Rights and a group of Privy Counsellors appointed under section 122 of the Act to review it had already concluded that Part IV of the Act was not 'a sustainable way of addressing the problem of terrorist suspects in the United Kingdom' and that 'it should be replaced' with a new scheme that applied equally to nationals and non-nationals alike and that did not require a derogation from Article 5 ECHR (*Report of the Privy Counsellor Review Committee*, HC 100 of 2003–04, p 5). Moreover, it was not only in respect of the Part IV powers of indefinite detention without trial that these reviewing committees were deeply critical of the 2001 Act. The *Report of the Privy Counsellor Review Committee* was, in this sense, not only an equally powerful, but also a more complete defence of liberty than anything the Law Lords were able to provide.

Secondly, we should bear in mind 'what happened next'. As we saw in chapter 5 (see above, pp 277–8), the provisions of the 2001 Act concerning indefinite detention without trial were replaced with new provisions under the Prevention of Terrorism Act 2005. Under section 2(1) of the 2005 Act the Secretary of State may impose a 'control order' on any individual (whether a British national or not):

> if he (a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and (b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

Control orders may include a considerable range of restrictions on an individual, listed in section 1(4) as follows:

> (a) a prohibition or restriction on his possession or use of specified articles or substances;
> (b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
> (c) a restriction in respect of his work or other occupation, or in respect of his business;
> (d) a restriction on his association or communications with specified persons or with other persons generally;
> (e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
> (f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;
> (g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;
> (h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;

(i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
(j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
(k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
(l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
(m) a requirement on him to allow himself to be photographed;
(n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
(o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
(p) a requirement on him to report to a specified person at specified times and places.

Control orders made by the Secretary of State are known as 'non-derogating control orders'. Control orders that infringe the right to liberty under Article 5 and that, to be lawful, require a derogation to be made from Article 5, may be imposed only by a court (s 4).

Control orders have been challenged in two sets of legal proceedings. In the first, several individuals who had been subjected to non-derogating control orders argued that the restrictions on their liberty were so severe as to engage – and to infringe – their Convention rights under Article 5. Sullivan J in the Administrative Court ruled in the individuals' favour and the Court of Appeal dismissed the Secretary of State's appeal: see *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin) and [2006] EWCA Civ 1141, [2006] 3 WLR 866. The control orders at issue in this case required the individuals concerned to remain within their one-bedroom flats at all times save for a period of six hours from 10.00am until 4.00pm; visitors had to be authorised by the Home Office, to which name, address, date of birth and photographic identity had to be supplied; the flats were subject to spot searches by the police; and during the six hours of the day when the individuals were not confined to their flats they remained confined to certain restricted urban areas, which deliberately did not extend (except in one case) to areas where the individuals had previously lived. As Sullivan J expressed it:

I do not consider that this is a borderline case. The collective impact of the obligations [imposed] could not sensibly be described as mere restrictions upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the

> obligations and their intrusive impact on the respondents' ability to lead a normal life, whether inside their residences within the curfew period, or for the six hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty.

The second set of legal proceedings concerning control orders challenged the degree of judicial protection afforded by section 3 of the 2005 Act to individuals subject to such orders: see *Secretary of State for the Home Department v MB* [2006] EWHC 1000 (Admin), [2006] EWCA Civ 1140, [2006] 3 WLR 839. Sullivan J held that the degree of judicial supervision was inadequate to satisfy the requirements of Article 6 ECHR. This was principally because the court's role was limited and because decisions could be made on the basis of evidence that was not disclosed to the individual concerned. The judge granted a declaration of incompatibility (under section 4 of the HRA) accordingly. However, the judgment of Sullivan J was overturned by the Court of Appeal, which held that the judicial supervision of control orders under section 3 of the 2005 Act was sufficient to meet the requirements of the right to a fair trial under Article 6.

The final factor we should bear in mind when assessing the impact of the House of Lords' decision in *A* is the extent to which the more robust – or more critical – attitude the majority of their Lordships displayed towards the relationship between personal freedom and national security has been sustained in subsequent case law. Two subsequent House of Lords decisions suggest that, rather than becoming the 'benchmark' that Professor Feldman predicted, the *A* case is already beginning to look like a one-off. As we saw in chapter 5, in *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307, the House of Lords ruled that what had been described in a lower court as the 'extraordinary' and 'sweeping' stop and search powers contained in the Terrorism Act 2000 (ss 44–47) may lawfully be used in the context of the police stopping apparently peaceful protesters from approaching an international arms fair to protest against Britain's involvement in the arms trade. The appellants' argument that the powers should be read as being available only where there were reasonable grounds for considering that their use was necessary and suitable for the prevention of terrorism was dismissed. In *R v Jones (Margaret)* [2006] UKHL 16, [2006] 2 WLR 772, several anti-war protesters were prosecuted for various offences (such as criminal damage and aggravated trespass) that they had committed while breaking into military bases in order to protest against the Iraq war. Their actions were described by Lord Bingham (at [25]) as 'entirely peaceable and involv[ing] no violence of any kind to any person', albeit that they caused damage to property. The defendants argued in their defence that their actions were lawful under section 3 of the Criminal Law Act 1967, which provides that 'a person may use such force as is reasonable in the circumstances in the prevention of crime'. The Iraq war, they argued, was a crime

of aggression, contrary to customary international law, customary international law being recognised and enforced by domestic law and falling, therefore, within the meaning of 'crime' for the purposes of section 3. This argument was unsuccessful. Lord Bingham ruled that the 1967 Act applied only to domestic crime and not to crimes contrary to international law. He noted that it had never been a defence to a charge under the Treason Act 1351 or under the common law of sedition that the Crown or the government had committed itself to an unjust or unlawful cause (at [31]). What is particularly notable about the case is the opinion of Lord Hoffmann, which was considerably more reminiscent of his opinion in *Rehman* above (pp 761–2), than of his dissenting opinion in the *A* case. His Lordship ruled, for example, (at [66]) that, 'The decision to go to war, whether one thinks it was right or wrong, fell squarely within the discretionary powers of the Crown to defend the realm and conduct its foreign affairs'. Moreover, his Lordship added to his opinion several paragraphs on what he termed 'the limits of self-help' and civil disobedience, in which he stated as follows, at [87]–[88]:

> Of course citizens are entitled, indeed required, to refuse to participate in war crimes. But if they are allowed to use force against military installations simply to give effect to their own honestly held view of the legality of what the armed forces of the Crown are doing, the Statute of Treason would become a dead letter.
>
> In my opinion, therefore, the District Judges would have been right to convict even if aggression had been a crime in domestic law. The apprehension, however honest, that such a crime was about to be committed could not have made it reasonable for the defendants to use force of any kind to obstruct military activities . . .

(See further Lustgarten, 'National security, terrorism and constitutional balance' (2004) 75 *Political Quarterly* 4 and Blick, Byrne and Weir, 'Democratic audit: good governance, human rights, war against terror' (2005) 58 *Parliamentary Affairs* 408.

3 Freedom of expression

The final two sections of this chapter are case studies of liberty and constitutional law in Britain. Our case studies consider both common law and statute. Neither focuses exclusively on protection under the Human Rights Act: rather, one of the themes of the case studies is that protection under that Act needs to be understood in the context of what the law already offered. We recognise that numerous such case studies could have been selected. Police powers of arrest and detention, or the scope of the protection afforded to privacy, are examples. The two we have selected, however, are freedom of expression and freedom of assembly. Neither is dealt with comprehensively – for reasons of space we have had to be selective in our choice of materials. Within the broad area of freedom of expression, we have been particularly selective, focusing

only on what might be called freedom of political expression. Other important areas of free speech law (such as obscenity, defamation, film and theatre censorship and broadcasting regulation, for example) are not considered in any detail.

(On other areas of law concerning personal liberty, see H Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (2000) and N Whitty, T Murphy and S Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001). On other areas of freedom of expression, see E Barendt, *Freedom of Speech* (2nd edn 2005); D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn 2002), chs 13–17 and S Bailey, D Harris and D Ormerod, *Civil Liberties: Cases and Materials* (5th edn 2001), chs 6, 7.)

(a) Freedom of expression and democracy

Freedom of speech, or expression, has two aspects: it is both a liberty of the individual to impart information and the freedom (or perhaps more naturally the 'right') of others to receive it. This twofold freedom can be supported, by a variety of arguments, as being essential to 'self-realisation, social life, politics, economic activity, art, and knowledge' (Richard Abel, *Speech and Respect* (1994), pp 28–9; see further Barendt, *Freedom of Speech*, above). A principal justification of freedom of expression is its contribution to the buttressing of democracy, and we shall consider it mainly from this perspective. It is believed that democracy is most secure, responsive and efficient – most likely to realise the high hopes placed in it – if there is a free exchange of information and opinions and freedom to criticise those who exercise governing power. This is a necessary freedom if the accountability of government is to be assured. Additionally freedom of expression, in fostering ideas, argument and understanding, counters officially-sanctioned nostrums and versions of the facts and enables citizens – and voters – to make informed choices. Accordingly, freedom of the press and other media of communication is rightly regarded as a bulwark of democracy. Judges have recognised this, Lord Bingham, for instance, saying in *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 290–1 that 'the proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring. For this reason the courts, here and elsewhere, have recognised the cardinal importance of press freedom'. For Lord Steyn in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 126:

> freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.

The importance of freedom of expression in a democracy was directly in issue in the following case.

Derbyshire County Council v Times Newspapers Ltd [1993] AC 534 (HL)

Articles published in the *Sunday Times* alleged that Derbyshire County Council had entered into improper financial transactions to the prejudice of its pension fund. The council brought an action against the publishers claiming damages for libel. The defendants applied to have the action struck out as disclosing no cause of action, so raising as a preliminary point of law the question whether a local authority could sue for libel in respect of words reflecting on the conduct of its governmental and administrative functions. The authorities established that both trading and non-trading corporations could sue for libel calculated to injure their business or governing reputations; was a local authority, itself a body corporate, in a different position?

Morland J was not persuaded that it was and declined to strike out the council's action, but the Court of Appeal reversed his decision, holding that a local authority could not sue for libel. The council appealed to the House of Lords, which unanimously dismissed the appeal, Lord Keith giving the only speech.

Lord Keith Of Kinkel: . . . There are . . . features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech. In *City of Chicago v Tribune Co* (1923) 139 NE 86 the Supreme Court of Illinois held that the city could not maintain an action of damages for libel. Thompson CJ said, at p 90:

> 'The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished . . . but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated,

> cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions'.
>
> After giving a number of reasons for this, he said, at p 90:
>
> 'It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.'

These propositions were endorsed by the Supreme Court of the United States in *New York Times Co v Sullivan* (1964) 376 US 254, 277. While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public. In *Hector v A-G of Antigua and Barbuda* [1990] 2 AC 312 the Judicial Committee of the Privy Council held that a statutory provision which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence contravened the provisions of the constitution protecting freedom of speech. Lord Bridge of Harwich said, at p 318:

> 'In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion.'

It is of some significance to observe that a number of departments of central government in the United Kingdom are statutorily created corporations, including the Secretaries of State for Defence, Education and Science, Energy, Environment and Social Services. If a local authority can sue for libel there would appear to be no reason in logic for holding that any of these departments (apart from two which are made corporations only for the purpose of holding land) was not also entitled to sue. But as is shown by the decision in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, a case concerned with confidentiality [on which, see below], there are rights available to private citizens which institutions of central government are not in a position to exercise unless they can show that it is in the

> public interest to do so. The same applies, in my opinion, to local authorities. In both cases I regard it as right for this House to lay down that not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it. It is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech.
>
> The conclusion must be, in my opinion, that under the common law of England a local authority does not have the right to maintain an action of damages for defamation.

Lord Keith did, however, note the possibility that individual councillors or officers of a local authority might sue for libel if publication of defamatory matter about the authority reflected on them personally. This qualification provoked the response that 'a suit launched by an individual is not demonstrably less chilling than an action by a council' (Loveland (1994) 14 *LS* 206, 217). As Christopher Forsyth remarks (in J Beatson and Y Cripps (eds), *Freedom of Expression and Freedom of Information* (2000), p 88), 'if free and vigorous criticism of public authorities is a necessary part of a democratic society how can free and vigorous criticism of the individuals in charge of those public authorities be avoided?'

These issues arose in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 in proceedings for libel brought by a politician and former Taoiseach (Prime Minister) of Ireland, arising out of allegations published in the *Sunday Times* that he had misled and lied to the Dáil (the Irish Parliament) and Cabinet colleagues. It was contended for the newspaper that the defence of qualified privilege (forfeited only on proof of malice) should be available in a case such as this arising out of political discussion and reflecting on the reputation of Mr Reynolds as Taoiseach and as an elected member of the Dáil in the exercise of his public responsibilities. It was argued that the common law should be developed so as to admit a new category of qualified privilege covering the publication of 'political information', which would give due recognition to the investigative role of the media in a democratic society. The House of Lords declined to develop the law in this way. A generic category of qualified privilege, protecting the publication of political information whatever the circumstances (in the absence of proof of malice) would not, said Lord Nicholls in the leading speech, give adequate protection to reputation and would be unsound in principle in distinguishing political discussion from discussion of other matters of serious public concern. The elasticity of the established common law approach was to be preferred, by which the court should 'have regard to all the circumstances when deciding whether the publication of particular material was privileged because of its value to the public' – or, more simply, 'whether the public was entitled to know the particular information'. Lord Nicholls listed, by way of illustration, ten specific matters to be taken into account by the court (at 205), adding that the court 'should be slow to conclude that a publication was not in the public interest and, therefore, the public had

no right to know, especially when the information is in the field of political discussion'. (See comments on this case by Loveland [2000] *PL* 351 and Williams (2000) 63 *MLR* 748. See further *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783, *Jameel v Wall Street Journal Europe* [2006] UKHL 44, [2006] 3 WLR 642 and Loveland, 'Freedom of political expression: who needs the Human Rights Act?' [2001] *PL* 233.)

(b) The '*Spycatcher*' cases

A constraint on freedom of expression may result from the equitable doctrine of breach of confidence, which has been fashioned and refined by the courts over many years. We saw in chapter 3 that in *Attorney General v Jonathan Cape Ltd* [1976] QB 752 this doctrine was carried over from the sector of domestic and commercial relationships so as to provide a legal sanction for Cabinet confidentiality, although one that proved inapplicable to the particular facts of that case. The doctrine was again relied upon by an Attorney General in the *Spycatcher* cases, in attempts to prevent publication by newspapers of matters that it was believed should be kept secret in the public interest.

Peter Wright, a former member of the Security Service, MI5, gave an account of his experiences in the service in his book, *Spycatcher*, which was to be published in Australia. The book described the organisation and operations of the Security Service and contained allegations of serious misconduct by members of the service, including a 1974 plot to instigate rumours intended to undermine the Wilson Government. The Attorney General, acting for the British Government, brought proceedings in the Australian courts for an injunction to prevent the publication of the book. The *Guardian* and the *Observer* then published articles about the Australian proceedings which disclosed allegations made in *Spycatcher*, and subsequently the *Sunday Times* began the publication of a series of extracts from the book. The Attorney General took proceedings in the English courts for injunctions against these newspapers, as well as for interlocutory (interim) relief. (There were also certain collateral proceedings for contempt of court: see *Attorney General v Newspaper Publishing plc* [1988] Ch 333 and *Attorney General v Times Newspapers Ltd* [1992] 1 AC 191.) Meanwhile *Spycatcher* was published in the United States – the British Government had been advised of the impossibility of obtaining a judicial restraint on its publication there – and copies became readily available in the United Kingdom.

The ground on which the Attorney General sought relief from the courts, both in Australia and in Britain, was that the information to be published had been acquired by Mr Wright in confidence as an officer of MI5 and that he, or anyone who obtained the information knowing of the circumstances, was under a duty of confidentiality which would be breached by publication of the information.

Interlocutory injunctions were granted against the newspapers and were upheld by a majority of the House of Lords in *Attorney General v Guardian*

Newspapers Ltd [1987] 1 WLR 1248. The Law Lords recognised that the case concerned 'the public right to freedom of expression in the press' and that this public interest and the public interest in the protection of the secrecy of the Security Service would have to be 'weighed against each other and a balance struck between them' (Lord Brandon at 1291). The majority were, however, persuaded of the necessity to restrain publication of the material until a final decision was reached on the Attorney General's application for permanent injunctions. They believed that, although the essential information contained in *Spycatcher* had already become known to some, wider dissemination would do further harm, and the need to prevent this must take precedence over the right of the public to be provided with information, at all events until the full trial of the case. The dissenting Lords, on the other hand, thought it wrong to maintain a fetter on the disclosure of information which had become publicly available, and they placed greater emphasis on freedom of speech and the 'legitimate business' of the press of 'collecting, disseminating and commenting upon news which they regard as of interest to their reading public' (Lord Oliver at 1315). The following passage, containing a stinging rebuke, is taken from the dissenting speech of Lord Bridge:

> I can see nothing whatever, either in law or on the merits, to be said for the maintenance of a total ban on discussion in the press of this country of matters of undoubted public interest and concern which the rest of the world now knows all about and can discuss freely. Still less can I approve your Lordships' decision to throw in for good measure a restriction on reporting court proceedings in Australia which the Attorney-General had never even asked for. Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road.

When the case came to full trial in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 the Attorney General's claim for permanent injunctions against the newspapers was refused, and this decision was upheld by the House of Lords. The Law Lords were satisfied that further publication would do no more damage to the public interest than had already been done, since the matter was no longer secret and was in the public domain. Detriment to the public interest was an essential condition of the grant of an injunction, at least if the intended publication was to be made, not by the Crown servant himself or his agent, but by a third party (such as the newspapers in this case).

Besides insisting on the requirement of detriment, the Law Lords in *Guardian Newspapers Ltd (No 2)* allowed of the possibility of a limited defence of revelation of 'iniquity' as a just cause for breaching confidence. Scott J, in

the High Court, had found this defence to be made out, holding that allegations such as that of a plot to 'destabilise' the Wilson Government were not to be suppressed: 'the ability of the press freely to report allegations of scandals in government is one of the bulwarks of our democratic society'. The House of Lords held, however, that general publication of mere allegations of this sort, not shown to be well founded, was not justified on the 'iniquity' ground.

While, in the result, the House of Lords gave a clear ruling that the suppression of disclosures of official information on the basis of confidentiality must be supported by proof of harm to the public interest, it was only the prior publication of the information contained in *Spycatcher* that was found to have negatived any such harm in this case. In principle, any demonstrated harm resulting from breach of confidentiality should be balanced against the public interest in freedom of expression. Lord Griffiths, for instance, said (at 273) that any detriment 'must be examined and weighed against the other countervailing public interest of freedom of speech and the right of the people in a democracy to be informed by a free press'; and Lord Goff declared (at 283) that 'in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism', which can be defeated only by 'some other public interest which requires that publication should be restrained'. These are sterling principles, but everything depends on how such a balancing operation is performed, what is regarded as detrimental to the public interest, and what weight is given to freedom of expression.

Their Lordships, it should be noted, were of the opinion that if Peter Wright had been within the jurisdiction of the English courts, an injunction to prevent him from publishing *Spycatcher* in this country might properly have been granted. As a former officer of MI5 he owed a lifelong obligation of confidence to the Crown. The prior publication of the book overseas would not avail him when he had himself brought that about, for he should not be allowed to benefit from his own wrongdoing.

The interim injunctions granted in the first *Spycatcher* case in 1987 (above) resulted in a hearing by the European Court of Human Rights of complaints by the newspapers concerned that their rights under Article 10 of the European Convention had been violated: *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153. The Court of Human Rights held that the continuation of the interim injunctions after *Spycatcher* had been published in the United States, and the confidentiality of the contents destroyed, was not necessary in a democratic society and was a violation of Article 10. (See Leigh, 'Spycatcher in Strasbourg' [1992] *PL* 200.)

(For comment on the *Spycatcher* cases see eg, Williams [1989] *CLJ* 1; Barendt [1989] *PL* 204; Birks (1989) 105 *LQR* 501; Burnet and Thomas (1989) 16 *Jnl of Law and Soc* 210; Michael (1989) 52 *MLR* 389; and Leigh [1992] *PL* 200. See also *Lord Advocate v Scotsman Publications Ltd* [1990] 1 AC 812.)

(c) Freedom of expression as a common law 'constitutional right'

Even before the Human Rights Act 1998 came into force, freedom of expression had won recognition in a number of common law cases as a 'constitutional right'. It was so characterised by Browne-Wilkinson LJ in a dissenting judgment in the Court of Appeal in *Wheeler v Leicester City Council* [1985] AC 1054, 1065. For Salmon LJ in *R v Metropolitan Police Commissioner, ex p Blackburn (No 2)* [1968] 2 QB 150, 155, freedom of speech was 'one of the pillars of individual liberty . . . which our courts have always unfailingly upheld' and for Laws J in *R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd* [1992] 1 WLR 1289, 1293, it was 'a sinew of the common law'. The courts repeatedly affirmed that Article 10 of the European Convention on Human Rights mirrored the common law – for instance, in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551; *Rantzen v Mirror Group Newspapers (1986) Ltd* [1994] QB 670, 691; and *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, 316–17.

Yet in the first cases in which the European Court of Human Rights found that the United Kingdom had violated the terms of Article 10 (the provision in the Convention that protects the right to freedom of expression), it was a decision of the domestic courts, rather than a piece of legislation, that was found to be in breach. *Sunday Times v United Kingdom* (1979) 2 EHRR 245 concerned an injunction that the House of Lords had granted to the Attorney General, which stopped the *Sunday Times* from publishing a story about the drug thalidomide (see chapter 5, above, p 269). The House of Lords had granted the injunction on the basis that it would be in contempt of court (on which, see further below) for a newspaper to publish an article where there was a *possibility* that publication would prejudice legal proceedings (see *Attorney General v Times Newspapers* [1974] AC 273). The Court of Human Rights ruled that this (common law) test gave insufficient weight to the newspapers' freedom of expression. (This common law test has now been replaced by the Contempt of Court Act 1981, section 2(2), which provides that such injunctions may be granted only where there is *substantial* risk of *serious* prejudice to legal proceedings.) In *Observer and Guardian v United Kingdom* (1991) 14 EHRR 153, as we saw in the previous section, the two newspapers successfully argued before the European Court of Human Rights that the ruling of the House of Lords in *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248 was in breach of Article 10.

In this light, not all judicial dicta about the compatibility of the common law with values of freedom of expression are to be taken at face value. As Lord Bingham stated in *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55 (at [34]), 'The approach of the . . . common law to freedom of expression and assembly was hesitant and negative'. That said, however, there are undoubtedly some cases where common law protection of freedom of expression has been high. The following is an example.

R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 (HL)

Two prisoners serving life sentences for murder protested their innocence and wished to have oral interviews with journalists who were willing to investigate the safety of their convictions. They hoped that by this means their cases would be reopened and their convictions be referred to the Court of Appeal by the Criminal Cases Review Commission. Acting in accordance with a policy adopted by the Home Secretary, the prison authorities refused to allow the interviews to take place unless the journalists signed written undertakings not to publish any part of the interviews. The journalists having refused to do so, permission for the interviews was denied. The prisoners sought judicial review of the lawfulness of the minister's policy. Their claim was based on the right to freedom of expression, as supporting their object of challenging the safety of their convictions.

It was argued for the Home Secretary that the ban on interviews was authorised by provisions of the Prison Rules, made under power conferred by the Prison Act 1952. As we saw above, p 729, a statute is not to be interpreted as allowing the infringement of what the courts hold to be a fundamental right unless it expressly or by necessary implication authorises this to be done. In the present case a like approach was taken to the interpretation of subordinate legislation, and it was held that the Home Secretary's policy was not authorised by the Prison Rules.

> **Lord Hoffmann:** . . . What this case decides is that the principle of legality applies to subordinate legislation as much as to Acts of Parliament. Prison regulations expressed in general language are also presumed to be subject to fundamental human rights. The presumption enables them to be valid. But, it also means that properly construed, they do not authorise a blanket restriction which would curtail not merely the prisoner's right of free expression, but its use in a way which could provide him with access to justice.

It was further held that even if the provisions of the Prison Rules could properly have been construed as permitting a blanket ban, those provisions would have been 'exorbitant in width' in undermining the prisoners' fundamental rights: so construed, the provisions would have been ultra vires and invalid.

The relatively strong role given to freedom of expression in *Simms* may be contrasted with the controversial ruling in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696. *Brind* concerned the power of the Home Secretary, under section 29(3) of the Broadcasting Act 1981, to require the Independent Broadcasting Authority (IBA) to refrain from broadcasting any matter he specified, and a like power with regard to the BBC under clause 13(4) of the licence and agreement which governed the operations of the BBC. Acting on these powers the Secretary of State directed the IBA and the BBC not to broadcast words spoken (ie direct statements, not reported speech)

by persons representing specified organisations, including Sinn Fein and the Ulster Defence Association. The aim of the directives was to cut off the 'oxygen of publicity' for various political actors who were allied (or deemed to be allied) to certain terrorist groups in Northern Ireland. The directives were debated in Parliament and approved by resolutions of both Houses.

Radio and television journalists brought proceedings for judicial review against the Home Secretary, contending that the directives were unlawful as exceeding the minister's powers. In the House of Lords the attack on the validity of the directives rested on two principal grounds. The first was that the Secretary of State had failed to have proper regard to Article 10 of the European Convention on Human Rights. This argument was unsuccessful. As the European Convention was, at the material time, not part of domestic law, the Secretary of State was not obliged to take account of it in exercising an administrative discretion. (Since the Human Rights Act 1998 this ruling no longer holds good. If an administrative decision is found to be incompatible with a Convention right, such as freedom of expression, it is unlawful: section 6(1) of the HRA.) The second argument was that the decision to issue the directives was in the circumstances so unreasonable as to be perverse. This ground invoked the standard of unreasonableness or irrationality derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223: if the decision was one that no reasonable minister could in the circumstances reasonably have made, it would be unlawful by this standard. Their Lordships held that the Home Secretary's decision was not defective in this respect: the complaints fell 'very far short of demonstrating that a reasonable Secretary of State could not reasonably conclude that the restriction was justified by the important public interest of combating terrorism' (per Lord Bridge). As we saw in the previous chapter, were a case such as *Brind* to be argued now, the court's approach would focus on whether the broadcasting ban was proportionate, rather than on whether it was *Wednesbury* unreasonable. However, while the *argument* in a case like *Brind* would today proceed on different lines, it may be that the *result* would be the same. It is of interest (although not conclusive of the matter for our courts in any future case) that when the journalists in *Brind*, having failed in the House of Lords, took their complaint to the European Commission of Human Rights, it was rejected as manifestly ill-founded. The Commission accepted that the interference with their freedom of expression was in pursuit of a legitimate aim and was not disproportionate to the aim pursued: *Brind v United Kingdom* 77-A DR 42 (1994).

(d) Freedom of expression and statute

A number of statutes expressly protect particular forms of expression. Parliamentary speech is protected under the Bill of Rights 1689, Article IX. The Public Interest Disclosure Act 1998 provides limited protection for 'whistle-blowers'. On the other hand, several statutes impose restrictions on freedom of

expression: the Obscene Publications Act 1959, the Public Order Act 1986 and the Official Secrets Act 1989 are all examples. Under section 3 of the HRA, of course, our courts are now required to read and give effect to such legislation in a way which is compatible with the Convention rights, 'so far as it is possible to do so'. The courts must therefore strive to interpret a statute (whenever enacted) in such a way that it does not constitute or permit a restriction of freedom of expression which is not justified in terms of Article 10(2) of the European Convention. If this is not possible, the court may make a declaration of incompatibility (s 4). In consequence of these provisions the courts may be called upon to reconsider their previous interpretations of statutory provisions and to review the balance between freedom of expression and other interests which is effected by particular statutes.

A statute of particular importance in the context of freedom of expression is the Contempt of Court Act 1981. Section 2 of the Contempt of Court Act, although it makes no express reference to freedom of expression, implicitly recognises its value by placing limits on the rule of strict liability for contempt, which applies to publications tending to interfere with the course of justice in particular legal proceedings. Section 2(2) provides:

> The strict liability rule applies only to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

This subsection, as we saw above, was enacted in response to the judgment of the European Court of Human Rights in *Sunday Times v United Kingdom* (1979) 2 EHRR 245. It is for the courts to determine whether the test of substantial risk of serious prejudice is met in any particular case. This is an exercise in evaluation rather than in balancing, but the Act's recognition of the value of freedom of expression is downgraded if the words 'substantial' and 'seriously' are not given their full weight. Indeed, the courts may appear to have devalued the requirement that the risk be 'substantial' in holding this to mean only that there must be more than a remote or minimal risk of serious prejudice (*Attorney General v English* [1983] 1 AC 116; *Attorney General v News Group Newspapers Ltd* [1987] QB 1, 15), but it has been remarked that the cases in which section 2(2) has been applied show that its provisions 'limit the scope of the old, common-law, strict liability rule . . . in a more than cosmetic way' (D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn 2002), p 984).

Section 5 of the Contempt of Court Act, which comes into play if the risk specified in section 2(2) is found to exist, provides as follows:

> A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

The policy reflected in this section is that the risk of prejudice to a trial must be accepted if it is an incidental by-product of a discussion in good faith of matters of public concern. Here again it is left to the courts to resolve the conflict between 'fair trial and free press', in deciding whether, in a particular case, the criteria in section 5 ('good faith', 'general public interest', 'merely incidental') are satisfied. (See *Attorney General v English*, above, and *Attorney General v Guardian Newspapers Ltd* [1992] 1 WLR 874; and note that it is for the prosecution to prove that the risk of prejudice to the proceedings resulting from a discussion in good faith of matters of general public interest was *not* merely incidental to the discussion.) Section 5 may be seen, in its qualification of the strict liability rule, as giving effect to the proportionality principle.

The Contempt of Court Act gives further recognition to the claims of freedom of expression – in particular, of the investigatory role of the media – in granting a conditional protection to the confidentiality of sources of information. Section 10 of the Act provides as follows:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

The purpose of this section was explained by Lord Diplock in *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 348–9:

> Section 10 . . . recognises the existence of a prima facie right of ordinary members of the public to be informed of any matter that anyone thinks it appropriate to communicate to them as such. . . . Provided that it is addressed to the public at large or to any section of it every publication of information falls within the section and is entitled to the protection granted by it unless the publication falls within one of the express exceptions introduced by the word unless.
>
> The nature of the protection is the removal of compulsion to disclose in judicial proceedings the identity or nature of the source of any information contained in the publication, even though the disclosure would be relevant to the determination by the court of an issue in those particular proceedings.

The need for the protection, Lord Diplock went on to say, was that 'unless informers could be confident that their identity would not be revealed sources of information would dry up'. For this reason the protection of journalistic sources is regarded by the European Court of Human Rights as 'one of the basic conditions for press freedom' (*Goodwin v United Kingdom* (1996) 22 EHRR 123, 143).

X Ltd v Morgan Grampian (Publishers) Ltd [1991] 1 AC 1 (HL)

A company, X Ltd, had prepared a business plan to be used in seeking loan capital. An unknown person purloined a copy of the plan and that person or another (the 'source') provided confidential and damaging information taken from it to Mr Goodwin, a journalist, who used it in writing an article about the company for a journal, *The Engineer*. The company applied for an order requiring Mr Goodwin to disclose to it the notes which he had made of his conversations with the source. This would enable the company to identify the source, take proceedings to recover the stolen document and prevent further dissemination of the damaging information. Mr Goodwin invoked section 10 of the Contempt of Court Act 1981. Hoffmann J ordered the defendant to disclose the notes to the company and this order was upheld by the Court of Appeal and by the House of Lords.

> **Lord Bridge of Harwich:** . . . [W]henever disclosure is sought, as here, of a document which will disclose the identity of a source within the ambit of section 10, the statutory restriction operates unless the party seeking disclosure can satisfy the court that 'disclosure is necessary' in the interests of one of the four matters of public concern that are listed in the section. I think it is indisputable that where a judge asks himself the question: 'Can I be satisfied that disclosure of the source of *this* information is necessary to serve *this* interest?' he has to engage in a balancing exercise. He starts with the assumptions, first, that the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessity will suffice to override it, thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section.

The House of Lords was in no doubt that it was 'in the interests of justice' that the company should be able to take remedial action against the source. In weighing this public interest against the public interest in the protection of sources, and concluding that discovery of the source was 'necessary' in the interests of justice, their Lordships were moved by the facts that the source had been a party to a gross breach of confidence, that severe damage would be done to the company's business if further dissemination of the confidential material could not be prevented, and that the publication of the information served no legitimate purpose.

Following the dismissal of his appeal to the House of Lords, Mr Goodwin was fined for contempt of court in his earlier refusal to comply with Hoffmann J's order to disclose his source.

Upon a complaint by Mr Goodwin that the order to disclose his source had violated his right of freedom of expression under Article 10 of the European Convention, the European Court of Human Rights considered, in *Goodwin v United Kingdom* (1996) 22 EHRR 123, whether the undoubted interference with his right was justified under Article 10(2), as having the legitimate aim of

protecting the rights of X Ltd (identified in these proceedings as Tetra Ltd). The court answered this question in the negative, on the ground that Tetra's interests in unmasking a disloyal employee, preventing further disclosure and obtaining compensation were not sufficient to outweigh 'the vital public interest in the protection of the applicant journalist's source'. Since the disclosure order was disproportionate to the legitimate aim pursued it could not be regarded as necessary in a democratic society for the protection of the company's rights.

It has been observed that the tests applied in this case by the European Court of Human Rights and the House of Lords 'were substantially the same'. It is said that the two courts reached different conclusions *on the facts*, essentially in their assessment of the damage likely to follow from any further disclosure of the confidential information by the source. (See *Camelot Group plc v Centaur Communications Ltd* [1999] QB 124.) Accordingly it was not considered that any amendment of section 10 of the Contempt of Court Act was necessary in consequence of the ruling of the European Court in *Goodwin*. (See further *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033.)

(e) Freedom of expression and the Human Rights Act 1998

To date the Human Rights Act has not had an enormous impact on freedom of expression, either positively or negatively, although such relatively few cases as have arisen have been rather disappointing, from a civil libertarian point of view. An early case was *R v Shayler* [2002] UKHL 11, [2003] 1 AC 247. As we saw in chapter 5 (above, p 277), this case was a challenge to the compatibility with Article 10 ECHR of certain provisions of the Official Secrets Act 1989. At the time of its enactment critics saw the Act as one of the Thatcher Government's most obnoxious assaults on freedom of political expression. Section 1 of the 1989 Act makes it an offence for a member or former member of the security and intelligence services without lawful authority to disclose any information relating to security or intelligence which came into that person's possession by virtue of his employment in the services. No damage to Britain's national security need actually (or even potentially) be caused by the disclosure and it is no defence to a charge under section 1 that the disclosure was in the public interest (on the ground that, for example, it revealed corruption in the services). In *Shayler* the House of Lords ruled that, notwithstanding the breathtaking scope of this section, it did not breach the protection of freedom of expression afforded by Article 10. Had the Act's ban on the disclosure of such information been absolute, Lord Bingham suggested (at [36]), Article 10 would have been breached. But, as it was, the Act allowed members and former members of the services to disclose any concerns they may have as to the lawfulness of the service's activities to the Attorney General, to the Director of Public Prosecutions or to the Metropolitan Police Commissioner, and to

disclose concerns about misbehaviour, irregularity, maladministration or incompetence in the services to the Home, Foreign or Northern Ireland Secretaries, to the Prime Minister, to the Cabinet Secretary or to the Joint Intelligence Committee. Their Lordships ruled that such avenues were sufficient, given what Lord Bingham described (at [25]) as 'the need for a security or intelligence service to be secure'. Perhaps the decidedly muted support for freedom of expression that one sees in this case had something to do with the unpromising facts. Shayler, a former MI5 officer, had disclosed a series of classified documents relating to the Security Service to the *Mail on Sunday* newspaper without first having gone through any of the channels for voicing grievances permitted to him under the Act. He then fled the country for three years, before returning to face his charges. In the event he was jailed for six months, of which term he served only seven weeks before being released.

R (Rusbridger) v Attorney General [2003] UKHL 38, [2004] 1 AC 357 concerned the compatibility with Article 10 of the Treason Felony Act 1848. Section 3 of that Act makes it a criminal offence, among other matters, to 'compass, imagine, invent, devise or intend to deprive or depose our Most Gracious Lady the Queen . . . from the style, honour, or royal name of the imperial Crown of the United Kingdom'. This provision had as a prime target editors of newspapers advocating republicanism in Britain. Rusbridger, the editor of the *Guardian* newspaper, published a series of articles there in which it was argued that Britain should become a republic. The Attorney General brought no proceedings under the Act of 1848 in respect of the articles. Rusbridger sought a statement from the Attorney General that the 1848 Act would be disapplied in respect of all published advocacy of the abolition of the monarchy other than by criminal violence. When the Attorney General declined to give such a statement Rusbridger sought judicial review, seeking either a declaration that section 3 of the 1848 Act does not apply in the context of peaceful advocacy of the abolition of the monarchy or, in the alternative, a declaration that section 3 of the 1848 Act is incompatible with Article 10 ECHR. The Administrative Court held that there was no decision by the Attorney General that was susceptible to challenge by way of judicial review. On appeal, the House of Lords agreed, refusing to grant either of the declarations sought by the newspaper. However, several of their Lordships passed comment on section 3 of the 1848 Act. Lord Steyn, for example, stated (at [28]) that 'The part of section 3 of the 1848 Act which appears to criminalise the advocacy of republicanism is a relic of a bygone age and does not fit the fabric of our modern legal system. The idea that section 3 could survive scrutiny under the Human Rights Act is unreal.' Lord Scott stated (at [40]) that 'It is as plain as a pike staff . . . that no one who advocates the peaceful abolition of the monarchy and its replacement by a republican form of government is at any risk of prosecution'.

Probably the most significant free speech case thus far in the Human Rights Act era is the *Prolife* case, to which we now turn.

R (Prolife Alliance) v British Broadcasting Corporation [2003] UKHL 23, [2004] 1 AC 185

Television broadcasters must ensure, so far as they can, that their programmes contain nothing likely to be offensive to public feeling. This 'offensive material restriction' is a statutory obligation placed on the independent broadcasters by section 6(1)(a) of the Broadcasting Act 1990. The BBC is subject to a comparable, non-statutory obligation under its agreement with the Secretary of State. Prolife Alliance is a political party that campaigns for 'absolute respect for innocent human life from fertilisation until natural death'. Among its main policies is the prohibition of abortion. In May 2001 Prolife Alliance fielded enough candidates for the June 2001 general election to entitle it to make a party election broadcast in Wales. Early in May 2001 Prolife submitted a tape of its proposed broadcast to BBC, ITV, Channel 4 and Channel 5. The major part of the proposed programme was devoted to explaining the processes involved in different forms of abortion, with prolonged and graphic images of the product of suction abortion: aborted foetuses in a mangled and mutilated state, tiny limbs, a separated head, and the like. Representatives of each broadcaster refused to screen these pictures as part of the proposed broadcast. The broadcasters did not raise an objection regarding the proposed soundtrack. As Lord Nicholls put it (at [3]) 'Prolife Alliance was not prevented from saying whatever it wished about abortion'. The objection related solely to the pictures. Prolife submitted two further versions of the proposed broadcast to the broadcasters. In the two revised versions the images of the foetuses were progressively more blurred. Neither was acceptable. On 2 June a fourth version was submitted and approved. This version replaced the offending pictures with a blank screen bearing the word 'censored'. The blank screen was accompanied by a sound track describing the images shown on the banned pictures. This version was broadcast in Wales on the evening of the same day, five days before the general election.

Prolife sought judicial review of the broadcasters' decisions. The Court of Appeal held in favour of Prolife, holding that the broadcasters' decisions had failed to have sufficient regard to the issues of freedom of political expression that were at stake. By a four-to-one majority (Lord Scott dissenting) the House of Lords upheld the broadcasters' appeal. Lord Nicholls was one of the majority.

Lord Nicholls: . . . Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts . . .

In this country access to television by political parties remains very limited. Independent broadcasters are subject to a statutory prohibition against screening advertisements inserted by bodies whose objects are of a political nature. The BBC is prohibited from accepting payment in return for broadcasting. Party political broadcasts and party election broadcasts, transmitted free, are an exception. These 'party broadcasts' are the only occasions when

political parties have access to television for programmes they themselves produce. In today's conditions, therefore, when television is such a powerful and intrusive medium of communication, party broadcasts are of considerable importance to political parties and to the democratic process.

The foundation of Prolife Alliance's case is article 10 of the European Convention on Human Rights. Article 10 does not entitle Prolife Alliance or anyone else to make free television broadcasts. Article 10 confers no such right. But that by no means exhausts the application of article 10 in this context. In this context the principle underlying article 10 requires that access to an important public medium of communication should not be refused on discriminatory, arbitrary or unreasonable grounds. Nor should access be granted subject to discriminatory, arbitrary or unreasonable conditions. A restriction on the content of a programme, produced by a political party to promote its stated aims, must be justified. Otherwise it will not be acceptable. This is especially so where, as here, the restriction operates by way of prior restraint. On its face prior restraint is seriously inimical to freedom of political communication.

That is the starting point in this case. In proceeding from there it is important to distinguish between two different questions. Once this distinction is kept in mind the outcome of this case is straightforward. The first question is whether the content of party broadcasts should be subject to the same restriction on offensive material as other programmes. The second question is whether, assuming they should, the broadcasters applied the right standard in the present case.

It is only the second of these two questions which is in issue before your Lordships. I express no view on whether, in the context of a party broadcast, a challenge to the lawfulness of the statutory offensive material restriction would succeed. For present purposes what matters is that before your Lordships' House Prolife Alliance accepted, no doubt for good reasons, that the offensive material restriction is not in itself an infringement of Prolife Alliance's Convention right under article 10. The appeal proceeded on this footing. The only issue before the House is the second, narrower question. The question is this: should the court, in the exercise of its supervisory role, interfere with the broadcasters' decisions that the offensive material restriction precluded them from transmitting the programme proposed by Prolife Alliance?

On this Prolife Alliance's claim can be summarised as follows. A central part of its campaign is that if people only knew what abortion actually involves, and could see the reality for themselves, they would think again about the desirability of abortion. The disturbing nature of the pictures of mangled foetuses is a fundamental part of Prolife Alliance's message. Conveying the message without the visual images significantly diminishes the impact of the message. A producer of a party broadcast can be expected to exercise self-control over offensiveness, lest the broadcast alienate viewers whose interest and support the party is seeking. Here, it was common ground that the pictures in the proposed programme were not fictitious or reconstructed or 'sensationalised'. Nor was the use of these images 'gratuitous', in the sense of being unnecessary. The pictures were of real cases. In deciding that, even so, the pictures should not be transmitted the broadcasters must have misdirected themselves. They must have attached insufficient importance to the context that

this was a party election broadcast. Any risk of distress could have been safeguarded by transmitting the programme after 10.00pm with a suitably explicit warning at the beginning of the programme.

In my view, even on the basis of the most searching scrutiny, Prolife Alliance has not made out a case for interfering with the broadcasters' decisions. Clearly the context in which material is transmitted can play a major part in deciding whether transmission will breach the offensive material restriction. From time to time harrowing scenes are screened as part of news programmes or documentaries or other suitable programmes . . . But, even in such broadcasts, the extent to which distressing scenes may be shown must be strictly limited, so long as the broadcasters remain subject to their existing obligation not to transmit offensive material. Parliament has imposed this restriction on broadcasters and has chosen to apply this restriction as much to party broadcasts as to other programmes. The broadcasters' duty is to do their best to comply with this restriction, loose and imprecise though it may be and involving though it does a significantly subjective element of assessment.

The present case concerns a broadcast on behalf of a party opposed to abortion. Such a programme can be expected to be illustrated, to a strictly limited extent, by disturbing pictures of an abortion. But the Prolife Alliance tapes went much further. In its decision letter dated 17 May 2001 the BBC noted that some images of aborted foetuses could be acceptable depending on the context: 'What is unacceptable is the cumulative effect of several minutes primarily devoted to such images.' None of the broadcasters regarded the case as at the margin. Each regarded this as a 'clear case in which it would plainly be a breach of our obligations to transmit this broadcast'. In reaching their decisions the broadcasters stated they had 'taken into account the importance of the images to the political campaign of the Prolife Alliance'. In my view the broadcasters' application of the statutory criteria cannot be faulted. There is nothing, either in their reasoning or in their overall decisions, to suggest they applied an inappropriate standard when assessing whether transmission of the pictures in question would be likely to be offensive to public feeling.

I respectfully consider that in reaching the contrary conclusion the Court of Appeal fell into error in not observing the distinction between the two questions mentioned above, one of which was before the court and the other of which was not. Laws LJ said (at [22]) the 'real issue' the court had to decide was 'whether those considerations of taste and offensiveness, which moved the broadcasters, constituted a legal justification for the act of censorship involved in banning the claimant's proposed PEB'. The court's constitutional duty, he said (at [37]), amounted to a duty 'to decide for itself whether this censorship was justified'. The letter of 17 May 2001 gave 'no recognition of the critical truth, the legal principle, that considerations of taste and decency cannot prevail over free speech by a political party at election time save wholly exceptionally': [44] . . .

The flaw in this broad approach is that it amounts to rewriting, in the context of party broadcasts, the content of the offensive material restriction imposed by Parliament on broadcasters. It means that an avowed challenge to the broadcasters' decisions became a challenge to the appropriateness of imposing the offensive material restriction on party broadcasts. As already stated, this was not an issue in these proceedings. Had it been, and had a declaration of incompatibility been sought, the appropriate Government minister

would need to have been given notice and, no doubt, joined as a party to the proceedings. Then the wide-ranging review of the authorities undertaken by the Court of Appeal would have been called for.

As it was, the Court of Appeal in effect carried out its own balancing exercise between the requirements of freedom of political speech and the protection of the public from being unduly distressed in their own homes. That was not a legitimate exercise for the courts in this case. Parliament has decided where the balance shall be held. The latter interest prevails over the former to the extent that the offensive material ban applies without distinction to all television programmes, including party broadcasts. In the absence of a successful claim that the offensive material restriction is not compatible with the Convention rights of Prolife Alliance, it is not for the courts to find that broadcasters acted unlawfully when they did no more than give effect to the statutory and other obligations binding on them. Even in such a case the effect of section 6(2) of the 1998 Act would have to be considered. I would allow this appeal. The broadcasters' decisions to refuse to transmit the original version, and the first and second revised versions, of Prolife Alliance's proposed broadcast were lawful.

This approach may be contrasted with that of Lord Scott (dissenting):

Lord Scott: . . . The short issue in the case is whether the broadcasters, the BBC and the ITV companies, acted lawfully in declining to transmit the television programme submitted to them by the Prolife Alliance as the Alliance's desired party election broadcast for the purposes of the 2001 general election.

It is accepted that the broadcasters' refusal to transmit the Prolife Alliance's programme engages article 10 of the European Convention on Human Rights . . .

The right to impart information and ideas does not necessarily entitle those who desire to do so to be supplied with the means or facilities necessary to enable the information to be conveyed to the desired audience. A person who has written a book or a play cannot insist on having it published by a publisher, or placed on someone else's bookstall, or, if a play, staged in someone else's theatre. But radio and television broadcasting are different. Licences are required. And licences are granted on conditions that impose restrictions as to the contents of programmes that can be broadcast. So article 10 is engaged.

It follows that, in the present case, the Prolife Alliance is entitled to say that the criteria applied to its desired party election programme by the broadcasters in deciding whether or not to accept the programme should be no more severe than are

> 'necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary' (Article 10(2)).

I have set out in full the article 10(2) heads under which restrictions on article 10 rights can be justified notwithstanding the obvious inapplicability of most of the heads to the reasons why the Alliance's proposed programme was rejected. I have done so because it seems to me helpful to notice their comprehensive character. The application of restrictions allegedly

in the public interest but not justifiable under any of these heads would, in my opinion, constitute a breach of article 10 rights . . .

It was not contended by counsel for the Alliance that a restriction barring the televising of a programme likely to be offensive to public feeling was, per se, incompatible with article 10. Nor should it have been. The reference in article 10(2) to the 'rights of others' need not be limited to strictly legal rights the breach of which might sound in damages and is well capable of extending to a recognition of the sense of outrage that might be felt by ordinary members of the public who in the privacy of their homes had switched on the television set and been confronted by gratuitously offensive material.

Nor, as my noble and learned friend, Lord Nicholls of Birkenhead, has pointed out, was it contended before your Lordships that the content of party election broadcasts should be subject to any textually different restrictions from those applicable to other programmes. The requirement that broadcasts should not offend good taste and decency or be offensive to public feeling is not necessarily an article 10 breach in relation to party election broadcasts any more than it is in relation to programmes generally. The issue, therefore, on the present appeal is a narrow one. It is whether the rejection by the broadcasters of this particular programme, the purpose of which was to promote the cause of the Alliance at the forthcoming general election, was a lawful application by the broadcasters of the conditions by which they were bound. To put the point another way, was their rejection of the Alliance's desired programme necessary in a democratic society for the protection of the right of home-owners that offensive material should not be transmitted into their homes?

The issue is one that is fact-sensitive. The relevant facts seem to me to be these. (1) The Prolife Alliance is against abortion. (2) Its candidates at general elections stand on a single issue, namely, that the abortion law should be reformed so as either to bar abortions altogether or, at least, to impose much stricter controls than at present pertain. This is a lawful issue and one of public importance. (3) The Alliance's desired programme was factually accurate. Laws LJ (at [13]), described what was shown in the programme thus: 'The pictures are real footage of real cases. They are not a reconstruction, nor in any way fictitious. Nor are they in any way sensationalised.' There was no dissent from this description. (4) Laws LJ went on to describe what was shown in the programme as 'certainly disturbing to any person of ordinary sensibilities'. This, too, was not disputed. (5) It was accepted that, if the programme was to be transmitted, it would have to be transmitted in the late evening, and be preceded by an appropriate warning. (6) Television is of major importance as a medium for political advertising. That this is so has throughout been recognised on all sides.

The decision to refuse to broadcast the programme was communicated to the Alliance by a letter of 17 May 2001 from the BBC. The letter said that the BBC, and the ITV broadcasters, had concluded that 'it would be wrong to broadcast these images which would be offensive to very large numbers of viewers'. Was this a conclusion to which a reasonable decision maker, paying due regard to the Alliance's right to impart information about abortions to the electorate subject only to what was necessary in a democratic society to protect the rights of others, could have come?

In my opinion, it was not. The restrictions on the broadcasting of material offending against good taste and decency and of material offensive to public feeling were drafted so as to be capable of application to all programmes, whether light entertainment, serious

drama, historical or other documentaries, news reports, party political programmes, or whatever. But material that might be required to be rejected in one type of programme might be unexceptionable in another. The judgment of the decision maker would need to take into account the type of programme of which the material formed part as well as the audience at which the programme was directed. This was a party election broadcast directed at the electorate. He, or she, would need to apply the prescribed standard having regard to these factors and to the need that the application be compatible with the guarantees of freedom of expression contained in article 10.

The conclusion to which the broadcasters came could not, in my opinion, have been reached without a significant and fatal undervaluing of two connected features of the case: first, that the programme was to constitute a party election broadcast; second, that the only relevant criterion for a justifiable rejection on offensiveness grounds was that the rejection be necessary for the protection of the right of home-owners not to be subjected to offensive material in their own homes.

The importance of the general election context of the Alliance's proposed programme cannot be overstated. We are fortunate enough to live in what is often described as, and I believe to be, a mature democracy. In a mature democracy political parties are entitled, and expected, to place their policies before the public so that the public can express its opinion on them at the polls. The constitutional importance of this entitlement and expectation is enhanced at election time.

If, as here, a political party's desired election broadcast is factually accurate, not sensationalised, and is relevant to a lawful policy on which its candidates are standing for election, I find it difficult to understand on what possible basis it could properly be rejected as being 'offensive to public feeling'. Voters in a mature democracy may strongly disagree with a policy being promoted by a televised party political broadcast but ought not to be offended by the fact that the policy is being promoted nor, if the promotion is factually accurate and not sensationalised, by the content of the programme. Indeed, in my opinion, the public in a mature democracy are not entitled to be offended by the broadcasting of such a programme. A refusal to transmit such a programme based upon the belief that the programme would be 'offensive to very large numbers of viewers' (the letter of 17 May 2001) would not, in my opinion, be capable of being described as 'necessary in a democratic society . . . for the protection of . . . rights of others'. Such a refusal would, on the contrary, be positively inimical to the values of a democratic society, to which values it must be assumed that the public adhere.

(See further on this case, Barendt [2003] *PL* 580, Macdonald [2003] *EHRLR* 651 and Rowbottom (2003) 119 *LQR* 553.)

(f) Conflict of rights

Different Convention rights protected by the Human Rights Act may come into conflict. In particular, freedom of expression (Article 10) may conflict with the right to respect for private and family life (Article 8). Each of these rights may be restricted by law so far as necessary in a democratic society inter alia for the protection of the rights of others (Articles 8(2) and 10(2)). In case of conflict it

is accordingly necessary for the court to balance one right against the other with reference to the particular circumstances, giving to each right its due value and having regard to the principle of proportionality.

Concern was expressed during the passage of the Human Rights Bill that freedom of the press might be curtailed by judicial decisions giving undue weight to respect for privacy. The press were especially apprehensive of the threat of prior restraint of publication by the grant of interlocutory injunctions by the courts, freezing press comment in matters still to be tried. The Government responded with an amendment (now section 12 of the HRA) designed to safeguard press freedom (but not restricted to cases affecting newspapers).

Section 12 applies if a court is considering, in civil proceedings, whether to grant any relief which might affect the exercise of the Convention right to freedom of expression. The section is not limited to cases in which one of the parties is a public authority. It is provided in particular (s 12(3)) that interlocutory injunctions – only in exceptional circumstances to be granted without notice, the respondent not being present or represented – are not to be granted unless the court is satisfied that the applicant is likely to succeed on the merits at the trial. Such injunctions will accordingly not be granted simply to preserve the existing position of the parties pending the full trial. Further, in deciding whether to give any relief the court 'must have particular regard to the importance of the Convention right to freedom of expression' (s 12(4)). While this provision demonstrates the importance attached to freedom of expression and the media, it does not 'require the court to treat freedom of speech as paramount' (Sir Andrew Morritt V-C in *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All ER 385, [18]); it is a 'powerful card' but 'not in every case the ace of trumps' (Brooke LJ in *Douglas v Hello! Ltd* [2001] QB 967, [49]). In proceedings relating to journalistic, literary or artistic material, the court must also have particular regard to the fact or imminent likelihood of the material being in any event available to the public, the extent to which publication would be in the public interest, and any relevant privacy code (such as the Press Complaints Commission's code of practice).

It is contemplated that persons complaining of intrusions into their privacy by the press will still ordinarily take their complaints to the Press Complaints Commission and that the courts will normally respect its determinations. (The Commission is a public authority and as such must, like the courts, give due weight to Convention rights and fairly balance them when they are in conflict.) But direct access to the courts in such cases is not excluded.

Venables v News Group Newspapers Ltd [2001] Fam 430 (Dame Elizabeth Butler-Sloss P)

The claimants had been convicted of murder when eleven years old and sentenced to be detained during Her Majesty's pleasure. Injunctions had been imposed to prevent publication of information about them during the period

of their detention. Having reached the age of eighteen and their release being in prospect, the claimants applied to have the injunctions continued, in particular so as to prevent disclosure of information about the new identities to be given to them on release, their whereabouts and physical appearance. The defendant newspaper groups contended that the injunctions sought would be an unjustifiable interference with freedom of expression. Although the court was concerned with matters of private law in litigation between private individuals, the President of the Family Division was satisfied that, the court being a public authority, she was bound to protect the Convention rights of the parties in adjudicating upon issues that arose from an established cause of action at common law. Evidence was submitted for the claimants that publication of information about them would put them in danger of serious injury or death and it was argued that the confidentiality of that information merited protection under the law of confidence.

The claimants relied upon Article 10(2) of the Convention which allows for restrictions on freedom of expression, inter alia 'for preventing the disclosure of information received in confidence'. They also invoked Articles 2 (right to life), 3 (prohibition of torture and inhuman treatment) and 8 (right to respect for privacy). The judge observed that she would 'have to resolve a potential conflict between Article 10 on the one hand and Articles 2 and 3 and 8 on the other hand'. If freedom of expression was to be restricted the criteria in Article 10(2), 'narrowly interpreted', would have to be met:

> The onus of proving the case that freedom of expression must be restricted is firmly upon the applicant seeking the relief. The restrictions sought must, in the circumstances of the present case, be shown to be in accordance with the law, justifiable as necessary to satisfy a strong and pressing social need, convincingly demonstrated, to restrain the press in order to protect the rights of the claimants to confidentiality, and proportionate to the legitimate aim pursued.

The judge was satisfied that the restriction resulting from the injunctions sought would be in accordance with the law, specifically the equitable duty of confidence. The duty extended to confidential information which came to the knowledge of the media, and which in the circumstances of the present case required 'a special quality of protection' by reason of the 'grave and possibly fatal consequences' which would be likely to follow from publication.

It was also clear to the judge that the restriction was necessary in a democratic society to satisfy a strong and pressing need, since she was satisfied on the evidence that there was a real possibility that publication would expose the claimants to revenge attacks, violating their rights under Articles 2 and 3. The grant of the injunctions would substantially reduce that risk and was proportionate to the legitimate aim pursued, in particular since newspapers could not otherwise be relied upon not to publish information about the identity or addresses of the claimants. (The injunctions might not have been appropriate, said the judge,

if it had been only Article 8 that was likely to be breached.) Injunctions were accordingly granted *contra mundum* – against the whole world, prohibiting the disclosure of information which would reveal the identity or whereabouts of the claimants.

4 Freedom of assembly

'The freedom to demonstrate one's views in public – within the law – is fundamental to a democracy' (*Review of the Public Order Act 1936*, Cmnd 7891/1980, para 36). As Tugendhat J stated in *Austin v Metropolitan Police Commissioner* [2005] EWHC 480, [2005] HRLR 20, [80]:

> Political demonstrations have long been a central feature of [British] life. Before the extension of the franchise in the nineteenth century they were the only means by which the public could make known their views. But they were generally treated as rebellions, whether they were violent or not. Out of the upheavals in the 16th and 17th centuries there came to be recognised a right of free speech and a free assembly. There are repeated re-affirmations by the Courts of the importance of these rights in a democracy. Large modern democracies operate through representation and elections. Political demonstrations are one of the few ways that members of the public can impress upon their representatives and upon candidates the importance of issues in which they might otherwise not take an interest.

(See further on this case, below). Lord Scarman, in his *Report on the Red Lion Square Disorders* of 15 June 1974 (Cmnd 5919/1975) numbered amongst our 'fundamental human rights' the rights of 'peaceful assembly and public protest' (at 1). Freedom of assembly bears a close relation to freedom of speech, for in the constitutional context our concern is with assemblies held to further a political campaign or to mount a public protest: such assemblies have the purpose of communication, by argument, pressure or persuasion.

Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982), pp 201–2

> Much speech takes place in settings in which the only issues as to regulation are those that relate to the content of the communication. Whether we should regulate matter appearing in books, newspapers, and Hyde Park Corner orations, for example, is determined by what is said, and our estimation of the dangers that might flow from the particular communicative content of the speech.
>
> Traditionally, these concerns with content have constituted the only important free speech questions. But as speech has moved into new settings, new considerations not related to content have appeared. When people communicate by picketing, through the use of demonstrations or in parades, interests not related to the content of the communication are implicated. Parades interfere with the flow of traffic, demonstrations may prevent people

from going where they wish to go, and picketing may interfere with the operation of a business or office. All of these are legitimate concerns. Yet these settings for communication are becoming increasingly prevalent in contemporary society. Reconciling the free speech interests with the acknowledged importance of traffic- and crowd-control has as a result become an increasingly important problem for free speech theory.

It is tempting to say that this type of communication is less important. Communication by parades, demonstrations and picketing is more emotional than intellectual, and more fully argued statements of the positions involved are available in books, newspapers, magazines and other less obstructive communicative formats. If we cut off 'speech in the streets', there remain readily available alternative forums, and there is little danger that some ideas will remain unsaid. Indeed, restricting speech of this type may well support some of the values protected by a system of freedom of speech, by forcing communication into channels more conducive to rational argument and deliberation, thereby increasing the overall level of civility in public discourse.

Acceptance of such a position, however, requires that we ignore an important phenomenon in contemporary communication. When people first started talking and writing about freedom of speech and freedom of the press, there existed only a few forums for communication. There was no radio or television or cinema, few newspapers, few periodicals, and comparatively few political tracts published for private distribution. It was not at all unreasonable to assume that a mildly expressed and closely reasoned political or social or theological argument would in fact be read or heard by most people having any interest in such matters. But now, with radio, television and film, with almost innumerable newspapers, magazines, books and pamphlets, and with so many people speaking out on so many different subjects, there is perhaps 'too much' speech, in the sense that it is impossible to read or hear even a minute percentage of what is being expressed. There is a din of speech, and our limited capacity to read or to hear has resulted in effective censorship by the proliferation of opinion rather than by the restriction of opinion. We learn no more from a thousand people all speaking at the same time than we learn from total silence.

Under such circumstances it is frequently necessary, literally or figuratively, to shout to be heard. One method of gaining a listener's attention is by the use of offensive words or pictures. Another, more relevant here, is through the use of placards, large groups of people, loud noises and all the other attention-getting devices that are part of parades, picketing and demonstrations. To restrict these methods of communication is to restrict the effectiveness of speech, and also to restrict the extent to which new or controversial ideas may be brought to the attention of potential listeners.

Moreover, important free speech values are served by emotive utterances. This is most apparent under the catharsis argument [discussed by the author in chapter 6 of his book]. But it is equally important under the argument from democracy. As a voter I am interested not only in what others feel about a certain issue, but also in how many people share that view, and in how strongly that opinion is held. As a public official I am equally concerned (or should be) with gauging the extent and the strength of public opinion. In addition, freedom of speech serves a legitimizing function, in holding that people should be bound by official policy if they have had, through speech, the opportunity to participate (even if

unsuccessfully) in the process of formulating official policy. In terms of this function, parades, picketing and demonstrations are a way of attempting to influence official policy and are thus a part of the total process.

I am not arguing that parades, demonstrations and picketing should always be protected. Nor am I arguing that there are not good reasons for restricting speech when it takes these forms. What I am arguing is that there are good reasons for recognizing this type of speech as being important, and that there seem to be no good reasons for relegating these forms of communication to some inferior status in the free speech hierarchy. The question is not one of balancing a less legitimate form of speech against legitimate governmental interests in peace and order, but rather is one of balancing an important and legitimate form of communication against important and legitimate governmental interests. When so formulated the problem is a difficult one, but one that is fortunately slightly more susceptible to rational resolution than some other free speech problems.

See too Eric Barendt's discussion of the value of freedom of assembly in J Beatson and Y Cripps, *Freedom of Expression and Freedom of Information* (2000), pp 165–9, suggesting that freedom of assembly is also important for other values than freedom of speech, as in enabling unrepresented groups in society to participate in political activity.

(a) Common law: the classic authorities

'It can hardly be said', remarked Dicey (*Law of the Constitution* (1885), p 271), 'that our constitution knows of such a thing as any specific right of public meeting'. On the other hand, he went on to say, if persons holding a meeting did not break the law they could not, as a general rule, be required by the authorities to disperse. This is the traditional view of constitutional 'rights' as merely residual liberties. The potential strength of this approach was famously illustrated in the following case.

Beatty v Gillbanks (1882) 9 QBD 308 (DC)

The Salvation Army were in the habit of marching in procession through the streets of Weston-super-Mare. Their objectives were peaceable but they were accompanied by vociferous supporters and opposed by a militant organisation, the Skeleton Army, which on several occasions violently resisted their passage, causing outbreaks of disorder on the streets. Local magistrates published a notice ordering all persons 'to abstain from assembling to the disturbance of the public peace', but on the following Sunday the Salvationists set out as usual, and as usual were followed by a large and noisy crowd. The police met the procession and told Beatty, one of the leaders, that they must obey the magistrates' notice and disperse. Beatty refused and, the march continuing, he and other leaders were arrested. None of them had committed acts of violence, but on being brought before justices of the peace they were found to have unlawfully

and tumultuously assembled and were bound over (required to find sureties to keep the peace) for twelve months. They appealed by way of case stated to the Divisional Court, which gave judgment for the appellants.

Field J: I am of opinion that this order cannot be supported. The matter arises in this way. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No one imputes to this association any other object, and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course, and, at all events in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such an assembly is in itself an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is, that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shewn that this offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants knowing when they assembled together that such consequences would again arise are liable to this charge.

Now I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.

In Hawkins' Pleas of the Crown, s 9, it is said, 'An unlawful assembly according to the common opinion is a disturbance of the peace by persons barely assembling together with the intention to do a thing which if it were executed would make them rioters, but neither actually executing it nor making a motion toward the execution of it.' On this definition, standing alone, it is clear that the appellants were guilty of no offence, for it cannot be contended that they had any intention to commit any riotous act. The paragraph, however, continues thus, 'But this seems to be much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no man can foresee what may be the event of such an assembly.' Examples are then given, but in each the circumstances of

> terror exist in the assembly itself, either in its object or mode of carrying it out, and there is the widest difference between such cases and the present. What has happened here is that an unlawful organisation has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.
>
> **Cave J** concurred.

Even if the reasoning of Field J on the question of the causation of the disorder was somewhat superficial (see Bevan [1979] *PL* 163, 178; M Supperstone, *Brownlie's Law of Public Order and National Security* (2nd edn 1981), pp 126–7), the case stands as a beacon, in upholding the legality of peaceful public assembly and the principle that a gathering does not become unlawful because other persons are so inflamed by it as to commit acts of violence. The dictum of O'Brien J in *R v Londonderry Justices* (1891) 28 LR Ir 440, 450, is consistent with this principle:

> If danger arises from the exercise of lawful rights resulting in a breach of the peace, the remedy is the presence of sufficient force to prevent that result, not the legal condemnation of those who exercise those rights.

Although only rarely since applied by the courts (and more often distinguished, as in *O'Kelly v Harvey* (1883) 10 LR Ir 285 and *Wise v Dunning* [1902] 1 KB 167), the principle of *Beatty v Gillbanks* has never been overthrown, has continued to inform public discussion (as in Lord Scarman's *Report on The Red Lion Square Disorders of 15 June 1974*, Cmnd 5919/1975, paras 69–70) and has, in general, guided public authorities in the use of their discretionary powers – for example, to ban the holding of processions (now under section 13 of the Public Order Act 1986): see Gearty, in C McCrudden and G Chambers (eds), *Individual Rights and the Law in Britain* (1994), p 55.

Beatty v Gillbanks, it has been remarked, 'is essentially concerned with prior control, in the form of formal restraining orders imposed by courts or administrators or by the police, rather than with the duty or power of police officers responding instantly to actual threats to the public peace' (DGT Williams, in A Doob and E Greenspan (eds), *Perspectives in Criminal Law* (1985), p 116). Persons taking part in peaceful public processions or meetings have had to submit to directions given by police on the spot in exercising their preventive powers to preserve the peace. This qualification (or is it more than a 'qualification'?) of the *Beatty v Gillbanks* principle was firmly embedded in the law by the decision in *Duncan v Jones* (below) and the two precedents have endured in uneasy misalliance since that time.

Duncan v Jones [1936] 1 KB 218 (DC)

Mrs Duncan was about to address a meeting in the street opposite the entrance to an unemployed training centre. After a meeting addressed by her in the same place fourteen months previously, a disturbance had taken place inside the centre. On this occasion police officers, reasonably believing – it was afterwards found – that a breach of the peace might again occur, told Mrs Duncan that the meeting must not be held in that place but might instead be held in another street nearby. When she insisted on addressing those present, she was arrested and subsequently convicted by magistrates of the statutory offence of obstructing a constable in the execution of his duty. Mrs Duncan appealed to the Divisional Court.

Lord Hewart CJ: There have been moments during the argument in this case when it appeared to be suggested that the Court had to do with a grave case involving what is called the right of public meeting. I say 'called,' because English law does not recognise any special right of public meeting for political or other purposes. The right of assembly, as Professor Dicey puts it, is nothing more than a view taken by the Court of the individual liberty of the subject. If I thought that the present case raised a question which has been held in suspense by more than one writer on constitutional law – namely, whether an assembly can properly be held to be unlawful merely because the holding of it is expected to give rise to a breach of the peace on the part of persons opposed to those who are holding the meeting – I should wish to hear much more argument before I expressed an opinion. This case, however, does not even touch that important question.

Lord Hewart then gave brief attention to 'the somewhat unsatisfactory case' of *Beatty v Gillbanks*, noting that the circumstances and the charge in that case were different from the matter before him and that Field J had there conceded that everyone must be taken to intend the natural consequences of his own acts. He continued:

The case stated which we have before us indicates clearly a causal connection between the meeting of [the previous year] and the disturbance which occurred after it . . . In my view, the deputy-chairman was entitled to come to the conclusion to which he came on the facts which he found and to hold that the conviction of the appellant for wilfully obstructing the respondent when in the execution of his duty was right. This appeal should, therefore, be dismissed.

Humphreys J: I agree. I regard this as a plain case. It has nothing to do with the law of unlawful assembly. No charge of that sort was even suggested against the appellant. The sole question raised by the case is whether the respondent, who was admittedly obstructed, was so obstructed when in the execution of his duty.

It does not require authority to emphasize the statement that it is the duty of a police officer to prevent apprehended breaches of the peace. Here it is found as a fact that the

> respondent reasonably apprehended a breach of the peace. It then, as is rightly expressed in the case, became his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to do he was wilfully obstructed by the appellant. I can conceive no clearer case within the statutes than that.

Singleton J agreed that the appeal should be dismissed.

See, on this case, Wade (1936–39) 6 *CLJ* 175, 179, who wrote that 'the net has closed entirely upon those who from lack of resources, or for other reasons, desire to hold meetings in public places'; Daintith [1966] *PL* 248, who observes that it brought about a 'substantial expansion of police powers'; and K Ewing and C Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1914–1945* (2000), who describe the case as being 'as noteworthy today for the vacuity of its reasoning as for its long-term deleterious effect on civil liberties' (at p 265). The courts have repeatedly endorsed the reasoning of *Duncan v Jones* and have readily upheld the actions of the police in preventing or dispersing demonstrations and in arresting those who persist for breach of the peace: see *Piddington v Bates* [1961] 1 WLR 162; *Kavanagh v Hiscock* [1974] QB 600; *Moss v McLachlan* [1985] IRLR 76. The courts have, it is true, insisted that the police must anticipate 'a real, not a remote, possibility' of a breach of the peace before taking preventive action, but have been reluctant to question the judgement of police officers on the spot as to the necessity for intervention (see further on this point, below). In *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, 435, Lord Slynn reaffirmed the principle reflected in *Duncan v Jones* and its progeny in saying: 'I do not accept that *Beatty v Gillbanks* lays down that the police can never restrain a lawful activity if that is the only way to prevent violence and a breach of the peace'.

The decision in the following case may be thought to invite a reconsideration of *Duncan v Jones*.

Redmond-Bate v Director of Public Prosecutions [2000] HRLR 249 (DC)

The appellant, Alison Redmond-Bate, and two other women were preaching to passers-by from the steps of Wakefield cathedral. A crowd of over 100 people gathered and some of them were showing hostility towards the preachers. A constable arrived and, fearing a breach of the peace, asked the women to stop preaching; when they refused he arrested them for breach of the peace. The appellant was subsequently charged with obstructing the constable in the execution of his duty. She was convicted, and her appeal to the Crown Court having been dismissed, she appealed by case stated to the Divisional Court.

The essential question for the court was whether the constable had been acting in the execution of his duty when he asked the women to stop speaking. A constable is not empowered to take preventive action in such circumstances unless he has reasonable grounds to fear that a breach of the peace, in the form

of violent conduct, will occur. Even if this requirement is satisfied there is a further matter to be considered by the constable – and by a court in deciding whether the constable was justified in the action he took. Sedley LJ's judgment (in which Collins J concurred) was mainly directed to this further question.

> **Sedley LJ:** . . . [A] judgment as to the imminence of a breach of the peace does not conclude the constable's task. The next and critical question for the constable, and in turn for the court, is where the threat is coming from, because it is there that the preventive action must be directed. Classic authority illustrates the point. In *Beatty v Gillbanks* (1882) 9 QBD 308 this court (Field, J and Cave, J) held that a lawful Salvation Army march which attracted disorderly opposition and was therefore the occasion of a breach of the peace could not found a case of unlawful assembly against the leaders of the Salvation Army. Field, J, accepting that a person is liable for the natural consequences of what he does, held nevertheless that the natural consequences of the lawful activity of the Salvation Army did not include the unlawful activities of others, even if the accused knew that others would react unlawfully. By way of contrast, in *Wise v Dunning* [1902] 1 KB 167 a Protestant preacher in Liverpool was held by this Court (Lord Alverstone, CJ, Darling and Channell, JJ) to be liable to be bound over to keep the peace upon proof that he habitually accompanied his public speeches with behaviour calculated to insult Roman Catholics. The distinction between the two cases is clear enough: the reactions of opponents would in either case be unlawful, but while in the first case they were the voluntary acts of people who could not properly be regarded as objects of provocation, in the second the conduct was calculated to provoke violent and disorderly reaction.

In regard to *Duncan v Jones*, Sedley LJ said that the court had there 'cast its reasoning somewhat wider than – as it seems to me – is consonant with modern authority'. He was able to distinguish that case from the present one on the basis that the justices in *Duncan v Jones* had found that the appellant, Mrs Duncan, had herself been the source of the threat to public order. Sedley LJ went on to consider the ruling of the Crown Court in the present case:

> The Crown Court correctly directed itself that violence is not a natural consequence of what a person does unless it clearly interferes with the rights of others so as to make a violent reaction not wholly unreasonable.

On the other hand, as to the ruling of the Crown Court that 'lawful conduct can, if persisted in, lead to conviction for wilful obstruction of a police officer', Sedley LJ said:

> This proposition has, in my judgment, no basis in law. A police officer has no right to call upon a citizen to desist from lawful conduct. It is only if otherwise lawful conduct gives rise to a reasonable apprehension that it will, by interfering with the rights or liberties of others, provoke violence which, though unlawful, would not be entirely unreasonable that a constable is empowered to take steps to prevent it.

With regard to the present case Sedley LJ went on to say:

> The question for [the constable] was whether there was a threat of violence and if so, from whom it was coming. If there was no real threat, no question of intervention for breach of the peace arose. If the appellant and her companions were (like the street preacher in *Wise v Dunning*) being so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Skeleton Army in *Beatty v Gillbanks*), then it was they and not the preachers who should be asked to desist and arrested if they would not.

On the facts of the case Sedley LJ could see no lawful basis for the arrest of the appellant or for her conviction. As to a concession by the prosecution that blame would not attach for a breach of the peace to a speaker 'so long as what she said was inoffensive', the judge responded:

> This will not do. Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

The conclusion of the court was that the situation perceived by the constable 'did not justify him in apprehending a breach of the peace, much less a breach of the peace for which the three women would be responsible'. The appeal was accordingly allowed.

The principle vindicated in this case was reaffirmed by the Court of Appeal in *Bibby v Chief Constable of Essex* (2000) 164 JP 297. See the comment on these cases by ATH Smith [2000] *CLJ* 425.

(b) Common law preventive powers and breach of the peace

Unlike in Scots law, in English law breach of the peace is not *itself* a criminal offence (for the offence in Scots law, see eg, *Smith v Donnelly* 2001 SLT 1007). In *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, Lord Brown stated (at [111]) that a breach of the peace, while not itself a criminal offence in English law, 'necessarily involves' the commission of a criminal offence; see further on this case, below. Under English law a magistrate may 'bind over' an individual to keep the peace, meaning that the individual may forfeit a sum of money if he or she subsequently breaches the peace (Magistrates' Courts Act 1980, s 115). Refusal to be bound over to keep the peace is an offence in English law, punishable by up to six months' imprisonment. (These principles date back to at least the fourteenth century: see the Justices of the Peace Act 1361; for commentary see Feldman [1988] *CLJ* 101.) Under the common law the police possess a preventive power of arrest in anticipation of a breach of the peace.

The anticipated breach of the peace must be 'imminent' (see below). This is not only a power: it is in some circumstances a duty. Moreover, it is a duty that is shared by the police and by citizens alike. In *Albert v Lavin* [1982] AC 546, Lord Diplock stated (at 565) that:

> every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case of a citizen who is a constable, it is a duty of imperfect obligation.

The police also possess a power, vehemently contested by civil liberties commentators, to enter private premises to prevent an anticipated breach of the peace (see the controversial decision in *Thomas v Sawkins* [1935] 2 KB 249; see further *McLeod v Metropolitan Police Commissioner* [1994] 4 All ER 553 and *McLeod v United Kingdom* (1999) 27 EHRR 493; for commentary on *Thomas v Sawkins*, see K Ewing and (Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain* 1914–1945 (2000), pp 289–95).

'Breach of the peace' is a concept that has been variously defined. In *R v Chief Constable of Devon and Cornwall Police, ex p CEGB* [1982] QB 458, 471, Lord Denning MR went so far as to proclaim that 'There is a breach of the peace whenever a person who is lawfully carrying out his work is unlawfully and physically prevented by another from doing it . . . If anyone unlawfully and physically obstructs the worker, by lying down or chaining himself to a rig or the like, he is guilty of a breach of the peace.' (Other members of the Court of Appeal offered narrower definitions in this case.) Given the range of intrusive and coercive powers accorded to the police in anticipation of breach of the peace, were such a broad definition to stand, the exercise of such police powers would clearly fall foul of Convention rights. In *Percy v DPP* [1995] 1 WLR 1382 the court made it clear that there could be no breach of the peace without violence or the threat of violence. That said, however, the violence does not have to be perpetrated by the person arrested: it is sufficient if violence from another party is a natural consequence of his action. The European Court of Human Rights has ruled that, given (and subject to) this clarification, arrests for breach of the peace do not (without some further problem) breach Article 5(1) ECHR: see *Steel v United Kingdom* (1998) 28 EHRR 603. But cf *Hashman v United Kingdom* (2000) 30 EHRR 241, where the Court held that a binding over order to be 'of good behaviour' was in breach of Article 10, and *McLeod v United Kingdom* (above), where the Court held that a particular use of the *Thomas v Sawkins* power to enter private premises in anticipation of a breach of the peace was not justified and was in breach of Article 8. (For commentary on these cases, see Fenwick and Phillipson, 'Direct action, Convention values and the Human Rights Act' (2001) 21 *LS* 535, 553–7.)

In *Moss v McLachlan* [1985] IRLR 76 the Divisional Court confirmed that preventive action may be taken only if the officers 'honestly and reasonably form the opinion that there is a real risk of a breach of the peace in the sense that it is in close proximity both in place and time', but the court's application of this principle to the facts of the case caused controversy. The case arose from the miners' strike of 1984–85. Disorder had occurred at collieries in Nottinghamshire and police were stationed at a road junction in the county to prevent striking miners from taking part in mass pickets at any of four nearby collieries. It was held that the police had acted lawfully in stopping a group of about sixty miners from proceeding in cars to join a mass picket at one or other of the collieries (the nearest being one-and-a-half to two miles away), since there was a substantial risk that an outbreak of violence would result. The likelihood of a breach of the peace, said the court, was 'imminent, immediate and not remote'. Four miners who had refused police orders to turn back were held rightly convicted of obstructing the police in the execution of their duty, although it was not shown that any of them had done anything from which an intention to commit acts of violence could be inferred. (For criticism of the decision see eg, Newbold [1985] *PL* 30.)

These issues arose again in the following case.

R (Laporte) v Chief Constable of Gloucestershire [2006] UKHL 55

Ms Laporte was travelling on a coach from London to Gloucestershire in order to take part in a protest against the Iraq war at a US Air Force base at Fairford, which is in that county. Several coachloads of protesters were making the same journey. The police had received intelligence that a number of the passengers intended to breach the peace and that not all of the protesters would act peacefully. A few miles from Fairford, at a place called Lechlade, the police stopped the coaches, boarded them and searched them. It was apparently impossible for the police to identify with certainty which of the passengers intended to protest violently and which peacefully. All the passengers were ordered to return to London and were escorted throughout the two-and-a-half hour journey by the police. The coaches were not allowed to stop and no passenger was permitted to disembark until the coaches reached London.

On an application for judicial review the claimant argued that the police had acted unlawfully (1) in preventing her from travelling to the demonstration at Fairford and (2) in returning her to London in the manner described above. The Divisional Court and the Court of Appeal held against the claimant on the first point (both courts expressly relying on *Moss v McLachlan*, above) and for the claimant on the second point. The House of Lords unanimously allowed the claimant's appeal (and unanimously dismissed the Chief Constable's cross-appeal). As Lord Brown expressed it (at [115]), the problem with the judgments of the lower courts was, in the view of the Law Lords, that, on the approach adopted there 'the police are under a duty to take reasonable

steps to prevent a breach of the peace *from becoming* imminent (rather than *which is* imminent)'.

While their Lordships declined to overrule the decision in *Moss v McLachlan* they distinguished it on the facts. Lord Brown (at [118]) said of the case that it had gone 'to the furthermost limits of any acceptable view of imminence, and then only on the basis that those prevented from attending the demonstration were indeed manifestly intent on violence'. Lord Carswell summarised the legal issues in *Laporte* in the following, stark, manner, at [92]:

> the appellant . . . was prevented from taking part in a lawful demonstration at the Fairford air base. In a country which prides itself on the degree of liberty available to all citizens the law must take this curtailment of her freedom of action seriously.

The significance of their Lordships' ruling in *Laporte* is further revealed in the following passages from the opinion of Lord Bingham:

> **Lord Bingham:** . . . Reduced to essentials, the argument of Mr Emmerson QC for the claimant rested on four propositions:
>
> (1) Subject to Articles 10(2) and 11(2) of the European Convention, the claimant had a right to attend the lawful assembly at RAF Fairford in order to express her strong opposition to the war against Iraq.
>
> (2) The conduct of the Chief Constable . . . in stopping the coach on which the claimant was travelling at Lechlade and not allowing it to continue its intended journey to Fairford, was an interference by a public authority with the claimant's exercise of her rights under Articles 10 and 11.
>
> (3) The burden of justifying an interference with the exercise of a Convention right such as those protected by Articles 10 and 11 lies on the public authority which has interfered with such exercise, in this case the Chief Constable.
>
> (4) The interference by the Chief Constable in this case was for a legitimate purpose but (a) was not prescribed by law, because not warranted under domestic law, and (b) was not necessary in a democratic society, because it was (i) premature and (ii) indiscriminate and was accordingly disproportionate.
>
> Mr Freeland QC, for the Chief Constable, did not contest the correctness of propositions (1), (2) and (3), and it was common ground that the Chief Constable acted in the interests of national security, for the prevention of disorder or crime or for the protection of the rights of others, these being legitimate purposes under Articles 10(2) and 11(2). The remainder of what I have called proposition (4) was, however, strongly contested between the parties.
>
> Mr Emmerson argued that the Chief Constable's interference was not prescribed by law because not warranted by domestic legal authority. According to that authority there is a power and duty resting on constable and private citizen alike to prevent a breach of the peace which reasonably appears to be about to be committed. That is the test laid down in *Albert v Lavin* [1982] AC 546 [above] . . . It refers to an event which is imminent, on the point of happening. The test is the same whether the intervention is by arrest or . . . by action short

of arrest. There is nothing in domestic authority to support the proposition that action short of arrest may be taken when a breach of the peace is not so imminent as would be necessary to justify an arrest. Here, Mr Lambert [the senior police officer at the scene] did not think a breach of the peace was so imminent as to justify an arrest. He recorded that judgment at 10.45am. There is no evidence to suggest that his judgment ever altered. It was, in any event, plainly correct. It did not and could not appear that a breach of the peace was about to be committed at Lechlade [not all their Lordships agreed with Lord Bingham on this point: all were agreed that Mr Lambert did not *in fact* consider that a breach of the peace was imminent; Lords Bingham, Brown and Mance indicated that they thought Mr Lambert could not on the facts have come to any other view; Lords Rodger and Carswell were explicit in resting their opinions on the fact that Mr Lambert considered that there was no imminent threat to the peace rather than on any view that such a conclusion was unavailable to him, see eg, [71], [105], [142]]. The conduct of Mr Lambert was not governed by some general test of reasonableness but by the *Albert v Lavin* test of whether it reasonably appeared that a breach of the peace was about to be committed. By that standard Mr Lambert's conduct, however well-intentioned, was unlawful in domestic law . . .

Mr Freeland took issue with this argument. The true principle of domestic law is, he submitted, that the police may and must do whatever they reasonably judge to be reasonable to prevent a breach of the peace. The only legal restriction on what steps may be taken by the police is one of reasonableness. There is no absolute requirement of imminence before the power to take reasonable steps arises, although questions of imminence will be relevant to what is reasonable. A breach of the peace need not be apprehended to take place in the immediate future for the power and duty to prevent it to arise. Mr Lambert's action was judged by the courts below to be reasonable, and it therefore met the standard prescribed by domestic law . . .

Mr Emmerson advanced a further, but linked, reason why Mr Lambert's interference with the claimant's right to demonstrate, by preventing her going beyond Lechlade, was not prescribed by law. It was that domestic law only permitted action to prevent a breach of the peace 'by the person arrested' (*R v Howell* [1982] QB 416, p 426) or against 'the person who is threatening to break the peace' (*Albert v Lavin,* above, *per* Lord Diplock, p 565). Even if, contrary to his submission, some of those on board the coaches reasonably appeared to be about to breach the peace, there was no reasonable ground to infer that all of them were, or that the claimant was. Mr Freeland answered this 'causal nexus' submission by relying on the general test of reasonableness already summarised, and by pointing to the impracticability of differentiating, at Lechlade, between those (if any) who were and those who were not about to breach the peace.

I am persuaded, for very much the reasons advanced by Mr Emmerson (. . . above), that the Chief Constable's interference with the claimant's right to demonstrate at a lawful assembly at RAF Fairford was not prescribed by law . . .

I would add . . . that if (on which I express no opinion) the public interest requires that the power of the police to control demonstrations of this kind should be extended, any such extension should in my opinion be effected by legislative enactment and not judicial decision. As the Strasbourg authorities . . . make clear, Article 10 and 11 rights are fundamental

rights, to be protected as such. Any prior restraint on their exercise must be scrutinised with particular care. The Convention test of necessity does not require that a restriction be indispensable, but nor is it enough that it be useful, reasonable or desirable: *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48; *Silver v United Kingdom* (1983) 5 EHRR 347, para 97. Assessment of whether a new restriction meets the exacting Convention test of necessity calls in the first instance for the wide consultation and inquiry and democratic consideration which should characterise the legislative process, not the more narrowly focused process of judicial decision. This is not a field in which judicial development of the law is at all appropriate.

In contending that the police action at Lechlade failed the Convention test of proportionality because it was premature and indiscriminate, Mr Emmerson relied on many of the matters already referred to. The action was premature because there was no hint of disorder at Lechlade and no reason to apprehend an immediate outburst of disorder by the claimant and her fellow passengers when they left their coaches at the designated drop-off points in Fairford and gathered in the designated assembly area before processing to the base. Because the action was premature it was necessarily indiscriminate because the police could not at that stage identify those (if any) of the passengers who appeared to be about to commit a breach of the peace. By taking action when no breach of the peace was in the offing, the police were obliged to take action against the sheep as well as the goats.

Mr Freeland resisted this contention also. He relied on Mr Lambert's belief, held by the courts below to be reasonable, that there would be disorder once the coaches reached Fairford. Given the intelligence known to the police . . ., the items found on the coaches and the unwillingness of the passengers to acknowledge ownership of these items or (in many cases) give their names, Mr Lambert was entitled to find that the 120 passengers had a collective intent to cause a breach of the peace. These considerations justified him in acting when and as he did.

I would acknowledge the danger of hindsight, and I would accept that the judgment of the officer on the spot, in the exigency of the moment, deserves respect. But making all allowances, I cannot accept the Chief Constable's argument. It was entirely reasonable to suppose that some of those on board the coaches might wish to cause damage and injury to the base at RAF Fairford, and to enter the base with a view to causing further damage and injury. It was not reasonable to suppose that even these passengers simply wanted a violent confrontation with the police, which they could have had in the lay-by. Nor was it reasonable to anticipate an outburst of disorder on arrival of these passengers in the assembly area or during the procession to the base, during which time the police would be in close attendance and well able to identify and arrest those who showed a violent propensity or breached the conditions to which the assembly and procession were subject. The focus of any disorder was expected to be in the bell-mouth area outside the base, and the police could arrest trouble-makers then and there . . . There was no reason (other than her refusal to give her name, which however irritating to the police was entirely lawful) to view the claimant as other than a committed, peaceful demonstrator. It was wholly disproportionate to restrict her exercise of her rights under Articles 10 and 11 because she was in the company of others some of whom might, at some time in the future, breach the peace.

This decision may be contrasted with that in *Austin v Metropolitan Police Commissioner* [2005] EWHC 480, [2005] HRLR 20. *Austin* concerned the policing in London of the May Day protests of 2001, when the police kept about 3,000 assorted anti-globalisation and anti-capitalist protesters confined at Oxford Circus for seven hours (from about 2.30pm until about 9.30pm). Tugendhat J held that this action engaged but did not breach Article 5 ECHR and that while the confinement constituted false imprisonment, it was justified under the doctrine of necessity.

(c) Freedom of assembly as a 'constitutional right'

In the traditional understanding of a citizen's rights as being, in general, merely residual liberties, our law formerly took the position that there was no right of assembly but only a liberty for people to assemble within whatever limits and prohibitions the law might impose. As Lord Hewart said in *Duncan v Jones* (above), 'English law does not recognise any special right of public meeting for political or other purposes'. In more recent times, however, the courts came to recognise freedom of assembly as having positive value as a constitutional right. In *Hubbard v Pitt* [1976] QB 142 Lord Denning, in a dissenting judgment, vindicated the right to demonstrate. The defendants in this case had picketed the premises of a firm of estate agents in protest against the firm's alleged anti-social practices directed against tenants in the area. The firm having sued for an injunction and damages for the tort of nuisance, the majority of the Court of Appeal held in interlocutory proceedings that there was a serious issue of private nuisance to be tried, and upheld an interim injunction granted (on different grounds) by the court below. Lord Denning, who would have discharged the injunction, said (at 178):

> Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge of those in authority – at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of Common Council of London affirmed 'the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances'. Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited.

It was time, Lord Denning went on to say, for the courts to recognise the right to demonstrate and to protest. In *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App Rep 143 the defendants, who had been demonstrating

outside a furrier's shop against the use of animal fur, were charged with an offence contrary to the Highways Act 1980, section 137. An offence is committed under this section if a person 'without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway'. The defendants were convicted by justices, but the Divisional Court allowed their appeal, for the justices had not asked themselves whether the conduct of the defendants was in all the circumstances a reasonable use of the highway, such as would have constituted a 'lawful excuse' in terms of the section. The place, the duration and the purpose of the gathering should have been considered. If this were done, said Otton LJ after quoting Lord Denning's dictum (above), the 'balance would be properly struck and . . . the "freedom of protest on issues of public concern" would be given the recognition it deserves'. The decision in this case was approved by Lords Irvine LC and Hutton in *DPP v Jones* [1999] 2 AC 240 (on which, see below).

Article 11 ECHR, a Convention right under the Human Rights Act, protects the right to assemble peacefully, whether in a stationary gathering or in a procession. The European Court of Human Rights has held that an assembly may be peaceful and qualify for protection even though it may annoy or cause offence and counter-demonstrators threaten to disrupt it with violence: public authorities are required to take all reasonable and appropriate measures to protect the peaceful demonstrators from disruption by their violent opponents. See *Plattform Ärzte für das Leben v Austria* (1988) 13 EHRR 204. (Compare *Redmond-Bate v DPP*, above, and see *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, in which the House of Lords held that the duty of the police to protect lawful activities is not absolute and may be qualified by the resources available to them and the demands of other policing requirements.) Restrictions may properly be imposed by law on the right of assembly on the grounds specified in Article 11(2), notably for the prevention of disorder or for the protection of the rights and freedoms of others. In deciding whether any restriction was justified in terms of Article 11(2), the courts must be satisfied that there was a pressing social need for the restriction and that it was proportionate to the legitimate aim pursued. The courts must closely scrutinise legislative provisions that appear to restrict freedom of assembly and must interpret and give effect to such provisions, so far as it is possible to do so, in a way which is compatible with the Convention right: Human Rights Act 1998, section 3(1). Accordingly, legislation should not be read as authorising public authorities – whether the Home Secretary, a local authority or the police – to act incompatibly with the right to freedom of assembly, unless such an interpretation is unavoidable.

(d) Statutory restrictions on freedom of assembly

Public processions and assemblies are subject to the controls for which provision is made in sections 11–14 of the Public Order Act 1986. They are summarised in the following memorandum.

The National Heritage Committee, *Fourth Report*, HC 294-III of 1992–93, Appendix 3: Memorandum submitted by the Home Office

PUBLIC ORDER ACT 1986

Police powers to control assemblies and processions

1. The purpose of the legislation is to give the police adequate powers to prevent and control disorder and to ensure that demonstrations are held without causing undue inconvenience to the rights of others.

2. Under sections 12 and 14 of the Public Order Act the police may place conditions (for example, as to numbers, route, location) on those organising and taking part in public assemblies of 20 or more people and public processions if the police reasonably believe that the assembly or procession is likely to result in: serious public disorder; or serious damage to property; or serious disruption to the life of the community; or if its purpose is to coerce.

3. A 'public place' within the meaning of the 1986 Act means any highway or any place to which at the material time the public has access, on payment or otherwise, as of right or by virtue of express or implied permission.

4. It is an offence for an organiser of a public procession or public assembly or a person taking part in such a procession or assembly knowingly to fail to comply with a condition imposed by the police, but it is a defence to prove that the failure arose from circumstances beyond his control. A constable may arrest without warrant anyone he reasonably suspects is committing such an offence, which is punishable by up to three months' imprisonment or a level 4 fine.

Advance notice of processions

5. Under section 11 organisers of public processions are normally required to give 6 days notice to the police of the date, time and proposed route, and the name and address of the proposed organiser. This requirement does not apply where the procession is one commonly or customarily held in the area or is a funeral procession. There is *no* such requirement for public assemblies.

Bans on processions

6. Under section 13 the police can apply to the local authority (but in London direct to the Home Secretary) for a ban on public processions (but *not* static assemblies) [see further on this point, below] if serious public disorder cannot be avoided by the imposition of conditions. Before a banning order is made the Home Secretary's consent is required.

It is to be noted that the police may impose conditions on processions and assemblies where it is reasonably believed that they may result in 'serious disruption to the life of the community'. These powers may be exercised even if there is no threat of violence or a breach of the peace. Decisions to impose conditions or to ban processions under these statutory provisions are in principle open to judicial review. It might be contended that the decision was reached on irrelevant grounds or was 'unreasonable' (irrational or perverse), but in matters

of such problematical judgement these defects are not easily established. A challenge on the ground of unreasonableness to a banning order (made under the provisions of the previous Public Order Act 1936) was unsuccessful in *Kent v Metropolitan Police Commissioner*, *The Times*, 15 May 1981. (See further Hadfield, 'Public order, police powers and judicial review' [1993] *Crim LR* 915.) A challenge under the Human Rights Act 1998 would, however, be mounted on a different basis, and in particular (1) the onus would rest on the public authority to justify the restriction or ban imposed; and (2) even though the restriction might survive a challenge based on irrationality, the more stringent requirement of proportionality has now to be met by virtue of Article 11(2).

A decision to restrict or ban will not necessarily be found to be incompatible with the Convention right of freedom of assembly. A general ban on processions in London for a period of two months, imposed under the 1936 Act, was held by the European Commission of Human Rights to be justified in terms of Article 11(2) as being necessary for the prevention of disorder, even though processions with peaceful objectives were caught by the ban: *Christians against Racism and Fascism v United Kingdom* (1980) 21 DR 138. The necessity for any such ban would, however, have to be assessed by the courts with reference to the particular circumstances and with due regard to the principle that it should not be a disproportionate response to the threat of disorder.

The Criminal Justice and Public Order Act 1994 introduced new restrictions, applicable in specified circumstances to persons who trespass on land. Section 68 created an offence of aggravated trespass, committed by trespassers whose actions are intended to intimidate, obstruct or disrupt any lawful activity on the land. This provision was principally aimed at hunt saboteurs and those who disrupt events such as the Grand National. The generality of the provision may, however, present a threat to non-violent protesters against, for example, road schemes or destruction of trees or intensive livestock rearing. Section 70, introducing a new section 14A into the Public Order Act 1986, extended the banning power – previously limited to public processions – to trespassory assemblies (of twenty or more persons) which may result in 'serious disruption to the life of the community' or in significant damage to land or buildings of historical, architectural, archaeological or scientific importance. A chief officer of police, reasonably believing that such disruption or damage may occur, may apply to the district council for an order prohibiting, for a specified period, the holding of *all* trespassory assemblies in the district or part of it, and the council may then make such an order (with or without modifications) if the Secretary of State gives consent. (In London the Metropolitan Police Commissioner may himself make a like order with the consent of the Secretary of State.) This provision was targeted at the sort of mass trespass that had taken place at Stonehenge, but again a much wider range of activities may fall within the broad terms of the section.

Enacted as a response to particular public order and policing difficulties which it was thought could not be overcome by using the existing law, these

provisions of the Criminal Justice and Public Order Act confer far-reaching discretionary powers on the police and effect a further encroachment upon freedom to protest. Consider what Peter Thornton, chairman of the Civil Liberties Trust, wrote with reference to the Act (The *Times*, 8 March 1994):

> Public protest is designed to inform, persuade and cajole. It may be a nuisance; it may be intended to be. It is often noisy and inconvenient. But it should not be banned or curbed; nor should peaceful protestors be put at risk of prosecution.

When a meeting or procession is held, for greatest effect, in the streets, the limits of lawful conduct by those attending are narrow and uncertain. Lord Scarman said in his *Report on the Red Lion Square Disorders of 15 June 1974* (Cmnd 5919/1975), p 38, that here too the right to demonstrate 'of course exists, subject only to limits required by the need for good order and the passage of traffic'. But the restrictions are potentially far-reaching. Those attending a meeting on the highway are at risk of committing the offence of wilful obstruction of the highway, contrary to the Highways Act 1980, section 137. They may also be guilty of public nuisance: see the restrictive judgment of Forbes J in *Hubbard v Pitt* [1976] QB 142. A right to assemble on the highway was given a qualified recognition in the following case.

Director of Public Prosecutions v Jones [1999] 2 AC 240 (HL)

The defendants were among a group of protesters, more than twenty in number, who had gathered on the grass verge of a public highway adjacent to the perimeter fence of Stonehenge. The local council had made an order under section 14A of the Public Order Act 1986 prohibiting trespassory assemblies in an area which included Stonehenge and the place in which the demonstration took place. The protesters were peaceful and, although the grass verge was part of the public highway, it was found as a fact that they had not caused an obstruction. The defendants were charged with taking part in a trespassory assembly prohibited under section 14A and were convicted. Their conviction was upheld by the Divisional Court and they appealed to the House of Lords.

The defendants were plainly guilty of the offence if their conduct in gathering on the highway constituted a trespass. The appeal raised the question of the extent of the public's right to use the public highway: the Divisional Court had ruled that a non-obstructive, peaceful assembly, such as had taken place on this occasion, exceeded the public's right and so must necessarily be trespassory. One interpretation of earlier case law was that the highway might be used by the public only 'to pass and repass' and at most to do anything *incidental or ancillary* to the right of passage (eg stopping to consult a street map or to have a rest). This was the view preferred by the minority (Lords Slynn and Hope) in the House of Lords. Standing or sitting on the highway in order to demonstrate had

nothing to do with use of the highway for passing and repassing and accordingly must be a trespass. The majority (Lords Irvine LC, Clyde and Hutton) derived a wider principle from earlier decisions: any reasonable and usual mode of using the highway is lawful, provided that it is consistent with the general public's right of passage. (What is reasonable or usual 'may develop and change from one period of history to another', observed Lord Clyde.) This conclusion was expressed as follows by Lord Irvine LC:

> I conclude . . . the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass; within these qualifications there is a public right of peaceful assembly on the highway.

It was held by the majority that an assembly on the highway was not necessarily unlawful; the ruling of the Divisional Court to the contrary was wrong; the assembly in this case had not exceeded the limits of lawful public use of the highway. The defendants' appeal was accordingly allowed.

It was a somewhat unusual feature of this case that the assembly was held on a part of the highway – the grass verge – not normally used for public passage. Had the protesters assembled on the part of the highway along which people passed the result might have been different. The requirement that a gathering on the highway must be non-obstructive leaves little room for a public right to assemble there.

DPP v Jones was decided before the Human Rights Act 1998 had come into force. The matter should now be approached from the standpoint of the right of assembly assured by Article 11 of the European Convention. The decision of the House of Lords is doubtless consistent with the result that would be required by an application of Article 11 to the same facts, but the Convention right may be more strongly fortified (by the strict limits placed by Article 11(2) upon restrictions of the right) than the qualified right admitted by the House of Lords. (See further Fenwick and Phillipson, 'Public protest, the Human Rights Act and judicial responses to political expression' [2000] *PL* 627.)

Appleby v United Kingdom (2003) 37 EHRR 38 concerned a peaceful protest not on the highway but in a privately owned public space – a shopping mall that, since its construction, formed the centre of a particular town. Protesters wanted to collect signatures for a petition arguing that the only remaining public playing field near the town centre should not be built on, as the local council was apparently planning. The manager of the shopping mall refused to allow the protesters to collect signatures in the mall. The European Court of Human Rights held that this ban constituted an infringement of neither Articles 10 nor 11. Three reasons were furnished: first, the property rights of the shopping mall owner needed to be borne in mind; secondly, Articles 10 and 11 do not

bestow any freedom of forum for the exercise of their rights, and thirdly, the restriction on the protesters' ability to communicate their views was limited to the entrance areas and passageways of the mall – they were not prevented from obtaining permission from the individual businesses within the mall, nor from distributing leaflets and collecting signatures outside the mall. (For an excellent analysis, see Rowbottom, 'Property and participation: a right of access for expressive activities' [2005] *EHRLR* 186.)

The need to balance freedom of assembly and public order has arisen in an acute form in Northern Ireland. Traditional parades held in the 'marching season', although often taking place peacefully, have sometimes been, or have been perceived as being, triumphalist and intimidatory, and on some occasions have resulted in serious public disorder. The Public Processions (Northern Ireland) Act 1998 made a fresh attempt to deal with the problem, with an emphasis on fostering local agreement on contested parades. The Act established an independent body, the Parades Commission for Northern Ireland, which has a duty 'to promote and facilitate mediation as a means of resolving disputes concerning public processions' (s 2(1)(b)). The Commission issues a code of conduct applicable to public processions and to meetings of protesters against them, and has power to impose conditions on persons organising or taking part in a procession, having regard not only to considerations of public order but to 'any impact which the procession may have on relationships within the community'. In the last resort processions can be prohibited by the Secretary of State (s 11). (See generally www.paradescommission.org/.)

The Public Order Act 1986 contains a series of offences criminalising various actions and forms of behaviour that may catch protesters. The more serious offences of riot, violent disorder, affray and fear or provocation of violence (ss 1–4) are relatively unobjectionable, but it is the more minor offences which may be said to blur the line between the criminal and the merely irritating. Demonstrators whose conduct inclines simply to the boisterous may fall foul of section 5 of the Public Order Act 1986, which makes it an offence to use threatening, abusive or insulting words or behaviour, or disorderly behaviour, which is likely to cause (not necessarily actually causing) harassment, alarm or distress to another who is within sight or hearing. The Government itself remarked of this offence when first proposing it that it was 'not easy to define the offence in a manner which conforms with the normally precise definitions of the criminal law' (*Review of Public Order Law*, Cmnd 9510/1985, para 3.26; see further, Geddis, 'Free speech martyrs or unreasonable threats to social peace?' [2004] *PL* 853). ATH Smith, *Offences Against Public Order* (1987), p 117, says of this provision:

> Because of the potential breadth of the language in which the section is drafted, it affords scope for injudicious policing; considerable common sense and restraint on the part of the police will be called for in the application of the section.

Anti-social behaviour legislation has also been used to police protests. Section 30 of the Anti-social Behaviour Act 2003 gives the police the power to order the dispersal of groups of persons in cases where members of the public have been 'intimidated, harassed, alarmed or distressed'. This power is available only where a senior officer has given an 'authorisation' that the power will be exercisable in a certain locality and for a certain period of time. Two such authorisations had been made in respect of particular streets in central Birmingham. The anti-social behaviour in connection with which the authorisations had been made related to drunken city-centre revelry in the lead-up to Christmas and to skate-boarding. A group of Sikhs protested against the performance of a play, *Behzti*, at the Birmingham Repertory Theatre, which is located within the area to which the authorisations applied. When the police relied on their section 30 powers to order the protesters to disperse, the protesters objected on the basis that the authorisations required under section 30 had been made in respect of behaviour that was wholly unconnected to their protest. They argued that the section 30 regime should be strictly construed as relating to persistent problems of anti-social behaviour and should not be applied to public protests, to which the regime of the Public Order Act 1986 instead applies. They further argued that the order to disperse was disproportionate. These arguments were rejected by the Court of Appeal, which upheld the legality of the police actions: see *R (Singh) v Chief Constable of West Midlands Police* [2006] EWCA Civ 1118, (2006) 156 *NLJ* 1400. (Note that Scotland has its own legislation in this area: see the Antisocial Behaviour (Scotland) Act 2004.)

In addition to the Public Order Act and the anti-social behaviour legislation, a considerable range of criminal legislation has been added to the statute book since 1997 in an attempt, in particular, to respond to the intimidatory and sometimes violent tactics employed by militant animal rights protesters. Note in particular the Protection from Harassment Act 1997 and provisions of the Criminal Justice and Police Act 2001 (s 42) and of the Serious Organised Crime and Police Act 2005 (see, especially, sections 125–7 and 145 of the 2005 Act; note too sections 132–8 of that Act, regulating demonstrations in the vicinity of Parliament, on which see *R (Haw) v Secretary of State for the Home Department* [2006] 3 WLR 40, considered above, pp 735–7). On the Protection from Harassment Act 1997, see *University of Oxford v Broughton* [2006] EWCA Civ 1305, concerning the long-running protests against the construction of a new research laboratory in Oxford that, when completed, will be used in part for experimentation on living animals.

Other important decisions affecting the right to protest and freedom of assembly, considered earlier in this chapter, are *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307 (see above, p 771) and *R v Jones (Margaret)* [2006] UKHL 16, [2006] 2 WLR 772 (see above, pp 771–2).

(See further, H Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (2000), ch 4; N Whitty, T Murphy and S Livingstone, *Civil Liberties Law: The Human Rights Act Era* (2001), ch 2; D Feldman, *Civil Liberties and*

Human Rights in England and Wales (2nd edn 2002), ch 18; S Bailey, D Harris and D Ormerod, *Civil Liberties: Cases and Materials* (5th edn 2001), ch 4; and Fenwick and Phillipson, 'Public protest, the Human Rights Act and judicial responses to political expression' [2000] *PL* 627 and 'Direct action, Convention values and the Human Rights Act' (2001) 21 *LS* 535.)

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