

THE  
HAMLIN  
LECTURES

Forty-first series

**Protection of  
the Public —  
A New Challenge**

The Right Hon.  
Sir Harry Woolf



# Protection of the Public— A New Challenge

by

The Right Hon. Sir Harry Woolf, LL.B.

*Fellow of University College, London.*

Based on the forty-first series of Hamlyn Lectures, this book charts the growth and describes the fundamental characteristics of administrative law. The author takes as his starting point the conclusion of Lord Denning's Hamlyn Lectures, *Freedom Under the Law*, delivered in 1949, warning against the abuse of power by the executive and the need for the courts to develop new remedies to counteract possible abuse.

Sir Harry Woolf identifies the features of our system which have enabled administrative law to develop so rapidly in recent years. He continues to examine the way in which these features could be used to achieve the further progress he believes is still needed to ensure that the public are adequately protected against the abuse of the executive's ever-increasing power.

Discussion falls into four sections:

- Features of the present process of judicial review
- The extension of judicial review by the courts
- Alternatives to judicial review
- Reforms

Drawing on his extensive experience both as barrister and as judge, Sir Harry Woolf concentrates on the practicalities of everyday administrative procedure.

*Protection of the Public* is lively reading and will prove a thought-provoking stimulus to all interested in how the power of the executive may be tempered in its application to individual citizens.

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THE RT. HON. SIR HARRY WOOLF,  
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The Rt. Hon. Lord Justice Woolf

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## THE HAMLYN TRUST

The Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law and studied the subject. She also travelled frequently to the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

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From the first the Trustees decided to organise courses of lectures of outstanding interest and quality by persons of eminence, under the auspices of co-operating Universities or other bodies, with a view to the lectures being made available in book form to a wide public.

The forty-first series of Hamlyn Lectures was delivered at the Institute for Advanced Legal Studies, London in October-November 1989.

November 1989

DAVID M. WALKER  
*Chairman of the Trustees*

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However, above all there is Neville Hinsley, my clerk, who loyally used his immense skill with the word processor to produce order out of chaos, and without whose help the lectures would not have seen print, and Marguerite, with whom I have shared the long period of painful gestation.



## *1. A Question of Balance*

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### **Introduction**

Lord Denning gave the first Hamlyn Lectures 40 years ago in 1949. The title was "Freedom under the Law." I was not fortunate enough to hear the lectures, but, I have read them and they are, as you would expect, splendid. They are a paean of praise of the English legal system. However, they conclude with a warning delivered in Lord Denning's unique style:

"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do: and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date

machinery, by declarations, injunctions and actions for negligence .... This is not the task for Parliament .... the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare state; but abused they lead to a totalitarian state. None such must ever be allowed in this country.”<sup>1</sup>

When, 40 years later, I became the surprising if not eccentric choice of the Hamlyn Trustees to give these 1989 lectures I was unable to resist the temptation to look again at what Lord Denning described as the greatest task of the courts in the “new age.”

The only justification for my presumption in taking on this task, other than that I inherited Lord Denning’s second set of Court of Appeal robes, is that due to two strokes of good fortune I have been involved, intimately first as a barrister and then as a judge, in more than my fair share of cases which have contributed to the development of administrative law. I happened to be the common law Treasury Junior or Devil when the new Order 53, which introduced a new procedure for challenging the abuse of power by public bodies, first came into force in 1977. So up till that time I had to work with the procedure which Lord Denning accurately prophesied would prove inadequate for the task. I was also one of the 4 judges who were nominated for the first time to hear administrative law cases under the 2nd stage of the reform introduced in 1980. As both these roles provide the source of my experience I should say something about them.

<sup>1</sup> *Freedom under the Law*, (1949), p. 126.

### The Treasury Junior

The Treasury Devil is an office the origins of which it is difficult to trace. However, according to an impeccable source, the former Lord Justice Cumming-Bruce, who believes he received the information from an equally impressive source, Lord Justice Winn (both ex Treasury Devils) the first Devil was appointed at the time when Pitt the Younger was Prime Minister. He was appointed because the Government was dissatisfied with the service they obtained from the law officers of that day and wanted a member of the Bar who would require the law officers to maintain the proper standards and, if they did not do so, to protest by resigning. (An early example of privatisation?)

For those unfamiliar with our legal system it is worth saying a few words about the Treasury Devil since he is a constitutional oddity who plays a significant role in our administrative law but, as far as I know, has no precise equivalent in other jurisdictions.<sup>2</sup> The Treasury Devil is accepted as head of the junior Bar. His only badge of office is a textbook, *Manning's Exchequer Practice*, the contents of which are of no possible relevance to the office today, but which records the fact that it has been handed down from one Treasury Devil to another for over a hundred years. The first entry records the transfer from A.L. Smith to W.O. Dankwerts in February 1885.

Although he remains an ordinary member of his Chambers, for a period of about five years the Treasury Devil has a general retainer in respect of the government's common law work. This gives him an unrivalled opportunity to obtain an insight into government litigation. However, until he is appointed he may have little or no experience

<sup>2</sup> The nearest of which I am aware is the Solicitor-General in Australia.

of public law. In my case, although for eighteen months I had been the Revenue Junior,<sup>3</sup> my ignorance of public law was demonstrated by the fact that I had to ask my predecessor, Gordon Slynn, which books I should read in order to prepare myself for my new responsibilities. Fortunately he suggested de Smith, *Judicial Review of Administrative Action*.

While the Treasury Devil is standing counsel, to most government departments his closest links are with the Attorney-General. The Attorney-General has first call on his devil's services in respect of both his role as legal adviser to the government and his role as the representative of the public interest in the Courts. Because of the Attorney-General's latter role, the devil is also normally the counsel instructed when the court requires an *amicus* to argue a difficult point of law from an independent standpoint. In the past he would always appear in court with the Attorney-General; Lord Rawlinson records in his autobiography that he would never go into court without Gordon Slynn. Today, however, the Law Officer's appearances in court are rare, so John Laws, the current Treasury Devil, often attends by himself in cases where even in my day the Attorney-General would have led. The present law officers have appeared in 12 cases (but all but four were before the European Commission, the European Court of Human Rights and the European Court of Justice.)

<sup>3</sup> My qualification to be the Revenue Junior, which involved representing the Crown in tax cases, was that up till the time I was appointed I had never studied tax or appeared in a tax case. The Revenue consider that they know tax law inside out but require guidance as to how their approach to the law would be perceived by a non-specialist court and so a common law junior with a broad experience of the courts and advocacy would be more likely to supplement their in-house expertise. The practice also avoids their counsel being embarrassed by previous involvement in advising tax payers.

A great strength of the system is that the Crown is being represented by an independent member of the Bar who is briefed and paid<sup>3a</sup> for each case he does and is able to take an objective view free from departmental pressures. Yet during his period in office the department will make available to him information which is not available to any other outside legal adviser and which indeed can relate to the activities of previous administrations, so it is not even available to ministers. His advice is taken at times by the Prime Minister of the day and he can even be invited to attend Cabinet meetings. If he initially lacks experience of the workings of government, this is compensated for by the quality of his solicitors - the Treasury Solicitor and departmental lawyers who continually prepare instructions of the highest quality and who have immense expertise, unrivalled elsewhere, in their specialist field. However, it is only when the Devil has been in office for some time that he is properly equipped to perform his role and the longer he is in office the better able he is to do this and the greater the dependence of the department on his advice. The fact that the Treasury Devil is an independent member of the bar contributes to the trust which exists between the Treasury Devil and the courts and lawyers appearing for litigants involved in legal proceedings against the Crown. It is accepted that he will not knowingly allow the Crown to abuse its position in the courts. If there is information available to the Crown which should be disclosed, it will be, irrespective of any argument of a technical nature to the contrary. If a Department wishes to use its powers oppressively it will be prevented from doing so. Although if rights of audience are extended to employed lawyers cause

<sup>3a</sup> Paid but modestly! I remember Gordon Slynn leading me and complaining that while he did not mind being paid less than the leader on the other side, he thought less than one third of the junior on the other side was going too far.

could be made for declaring the Treasury Devil redundant, I believe this would be a great mistake, it could be bad for standards within the government legal service, bad for the courts and bad for the public. It is all too easy to underestimate the advantages of an independent mind in the inner closets of government.

By the time I was appointed in 1974 there had already been a substantial increase in government litigation and the Treasury Devil certainly could no longer do private work. As my unfortunate pupils will testify, being a Treasury Devil involves frantic activity, rushing from court to court and conference to conference. By the time I became a judge in 1979 the volume of litigation had increased to such an extent that, in order to cope on the common law side, we had a small team. Since that time the team has grown and my successors, having been appointed from this team, already have acquired on appointment the experience which I lacked. However, my Chancery counterpart, now Mr. Justice Peter Gibson, was then still managing with the majority of Chancery work, including some tax cases, himself and even finding time to join with me, alas, only in some of my cases. I say "alas," because it remains our proud boast that when we were both briefed to appear together for the Crown we never lost a case. I am afraid my record appearing on my own was not quite so impressive. With singular lack of success, in a period of little over a year, I appeared in cases such as *Tamesside*,<sup>4</sup> *Congreve*,<sup>5</sup> *The Crossman Diaries*<sup>6</sup> and *Laker Airways*,<sup>7</sup> all of which contributed to the development of administrative law. At the same time the conventional work progressed very much as it had done in my predecessor's time. The Treasury Devil appeared almost

4 [1977] A.C. 1014.

5 [1976] Q.B. 629.

6 [1976] Q.B. 752.

7 [1977] Q.B. 643.

daily before the Lord Chief Justice, Lord Widgery, in the Lord Chief Justice's Court, occupying the seat which was traditionally occupied by the Treasury Devil (the first seat on the left of the central gangway). An astonishing number of cases involving the Crown would be disposed of, frequently on some technicality which would never succeed today, such as insufficient standing or interest or the absence of an error on the face of the record.

### A Nominated Judge

Then I became a Judge<sup>8</sup> in time to play a part in drafting the amendment to Order 53 which took effect in 1980 and which was the second stage of the reform in procedure providing the highway for the dramatic progress in administrative law which has occurred during the last decade. Like the other four judges who were for the first time nominated to hear applications for judicial review, I found myself called upon to decide cases which a few years earlier would have been quite outside the role of the Courts - for example, the part which nurses could lawfully be called upon to play in procuring an abortion,<sup>9</sup> the legality of distributing a pamphlet which described methods of efficiently terminating

8 The Treasury Devil does not normally take silk but goes straight to the bench - Gordon Slynn did so for a short time but the experiment was not a success and has not been followed. It might be thought that to appoint a Treasury Devil to be a judge is equivalent to appointing a poacher to be a game-keeper. In practice I do not believe it works that way (although I would say that) and in support remember a comment which I believe was half-serious by my successor (now Mr. Justice Simon Brown) that as I had been a judge about a year it was now no longer necessary always to give judgment against the Crown.

9 *Royal College of Nursing v. D.H.S.S.* [1981] A.C. 800; [1981] C.L.R. 169.

your own life<sup>10</sup> and the lawfulness of a department's guidance on the provision of assistance as to methods of contraception to girls under the age of 16.<sup>11</sup> Developments were taking place so rapidly that those involved, myself included, were swept along without having time to identify the destination for which we should be making and without appreciating the hazards which we were creating for those who would have to follow along the tracks which we had left behind us. Windeyer J., a distinguished Australian jurist, identified our role when, using a different metaphor, he said:

“A judge is a working hand part of the crew of a vessel, the courts, for which each case is a separate voyage. He has not the time to be a cartographer of lands discovered. That is the task which is undertaken by academic writers.”<sup>12</sup>

### The Influence of Academics

In administrative law, the influence of academic writers has been immense. Without the contribution of academics such as Professor de Smith and Sir William Wade, the judges could not have made the progress they have. Of course even with this help judges can lose their way but on the whole the academic writers have been reasonably kind about what has been achieved.

<sup>10</sup> *Att.-Gen. v. Able* [1984] Q.B. 795.

<sup>11</sup> *Gillick v. D.H.S.S.* [1986] A.C. 112; [1984] Q.B. 581.

<sup>12</sup> They were selected because of administrative law. It was a recognition, for the first time, that as in the case of the Commercial Court judicial review required expert judges. It was a typically English compromise between having a separate Administrative Court of the sort that exists on the Continent and maintaining the English tradition that everyone including public bodies should be subject to the ordinary courts of the land.

### What Has Been Achieved

There have been two recent publications which are likely to be highly influential on the development of administrative law. The first publication is that of the Justice All Souls Review of Administrative Law, called *Some Necessary Reforms*. This review provides the long overdue in-depth examination of administrative justice which most administrative lawyers feel should have been undertaken by the Royal Commission, "that never was."<sup>13</sup> The other is the publication of the sixth edition of Wade's, *Administrative Law* which is undoubtedly destined, like previous editions, to be the haven to which all lawyers, including judges, will resort with gratitude when at sea in uncharted areas of administrative law.

Both works acknowledge what has been achieved by the courts. The Review recognises that the face of administrative law was being transformed and judicial and professional attitudes were changing even during the period when they were conducting their investigation.<sup>14</sup> Sir William Wade acknowledges that judges do not appear to be "disposed to retreat from the high ground which they had invaded so vigorously in recent years." He states that:

"in defiance of theoretical obstacles they have extended their empire by reviewing the exercise of the royal

<sup>13</sup> The membership of the Committee was broadly based, and included practitioners, academics and administrators. It also had an Advisory Panel which included judges from this country and abroad. I was with Lord Wilberforce, one of the two English Judges. The views I express at this lecture will be no surprise to the Committee and in particular the very distinguished Chairman of the Committee, Sir Patrick Neill, who very generously autographed my copy and in doing so thanked me for my "friendly advice and some even friendlier criticism!"

<sup>14</sup> The Review took 10 years to complete. I suspect because its thoughts were continuously being overtaken by the speed of developments.

prerogative, the rulings of non-legal bodies such as the Take-Over Panel, decisions which conflict with published policies or undertakings, and discretionary decisions which an earlier generation of lawyers would have considered impregnable.”

Sir William adds:

“It might have been supposed in the previous edition that judicial intervention has been carried virtually to the limit, but the courts have continued to spring surprises and they doubtless have plenty more in store.

At the same time there has appeared in some areas at least a welcome tendency towards the simplification of doctrine and the upholding of wide general principles.”<sup>15</sup>

### The Programme

The present state of administrative law having been so admirably charted by the Review and Sir William Wade and other academic writers I will not concentrate in these lectures on the principles of administrative law. Instead I will take advantage of my practical experience to focus on two objectives. The first will be to identify the features of our system which have enabled administrative law to develop so rapidly in this country. The second will be to identify the way in which the same features could be used to achieve the further progress which I believe is needed.

These being my objectives, my programme is as follows: in my next lecture, I will illustrate how the courts have

<sup>15</sup> Preface to Wade, *Administrative Law*. (6th ed., 1988).

extended the process of judicial review by the use of declaratory remedies, one of the new and up to date pieces of machinery to which Lord Denning referred. I will also contrast this situation with what has happened to injunctions and damages, where much less progress has been made. In my third lecture I will concentrate on the alternatives to judicial review - what I call non-judicial review - which by complimenting the work of the courts have allowed the courts to focus on what they do best. The emphasis will be on the important if unglamorous role of tribunals, which numerically determine many more administrative law problems with greater speed and economy than the courts, and the Ombudsman, who has been transplanted from more northerly climes with such success. Linked to my examination of non-judicial review, I will discuss the failure of the courts to develop a requirement for administrators to give reasons for their action. I do so because I believe that if we improve our remedies and integrate our machinery of non-judicial and judicial review with the requirement to give reasons we would indeed have a system capable of protecting our freedom in the next four decades. Finally, in my last lecture I will try and highlight a menu of the reforms which I believe still need to be made.

However, for this, the first course, I want to concentrate on what will at first sight appear, and for my audience I fear may remain, an unexciting subject, that is our present procedure of judicial review. I will stress its characteristics which I believe explain why it has been possible for there to be this striking judge-propelled progress in administrative law, which is not reflected in other parts of our legal system. These characteristics are the "safeguards" built into the procedure of judicial review: the requirement on an applicant to obtain the leave of the court to make an application for judicial review, the strictly limited time in which to make the application, the absence in the ordinary way of evidence or discovery and the discretionary nature of

the remedy which enables the court only to intervene when it is right to do so. I regard these safeguards as being so important, not because they protect public bodies, but because they protect the public and in addition have encouraged judges to develop their power to intervene to control abuse of power in a way which they would not have done otherwise.

### **Public Law and Private Law Proceedings**

To understand my approach it is necessary to appreciate that I regard administrative or public law proceedings as serving a different purpose to private law proceedings. In the case of private law proceedings it is the parties alone who are directly concerned with the outcome of the litigation. The public at large are not usually interested in the outcome of private law proceedings. The public as a whole are concerned only that private law proceedings should provide a fair and efficient manner of resolving disputes between individuals and of enforcing the rights of one individual over another. However, public law proceedings much more frequently directly affect many members of the public or even the public at large as well as the parties to the proceedings. For example, many members of the public are directly affected by a challenge to a scheme for a new motorway. Some members of the public's interest will be direct and obvious because, for example, their home will have to be compulsorily purchased if the scheme goes ahead and they want to know if and when they will be required to move. Other members of the public will be interested to a lesser extent because they would want to use the motorway when and if it is built and until it is built they will have to put up with the inconvenience of using existing overcrowded roads. Other members of the public's interest will be limited

to the fiscal consequences which will be involved in financing the new road, the cost of which will be met out of national or local taxes. The public will also be involved because the case may set a standard for administrative decision-making generally; there may be other decisions which will be taken by other departments which will be influenced and those subsequent decisions may affect them. In resolving a dispute of this type between a public body and the individual citizen the court must always have in mind this wider interest of the public. There are also public law cases which may be of little interest to the public at large - the immigrant who is threatened by removal for alleged deception on entry is vitally concerned about the proposed action but the public in general will not be affected and in his case the court will be largely, if not exclusively, concerned with the merits of his application alone. However, both sets of proceedings are treated under our system as public law proceedings because the decision is taken by a public body performing a public duty.

English administrative law procedure is fortunate in having as its primary source the historical prerogative writs. Those writs, which were used to control inferior courts and public bodies,<sup>16</sup> already had the safeguards to avoid abuse to which I have referred, so that when the new remedy of judicial review was created based on the prerogative remedies it was natural it should inherit the same safeguards. These included a two-stage procedure, a requirement to bring proceedings promptly and a broad discretion to refuse relief.

The historical link between judicial review under Order 53 and the prerogative writs is emphasised by section 31 of the Supreme Court Act 1981. Initially the change in procedure

<sup>16</sup> See de Smith (4th ed.), Appendix 1, pp. 581-584 *et seq.*, on the historical origins of the prerogative writs.

was introduced by the simple process of amending the Rules of the Supreme Court but section 31 gives retrospective statutory recognition to the procedure of judicial review. Section 31 does not affect the jurisdiction of the court to grant orders of mandamus, prohibition or certiorari - that remains as it was prior to the new procedure. The proceedings are still brought in the name of the Crown and not in the name of the individual applicant and there is a similar two-stage procedure. Declarations and injunctions can now also be brought by the same procedure but the High Court, in deciding whether to grant a declaration or injunction, is specifically required by section 31(2) to consider:

“(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari and (b) the nature of the persons and bodies against whom relief may be granted by such orders.”

So the basis upon which a declaration or injunction can be granted is linked to and controlled by the circumstances which, prior to the procedural changes, the prerogative remedies could be obtained.<sup>17</sup>

The nature of judicial review as a public law remedy also emerges from section 31(6), which expressly empowers the court to refuse relief where there has been undue delay in making an application for judicial review, if the court considers that the granting of relief would be likely to cause

<sup>17</sup> This position has to be contrasted with the position with regard to the power of the court to award damages on an application for judicial review. Here, under s. 31(4) of the Act, there is the requirement that the court is required to be satisfied that if the claim had been included in an action the applicant would have been awarded damages. In other words damages can only be recovered if damages could have been recovered in a separate private law action.

The nature of judicial review as a public law remedy also emerges from section 31(6) which expressly empowers the court to refuse relief where there has been undue delay in making an application for judicial review, if the court considers that the granting of relief would be likely to cause substantial hardship to, or substantially prejudice the rights of "any person," that is not only a party to the proceedings, or would be "detrimental to good administration."

This unusual and probably unique requirement in English law to have regard to the interest of good administration underlines the distinct nature of an application for judicial review. The court has to take into account not only the interests of the applicant and the respondent but also the interests of the public as a whole in good administration.

I recognise that it can be argued that this should not be the approach, and that no distinction should be drawn between the rights of the individual in private law proceedings and his rights in public law proceedings. However, if, as I contend, there is a fundamental difference between the primary purpose and effect of public and private law proceedings then it is perfectly acceptable that, in order to safeguard the interests of the public at large, not administrators, there should be restrictions upon an applicant's right to bring judicial review proceedings which do not exist and would be unacceptable in the case of ordinary civil proceedings. I also believe that individual applicants do in fact benefit as a result of these safeguards, because, as I have indicated, they encourage the courts to intervene in areas where they would not do so but for the safeguards. However, if there are safeguards involving restrictions which apply only to public law proceedings inevitably it becomes necessary to identify those proceedings and there must also be, if the safeguards are not going to be ineffective, some form of requirement coupled with a sanction to ensure that the safeguards are not bypassed.

Here lies the problem.<sup>18</sup>

### The Attitude of Public Bodies

Before commenting further on the problem there is one further general point which I should make and that is the critical importance of the courts in public law proceedings maintaining *in the interests of the public* a proper balance between the interests of applicants and public bodies against whom applications are made. So far as applicants are concerned, the growth in the number of applications dispels any fear that the courts are being establishment-minded. I have, however, anxiety with regard to respondents to applications and in particular central government's conception of judicial review.

It should be acknowledged that so far the co-operation of government departments with the judicial review process has contributed to its success. For example, when there is a challenge to some departmental decision, it is the practice for the department to set out frankly in an affidavit the matters which were taken into account in reaching a decision. The decision-making process is fully disclosed.

<sup>18</sup> I apologise for the emphasis which I place upon the distinction between public and private law proceedings which lawyers who have any familiarity with administrative law will regard as trite (I have dealt with this subject before in more detail in "Public Law - Private Law: Why the Divide?", 1986 Public Law 220, which was the second Harry Street Lecture) but I felt it necessary to do so because this explains and goes to the root of my approach to administrative law. It also explains why I reject the criticisms and proposals which the Justice All Souls Review Report makes on the safeguards which are built into the present procedure on an application for judicial review and the criticism that the Review and Sir William Wade make of the decision in *O'Reilly v. Mackman*.

This has the advantage that in the majority of applications for judicial review it has been possible both to dispense with any order for discovery and to dispose of the application on affidavit evidence without cross-examination.<sup>19</sup> This has contributed to a simple, inexpensive and expeditious procedure. Again, government departments, where there is a bona fide application, are mainly content to hold their hand pending the outcome of the application, thus compensating for the inability to obtain an interim injunction against the Crown.<sup>20</sup>

However, as judicial review has become more and more pervasive there has undoubtedly been increasing anxiety at the highest levels of government as to whether judicial review is inhibiting the implementation of governmental decisions and policy to an extent which is becoming intolerable.<sup>21</sup> This has led to steps designed to reduce the vulnerability of government departments to the consequences of supervision by the courts on judicial review being taken. Some of the steps which have been taken by government in this regard are welcome. They have improved the way decisions are reached and they have made some attempt to explain judicial review to administrators who are on the whole sadly lacking in legal training. For example, nothing but good can flow from the distribution by the Treasury Solicitor to government departments of his pamphlet, *The Judge over your Shoulder*, which in clear and simple terms describes the judicial review process. There are, however, also less welcome and more questionable procedures which are being adopted with increasing

<sup>19</sup> Both features of the procedure criticised by the Review.

<sup>20</sup> *R. v. Secretary of State for Transport, ex p. Factortame* [1989] 2 W.L.R. 997.

<sup>21</sup> It has also resulted in correspondence in *The Times* initiated by Sir William Wade suggesting that the courts are going beyond their allotted role.

frequency and which appear to be designed to remove particular decisions from the area of judicial review. About these procedures I am less happy.<sup>22</sup> This unhappiness was shared by a government lawyer at a talk he gave to the Administrative Law Bar Association. He said while presently public administration is honest there is a risk that, as a result of judicial review, people will go through a charade: applicants to put themselves in the best possible position and the authority to defend themselves.<sup>23</sup>

Although it is too much to expect a department to welcome the scrutiny of the courts, they should realise that the effect of that scrutiny is to protect the interests of the citizen and at the same time to raise administrative standards. Nonetheless I do recognise that complaints are raised by government departments that judges are insufficiently aware of the problems with which administrators are faced and that on occasions they are required to adopt unrealistic standards in order to comply with decisions of the court. It is perhaps unnecessary to determine whether these complaints are justified or not; it is sufficient that some civil servants at the highest level consider they are justified. Action should therefore be taken to remedy the situation. In my view a contributory factor to the problem, in addition to lack of legal training of civil servants, is that there is virtually no interchange between the judiciary and administrators as to the supervisory role performed by the courts in relation to administrative action. I well understand the difficulty in having discussions on the subject. It is no doubt due to a reluctance on both sides to create the impression that judges and administrators are in cahoots. However, I do regard the present situation as being unsatisfactory and I will later suggest that an improvement

<sup>22</sup> See also Professor A.W. Bradley, [1988] Public Law 2.  
<sup>23</sup> Michael Warr, October 26, 1987.

would be made if judges dealing with applications for judicial review were to receive training as to the problems of administrators.<sup>24</sup>

The danger which could result from the effect of an over-invasive use of judicial review emphasises the importance of the safeguards which are built into judicial review since they enable the courts to strike a balance between the interests of the administrators and the public, which in some proceedings for judicial review come into direct conflict. If the safeguards did not exist the undesirable tendency to which I have referred of governments taking avoiding action to prevent judicial review could well increase, with the result that judicial review would afford less effective protection of the public. In seeking to draw attention to this possible counter-productive effect of judicial review I am of course not suggesting the court should ever be inhibited in interfering as forcefully as necessary with a governmental department if justice requires that intervention. All I wish to ensure is that judges appreciate the consequence of their intervention.

### The Safeguards

I turn now to the safeguards against its abuse built into judicial review and in particular the requirement for leave to make an application for judicial review. The requirement of leave is a unique feature of our system although in some Commonwealth countries such as India and Israel where the old prerogative orders of certiorari, prohibition and mandamus still issue there is also a similar procedure.

The requirement to obtain the leave of the court to make

<sup>24</sup> I come back to this subject in my fourth lecture.

an application would probably not exist were it not for the fact that for historical reasons there was always in effect a two-stage procedure to obtain the prerogative writs of certiorari, prohibition or mandamus.<sup>25</sup> In the case of the prerogative orders prior to the new Order 53, the application involved an *ex parte* stage followed if necessary by an *inter partes* hearing.<sup>26</sup> It may well be that when the new procedure was introduced it was unwise to describe the first stage of an application for judicial review as an application for leave. It would have been better if, what would in effect have been the same thing, was described as a two-stage hearing, the first being *ex parte* or *nisi* and the second only taking place if there was a case to answer. I say this because the objection to the requirement of leave is often made as a matter of principle. For example, the Justice All Souls Review argues that:

“The citizen does not require leave to sue a further citizen and we do not think they should have to obtain leave in order to proceed against state and administrative bodies .... What we regard as wrong in the current situation is that one category of litigant namely those seeking judicial review should be subjected to an impediment which is not put in the way of litigants generally.”<sup>27</sup>

This reasoning has considerable emotive force but its impact

<sup>25</sup> I am therefore not surprised that in new systems (including that of Scotland) which do not have this tradition there is no requirement for leave. Nor am I surprised that where a country has abolished the two stage procedure, it is not prepared to introduce any requirement for leave.

<sup>26</sup> The position is still the same today in the case of an application for habeas corpus which is governed by Ord. 54 and involves an initial application *ex parte* followed by an adjourned *inter partes* hearing if this is justified.

<sup>27</sup> At p.153.

would have been reduced if the same practical result had been achieved by adopting the two-stage procedure which still exists on an application for habeas corpus. However the fact that the initial stage is an application for leave should not be allowed to obscure the advantages of the present procedure. In practice the requirement, far from being an impediment to the individual litigant, can even be to his advantage since it enables a litigant expeditiously and cheaply to obtain the view of a High Court judge on the merits of his application.<sup>28</sup> But even if this were not the case I believe its retention would be justified in the interest of the public at large. From my discussions with colleagues from many European and Commonwealth countries which do not have this requirement I can confidently say that if the requirement were to be politically acceptable, it is one which they would welcome. The explosion in applications for judicial review has not been confined to this country, but is a phenomenon of most developed legal systems. Most legal systems are from time to time troubled by vexatious applications for judicial review. The requirement of leave acts as a useful filter in respect of such applications. Its effectiveness, however, cannot be assessed by counting the number of applications in which leave is refused. The requirement of leave undoubtedly deters many frivolous applications as litigants do not trouble to make an application if they do not consider that they will get leave.<sup>29</sup> The solution chosen by the Committee for dealing with frivolous applications, namely an application to strike out the proceedings, does not have the same deterrent effect as the requirement of leave. In addition there is inevitably a period of uncertainty until an application to strike out can be

<sup>28</sup> The granting of leave will ensure that if he is eligible there should be no difficulty in his obtaining legal aid.

<sup>29</sup> In fact during 1988 of 1,229 applications for leave 574, 45 per cent., were refused.

heard during which the public body is involved in the proceedings and the activities of the public body are brought to a halt contrary to the interests of the public.

The Committee suggests that the requirement of leave is discriminatory and the passages I have quoted from the Report express this feeling of the citizen being at a disadvantage to public bodies. However, many applications for judicial review are now made by public bodies including central government and a public body which is an applicant is subject to exactly the same requirement to obtain leave as is the ordinary member of the public.

For those who are not already aware of this, I would emphasise that the procedure for obtaining leave is very inexpensive and simple. It is well within the capabilities of the ordinary litigant to make the application in person and normally involves no more than filling in a simple form and swearing an affidavit in support of the application. An application is then considered usually in the first instance by a judge on the papers without the litigant having to attend. If he is refused leave he has the right to renew the application in open court and, if again refused leave to renew it, before the Court of Appeal. It is true, as the Committee points out, that if he is refused leave by the Court of Appeal, the applicant has no right to seek leave to appeal to the House of Lords. While I would not object to the House of Lords being the final arbiter as to whether leave should be given,<sup>30</sup> in practice the number of cases in which it would be appropriate for the House of Lords to consider the application for leave would be minute. Moreover, there is already a practical way of dealing with the isolated case where an applicant could succeed before the House of Lords

<sup>30</sup> As recommended by the Review, p. 166.

but not before any other court. What happens is that the High Court judge or the Court of Appeal grants leave and then dismisses the application so as to give the House of Lords jurisdiction to grant leave to appeal if it wishes to do so.

When these considerations are taken into account and the distinction to which I referred earlier between ordinary (that is private law) legal proceedings and proceedings in the public law field is appreciated, the argument based on principle I believe loses much of its force. Nor am I impressed by the alternative proposal which is made by the Review Committee that if it is necessary to have a special safeguard, that safeguard should be that which exists in Scotland, namely a preliminary *inter partes* hearing. It would not assist the applicant to have the respondent present at the preliminary hearing. It is already the practice in England in the exceptional case where it is felt that this would assist to require the respondent to be given notice of the application for leave so that the respondent has the opportunity to attend. However, in practice, it has been found that the involvement of the respondent at this early stage was really of limited help except in the cases of the most complicated applications or where the applicant is acting in person and the court needs the assistance of the respondent to ensure that there is not some point which the applicant has been unable to make clear involved in the application.

If the leave stage was abolished it would also deprive the court of the power to exercise its discretion at the outset of the proceedings. The discretion which the court has at this stage is much more limited than that which exists at a later stage although is still very important. The discretion is only to deal with the obvious case where, whatever the merits, the court should not intervene, as for example, when there is an alternative and better remedy or because there has been excessive delay. I know there have been problems over the

time limit laid down by the Act and the Rules of the Supreme Court. The Rules refer to the need to bring proceedings promptly and in any event within three months. However, this time limit can be and usually is extended if there is an explanation for the delay and the delay is fully and properly taken into account in making the ultimate judgment as to whether as a matter of discretion it is proper to grant relief if the application is otherwise successful.

However, the requirement of leave made necessary the decision in *O'Reilly v. Mackman*<sup>31</sup> with regard to which the Justice All Souls Report<sup>32</sup> and Sir William Wade join forces. Both are equally hostile to the decision. In the preface to the sixth edition of *Administrative Law* Sir William expresses his hostility with considerable eloquence and I know that he will forgive me for quoting the passage. He says:<sup>32a</sup>

“No subject calls out more loudly for reform than the unfortunate procedural dichotomy enforced by *O'Reilly v. Mackman* criticised alike in the Review and in this volume. Every admirer of the late Lord Diplock will agree that his speech in that case was a brilliant virtuoso performance. But the misfortune resulting from it is that procedural technicality, always the bugbear of this subject, has become more dominant and more troublesome than ever. A solitary judgment on a single case is not an ideal instrument for proclaiming radical and sweeping changes. In his later years Lord Diplock was inclined to yield to the temptation to restate a whole branch of the law in his own terms. His mastery of administrative law and his

<sup>31</sup> [1983] 2 A.C. 237.

<sup>32</sup> Sir Patrick Neill, our Chairman of the Review, and I have crossed snakes and ladders on this subject prior to the Report. See Sir Patrick's sixth Child Lecture and the second Harry Street Lecture and Notes 13 and 18.

<sup>32a</sup> At p. viii

contributions to it entitle these *ex cathedra* statements to great respect; but it may not, I hope be impertinent to point out their drawbacks as a technique either of codification or of law reform. A feat of Lord Diplock's, however, which as a mere academic I can only envy is his ability to put forward a novel theory in a lecture and then to enshrine it canonically in a speech in the House of Lords."

The whole of Sir William's criticism is not confined to the decision of *O'Reilly v. Mackman*; he is also concerned about Lord Diplock's views as to the significance of and distinction between errors going to jurisdiction and errors within the jurisdiction. However, it is clear that Sir William regards the *O'Reilly v. Mackman* decision as one of the great problems of administrative law today. Earlier in his preface he says that within a fortnight of the last edition of his book<sup>32b</sup>

"the House of Lords created the most seismic disturbance that the subject had suffered in many years. By declaiming a rigid dichotomy between public and private law, but without explaining how the line was to be drawn the House of Lords created a host of new problems for litigants which have by no means yet been resolved."

Criticism in these strong terms by Sir William Wade echoing the Report of the Committee clearly deserves the greatest respect. The decision of *O'Reilly v. Mackman* is undoubtedly immensely important. First of all it gives what I regard as needed emphasis to the fact that there now is a real distinction between public and private law. In drawing the distinction the House of Lords was doing no more than recognising that our legal system has a feature derived from

<sup>32b</sup> At p. vii

the ancient prerogative writs which is common to most if not all other advanced legal systems though the boundary is drawn differently in virtually every country.<sup>33</sup> I appreciate, as Sir William points out that our boundary is blurred. It does not have a Berlin Wall, but this far from being a defect could be a strength. In the days of privatisation and the creation of non-statutory regulatory bodies it is very important that the courts should not be prevented by a strict definition of what is the boundary of public law from extending supervision of the courts to bodies which otherwise would exercise uncontrolled power. Secondly the decision is important because it lays down that generally (and I emphasise the word "generally" as did Lord Diplock in his speech in *O'Reilly v. Mackman*) if a case is appropriate for an application for judicial review then the application has to be made by way of judicial review since to do otherwise would be an abuse of the process of the court. Where I believe the critics of the decision in *O'Reilly v. Mackman* are in error is that they regard the decision as in some way building an insurmountable wall between judicial review and private law proceedings which can prejudice litigants and result in very unattractive demarcation disputes between public law and private law proceedings. I do not believe that this is, or needs to be, the result of *O'Reilly v. Mackman*.

Sir William Wade<sup>34</sup> says

"the rigid dichotomy which has been imposed, .... must be accounted a serious setback for administrative law. It has caused many cases which on their merits might have succeeded, to fail merely because of the wrong form of action. It is a step back to the times of the old forms of

<sup>33</sup> Lord Goff's speech in the case involving *The State of Norway* (No.2) *Application* [1989] 2 W.L.R. 458.

<sup>34</sup> At p. 677.

action which were so deservedly buried in 1852.”

With respect to Sir William I am not aware of the “many” cases which would might have succeeded where this unfortunate result has occurred. Certainly no case ever came before me in which *O’Reilly v. Mackman* created any difficulty. If a case should have been brought by judicial review and is not but it is a case with merit, then it is always open to the judge, as I have myself done, to give leave there and then for the matter to proceed and to treat the pleadings which already exist as being a sufficient compliance with the requirements of Order 53. If on the other hand the matter comes before the court under Order 53 as an application for judicial review but could more conveniently be dealt with as an action the reverse procedure can be adopted by using a similar stratagem or alternatively taking advantage of Order 53, rule 9(5), to order that the proceedings should continue as if they had been begun by writ. What however should not be allowed in my view is for a litigant to be able deliberately to avoid the safeguards built into an application for judicial review if he would not have been able to fulfil their requirements. It should be emphasised that in *O’Reilly v. Mackman* there was no question of any mistake as to which procedure should be used. In Lord Diplock’s words it was a case of “blatant attempts to avoid protection for respondents for which Order 53 provides” and the case was so regarded by Lord Wilberforce in *Davy v. Spelthorne Borough Council*. He said “the plaintiffs were improperly and flagrantly seeking to evade the protection which the rule confers on public authorities.”<sup>35</sup> In addition to referring to “a general rule” Lord Diplock was also careful to say no more than “it may normally be appropriate to apply .... by the summary

<sup>35</sup> [1984] A.C. 262 at p. 278

process of striking out the action."<sup>35a</sup> He also pointed out that there may be exceptions and it is clear that he was laying down the general rule so as to avoid public authorities being put to the expense of contesting proceedings in order to establish that they were without merit. It is the regrettable fact that in ordinary civil proceedings, the power to strike out proceedings is extremely limited and rarely successfully invoked.

The real issue is surely not whether the decision in *O'Reilly v. Mackman* is right having regard to the provisions of Order 53, but whether Order 53 should be amended so as to remove the safeguards which are the special features of its procedure. If the safeguards are to remain then cases which are obviously within Order 53 must go down that route. If, however, the safeguards are removed then there is no need to require litigants to adopt the procedure.

It is true that since *O'Reilly v. Mackman* there have been a number of cases where it has been argued, sometimes successfully, that a claim could be dismissed because the wrong procedure had been adopted<sup>36</sup> and it remains the fact

<sup>35a</sup> [1983] 2 A.C. at p. 285.

<sup>36</sup> The first of those cases was the case which immediately followed *O'Reilly v. Mackman*, the case of *Cox v. Thanet District Council* [1983] 2 A.C. 286. But that case has also been misunderstood. It should be noted that the issue was whether the proceedings could be properly brought in the county court rather than the High Court. In *Cox* there would have to be two sets of proceedings in any event if Mr. Cox was to recover damages because, as Lord Bridge made clear, if the decision to refuse to house Mr. Cox was flawed the decision would have to be retaken and Mr. Cox's right to damages would depend on the result of that reconsideration. Speaking for myself I can see there is an argument for saying the matter could properly be dealt with in the county court, or, better still, as I will suggest in a later lecture, by a tribunal.

that if it had not been for the decision in *O'Reilly v. Mackman* it may well be that the preliminary issue as to the appropriateness of the procedure which was being adopted would not have arisen. However, when there has been an advance in the law of this magnitude, it always takes a time for the extent of that development to be accurately appreciated and for pragmatic solutions to be worked out on a case by case basis.

There are also problems, which flow from the special requirements contained in Order 53 and which have nothing to do with judicial review being an exclusive remedy but result from the discretionary nature of judicial review, arising from the decision of the House of Lords in *Wandsworth London Borough Council v. Winder*.<sup>37</sup> You will recall that Mr. Winder was a Council tenant who was sued

Against that view it has to be recognised that the policy so far has been, and this policy has been generally accepted, that public law issues should be tried in the High Court and tried by the nominated judges who have the experience of the legislation in question. Another case which went to the House of Lords was *Davy v. Spelthorne Borough Council* [1984] A.C. 262, in the year following *O'Reilly v. Mackman*. In that case the House of Lords concluded that it was perfectly appropriate for the plaintiff not to have proceeded by way of Ord. 53 though so it does not help to substantiate the criticisms which are advanced to *O'Reilly v. Mackman*. It is also to be noted that quite distinct arguments were advanced by the defendants for saying the case was misconceived and it is therefore probable that the litigation in that case would have taken place irrespective of what had been the decision in *O'Reilly v. Mackman*. (The alternative arguments relied on the specific statutory provisions applicable to the proceedings under the Town and Country Planning Act 1971.)

The third case was *Wandsworth Borough Council v. Winder* [1985] A.C. 461. In that case it was decided by the House of Lords that it was possible to rely upon a public law defence in proceedings brought against the defendant without making a separate application for judicial review. In this case as well, therefore, no problem should have been created by the decision of *O'Reilly v. Mackman* and now we have had the House of Lords decision no problem should arise in future.

by the Council in the county court because he was in arrears with his rent. His defence was that the decision of the Council to increase council house tenants' rents by approximately 50 per cent was unreasonable and therefore invalid. If he was right this would affect many other tenants and the income of the Council. The Council failed in its application to strike out the defence on the basis that an allegation of this nature could only be raised on applications for judicial review. Because of the delay which had taken place, success on an application for judicial review would require an exercise of the court's discretion in Mr. Winder's favour. As he had been refused leave to apply for a judicial review we can assume that the Court would not have been prepared to exercise its discretion in his favour. Nonetheless the House of Lords decided that Mr. Winder was entitled to rely upon the alleged invalidity of the resolution of the local authority to increase his rent not only as a defence to the local authority's claim to the arrears of rent but also as the basis of a counterclaim for a declaration that he was under no liability.

I am bound to say that unlike the academics who apparently regard the case as being a welcome exception to the *O'Reilly v. Mackman* case the decision leaves me in a state of confusion. I can see some sense in the question of the invalidity of the resolution to increase the rent being able to be raised as a defence rather than in separate proceedings. I would, however, have expected there to have been some indication by the House of Lords that the right to rely on the defence would be subject to the court exercising its discretion in the same way as it would on an application for judicial review, and therefore that it would be preferable for the case to be transferred to the High Court so that it could be heard by one of the nominated judges who would have heard the application for judicial review. I am, however, appalled that a situation should be able to arise where Mr. Winder would not succeed on an application for

judicial review because the court would not exercise discretion in his favour but he could still succeed on the same facts as a defence and for the purposes of obtaining a declaration by way of counterclaim. It appears that for no good reason we now have as a result of the *Winder* case not only an understandable exception to the *O'Reilly v. Mackman* principle but also have accepted that different standards will apply where the invalidity of a council decision is relied on as a defence from those which will apply when it is relied on as the grounds for an application for judicial review. However, Lord Fraser and the House of Lords were well aware of the arguments against the decision to which they came since they were set out clearly and succinctly in the court below by Ackner L.J. in a dissenting judgment of considerable force. What, if I may say so, may have been overlooked is that while the public interest arises most frequently in public law proceedings it can also arise in private law proceedings. An application for an injunction against a union in relation to a proposed strike or the *Spy-catcher* type of case are prime examples. Whether the proceedings are brought by a private individual or the Attorney-General the court should be able to consider the public interest and make use of the expertise developed on applications for judicial review as to the grant of discretionary relief. There are therefore still anomalies which the courts will have to resolve between public and private law proceedings.

The problem may be related to the fact that the courts have yet to establish clearly the effect of a decision being void. Does it remain valid until the courts have ruled on its invalidity? While giving the lectures I was a party to the decision of the Divisional Court in the case of *Hazell v. the London Borough of Hammersmith and Fulham* (November 1, 1989) unreported, which vividly highlights the problems without resolving them. This question is at the heart of my problems with the *Winder* case and it may be that the

anomalies involved in the decision will be resolved in the process of finally and clearly deciding what is the effect of invalidity.

I leave the debate as to whether the safeguards contained in Order 53 should be retained and whether Order 53 should generally be the required procedure for reviewing the activities of public bodies by emphasising that both questions are related. I also emphasise that the answer which is adopted is likely to be of critical importance to the further development of administrative law since, as Lord Wilberforce also pointed out in *Davy v. Spelthorne Borough Council*, "English law fastens not on principles but on remedies."<sup>38</sup> The flexible nature of the remedy of judicial review of which the safeguards are the prime ingredient have contributed to the rapid development of judicial review and will enable the further developments which I regard as needed to take place. I will identify these developments in my later lectures.

It is because I consider that it is essential to retain this flexibility that I would not advocate the codification and enactment of the grounds for judicial review as was advocated in the Justice All Souls Report.<sup>39</sup> I agree that the objective of clarifying the law to which the authors refer is a desirable one but the inflexibility which could result could be too high a price to pay. The Committee point out as a precedent the Australian Administrative Decisions (Judicial Review) Act 1977, as amended, which does set out in clear terms the grounds on which an application can be made. However, in fact the Australian experiment confirms my fears of what can follow from statutory intervention in this area. The August 1988 report published by the Australian Administrative Review Council points out that "significant

<sup>38</sup> At p. 276.

<sup>39</sup> Para. 6.34.

areas of administrative action remain to which the Act does not extend. In consequence resort is being had, in Australia, to the old prerogative writ jurisdiction which still exists under section 39(b) of the Australian Judiciary Act 1983. It is because of that writ jurisdiction that developments can still take place in Australian law. In particular, reflecting similar progress in this country, it is now established that decisions of the Governor General which cannot be reviewed under the Act of 1977 are now capable of being reviewed by use of the prerogative writs. In this area in Australia if it were not for the fact that there was a second means of review the 1977 Act would have frustrated the development of judicial review. Their legislation will now have to be amended to catch up with these changes. However, in this country if we were to codify the grounds of judicial review it would not be possible to by-pass, as did the Australians, the restrictive effect of the code since the prerogative writs have already been subsumed into judicial review.

### Conclusion

That brings me, with some relief, to the end of what I want to say about procedure. I apologise for taking so long and can only plead in mitigation that this is the base upon which I will build my later lectures and that I regard the safeguards as being critical to our system of judicial review. I believe that if the safeguards were impaired this would not only retard the future development of judicial review but would also destroy much of what already has been achieved to meet Lord Denning's challenge.

I regard the distinction, albeit blurred, between public law and private law as now being an essential feature at the heart of our administrative law system. I regard 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. The procedure of judicial review therefore does have and should have safeguards which do not exist in other proceedings so as to reduce as far as is consistent with the courts' role of reviewing administrative action the interference to which public bodies are subject. This is not because I want to protect public bodies but because I believe it is in the interest of the public as a whole.

In performing this task before the court grants relief it is required to ask itself the critical question of whether justice requires the decision or action of the administrative body to be quashed or otherwise interfered with by the courts. If looking at the situation as a whole - and I emphasise not looking at just one step in a complete process of adjudication - there has been unfairness then of course the court must interfere unless there is very good reason for not doing so. If on the other hand there is or has been some procedural error but the result is not unjust or unfair then the court in its discretion should be ready to refuse relief. The discretion should be exercised with a strong bias to remedying injustice and against unnecessary intervention where there is no injustice. There are a multitude of considerations which will point in different directions in each case. The approach necessitates developing separate public law procedures and also separate public law principles. It also involves identifying the situations to which the separate proceedings and principles apply. This is what has been happening in the courts over the last 20 years and should continue. It involves a fundamental change from the traditional approach of English law, which in the past tended to equate the rights and duties of public bodies with those of private individuals. On the Continent this new role of the

courts has long been the approach. The pressures of contemporary society in this country have resulted in our producing our own solution designed to achieve the same result. I believe our procedure is working well, is capable of meeting Lord Denning's challenge and that it is the base on which to build in the future. As our procedure is working well it would be a mistake to try and mend it by removing the safeguards which have been the explanation of its success so far.



## 2. Remedies

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At the beginning of the first of these lectures I cited the passage with which Lord Denning concluded the first Hamlyn Lecture 40 years ago. That passage ended with these words:

“Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure for mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence.”<sup>1</sup>

Contrary to this advice, over the last 40 years we have not, except for the action on the case, retired the old remedies. Instead they have been remodelled and given a new lease of life alongside Lord Denning’s “new and up to date machinery” of declarations and injunctions and, where there is a cause of action, damages.

<sup>1</sup> At p. 126.

The combining in this way of the remedies available was both in historic and practical terms dramatic. It halted what otherwise would have been the progressive decline of the prerogative remedies, but it also gave an opportunity to exploit the new machinery which would not have been possible but for the change in procedure. In this lecture I want to examine the way in which the courts have taken advantage of this opportunity to use the “new machinery” for the benefit of the public.

### **The Declaratory Judgement**

I start off with the declaration not only because it was the first of the new machines referred to, but also because it is in relation to the use of the declaration that the courts have been most successful in developing and adapting an existing private law remedy to meet the new challenge. Prior to the introduction of Order 53 litigants were with increasing frequency resorting to declaratory proceedings instead of applying for the prerogative writs in order to control the abuse of power by public authorities. There were good practical reasons for this. The prerogative orders were encrusted with technical rules and success normally depended upon establishing some error on the face of the record or some jurisdictional defect. There was also the difficulty that usually discovery and cross-examination were not available.

Probably the greatest advantage of seeking a declaration instead of applying for what were conventionally regarded as being the public law remedies, the prerogative orders, was that it was possible to bypass the Divisional Court. By the 1960s the Divisional Court was grossly overwhelmed with

work. The court only sat in one Division and it was almost invariably presided over by the Lord Chief Justice of the day so that he could ensure consistency. However, in addition to dealing with applications for the prerogative orders the court had to deal with the appeals from magistrates and a host of statutory tribunals including even the VAT Tribunal. The Divisional Court could only attempt to cope with the huge volume of the cases which were coming before it by strictly limiting the argument and hearing an unconscionable number of cases each day. Even then and despite all the efforts and expertise and outstanding ability of the Chief Justices of those times, a substantial backlog developed so that even urgent matters were having to wait for an unacceptable period to come before the court.

An application for a declaration usually made to the Chancery Division, was a very attractive alternative. The Chancery Division was staffed by judges of the highest quality who were not subject to the same overwhelming pressure. They had time to give the cases which raised important issues the attention which they deserved. I can again turn to Lord Denning to describe graphically the situation:<sup>2</sup>

“At one time there was a blackout on any development of administrative law. The curtains were drawn across to prevent the light coming in. The remedy of certiorari was hedged about with all sorts of technical limitations. While the darkness still prevailed we let in some light by means of a declaration.”

It was therefore no coincidence that of the three cases which Lord Diplock identifies in *O'Reilly v. Mackman* as being the landmark cases which are the source of our system

<sup>2</sup> In *O'Reilly v. Mackman* [1983] 2 A.C. 237 at p. 253.

of administrative law, two, namely, *Ridge v. Baldwin*<sup>3</sup> and *Anisminic v. Foreign Compensation Commission*<sup>4</sup> involved proceedings for a declaration and it was only the third case, namely, *Padfield v. The Minister of Agriculture, Fisheries and Food*<sup>5</sup> which went before the Divisional Court on an application for a prerogative order.

However, until the introduction of judicial review there were still problems in seeking declaratory relief because the declaration was a private law remedy, by which I mean a remedy for declaring private rights. This meant that the applicant for declaratory relief had to establish that he had the necessary *locus standi* to bring proceedings, that is to say that he had at least some personal interest which was adversely affected. He could not normally bring proceedings on behalf of the public. Nonetheless it was not necessary for the Plaintiff to have a course of action, as was decided in a case which we would now decide on judicial review, which in 1911 confirmed the potential of declaratory relief<sup>6</sup> This meant in practice that although a cause of action was not needed the plaintiff in order to establish that public right had been infringed had either to obtain the assistance of the Attorney-General, so as to bring a relator action in his name, or he had to establish that his private law rights had been infringed or that a breach of statutory duty had resulted in his suffering special damage. This was made abundantly clear by the decision of the House of Lords in *Gouriet v. The Union of Post Office Workers*.<sup>7</sup> The problem did not exist to the same degree in prerogative proceedings where it was sufficient to show that you had a real interest.

3 [1964] A.C. 40.

4 [1969] 2 A.C. 147.

5 [1968] A.C. 997.

6 *Dyson v. Att.-Gen.* [1912] 1 Ch. 158.

7 [1978] A.C. 435. So far as an ordinary action is concerned the position is still the same today; see *Meadows Indemnity Co. v. Insurance Co. of Ireland*, Court of Appeal, May 11, 1988.

The introduction of the new Order 53 removed this limitation on the availability of declaratory relief on an application for judicial review. As a result the declaratory judgment was given an immense boost. The declaration proved to be the ideal remedy in public law proceedings. It was much more flexible than the prerogative orders, which could quash decisions, order decisions to be made or prohibit decisions being taken, but could not give specific guidance as how these decisions should be reached. The declaration was very much in accord with the role and spirit of judicial review which was primarily but not exclusively concerned with the decision making process rather than the merits of a particular decision. The declaration by careful drafting could be applied with considerable precision. This was attractive to courts because it enabled the court to cut out the defective part of the decision without necessarily cutting down the whole of a decision, something which was quite impossible in the case of certiorari.

I have already stressed in the first lecture the importance of the existence of the safeguards in judicial review as giving the courts confidence to extend the scope of their jurisdiction to review the activities of public bodies. I have little doubt that the sophisticated nature of declaratory relief had a similar influence. In the case of *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*<sup>8</sup> Lord Wilberforce<sup>9</sup> indicated that although in Order 53, rule 3,<sup>10</sup> the same words are used to cover all the forms of remedy available on judicial review (other than damages) the rule does not mean the test is the same in all cases. Lord Wilberforce went on

“when Lord Parker C.J. said that in cases of mandamus

<sup>8</sup> [1982] A.C. 617.

<sup>9</sup> At p. 631.

<sup>10</sup> The rule which deals with standing.

the test may be stricter .... 'on a very strict basis' he was not stating a technical rule which can now be discarded but a rule of common sense reflecting the different character of the relief asked for. It would seem obvious enough that the interests of a person seeking to compel an authority to carry out a duty is different from that of a person complaining that a judicial or administrative body has, to his detriment, exceeded its powers."

Lord Wilberforce ended this part of his speech by saying "it is hardly necessary to add that recognition of the value of guiding authorities does not mean the process of judicial review must stand still."<sup>11</sup>

Indeed it has not stood still. The position has now been reached where it is virtually impossible to find a case in which declaratory relief is sought that would otherwise have succeeded on an application for judicial review where an applicant was deprived of relief because, for example, of lack of *locus standi*. This has in turn had a liberating effect on what were the prerogative remedies. Practitioners have ceased to take technical points as to the limits of mandamus, certiorari or prohibition since the court could in any event avoid the technical point by granting a declaration.

The new attitude of the courts was reflected in Lord Diplock's speech in the *Self Employed* case:<sup>12</sup>

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation or even a single public spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped."

<sup>11</sup> At p. 631.

<sup>12</sup> At p. 643.

Lord Diplock added that, so far as the misdeeds of central government are concerned, the Attorney-General is of no assistance since in practice he never applies for prerogative orders against government departments. It is therefore important that the individual can do so since while government departments

“are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.”<sup>13</sup>

Interestingly, having established this broad approach to *locus standi* in relation to declaratory relief on applications for judicial review, the courts have also without argument adopted a similar approach to applications for declarations against public bodies where the application is not made by way of judicial review. When Mrs. Gillick applied for her declarations against the Department of Health and Social Security she did so in an ordinary action but it is doubtful whether there was any prospect of her being within the test of *locus standi* laid down in the *Gouriet* case. Likewise in the *Royal College of Nursing* case a declaration was sought and it was refused not on any technical basis that the Royal College was not entitled to bring proceedings but because of the merits of their case.

In the House of Lords, in the Gillick case Lord Bridge alone addressed this point.<sup>14</sup> He recognised that a great leap forward had been made, not so much as to the standing necessary to bring proceedings but as to the nature of the subject matter which was amenable to judicial review,

<sup>13</sup> At p. 644.

<sup>14</sup> *Gillick v. West Norfolk and Wisbech A.H.A., and D.H.S.S.* 1986 A.C. at p. 191.

since what was in issue in the *Gillick* case was not the exercise of some statutory discretion or power but a mere departmental circular or advice which had no statutory or other legal authority. What Lord Bridge had to say was however, also relevant to the right to bring proceedings<sup>15</sup> and he considered that the extended jurisdiction which he identified should be exercised with considerable care and caution. Lord Bridge had in mind the dangers involved in the courts intervening to control the activities of government beyond the permissible limits. Similar unease was expressed in a letter written to *The Times* by Sir William Wade about the recent application for judicial review in respect of the publication of a leaflet by the Government as to the community charge or poll tax which was alleged to be misleading. However, the letter provoked an immediate response from other distinguished correspondents, indicating the dangers which could result from there being no control over the use of the immensely powerful machinery of government to disseminate false information or the exercise of unbridled power by non-statutory bodies.

The solution to this dispute in my view is not to hold that the courts never have any power to intervene in an area which could be grossly abused such as the dissemination of propaganda but to regard that power as one to be exercised with considerable caution and discretion, bearing in mind both that it is no part of the role of the courts to be a critic or censor of governmental circulars and Lord Bridge's advice in the *Gillick* case. In those rare cases where it is appropriate to intervene the court can only do so by declaration. A circular cannot be quashed and prohibition is too blunt an instrument for use in such circumstances.

<sup>15</sup> *Gillick* but not the *Royal College of Nursing* case can be explained by the fact that some of their Lordships at any rate appeared to think that Mrs. Gillick had a private right which was, if she was correct, infringed by the Department of Health's circular.

The desire to avoid the exercise of considerable power which is not subject to the supervision of the courts also explains the decision in the case of *Datafin*,<sup>16</sup> which marked a further extension of the boundaries of the jurisdiction of the court on judicial review. In that case the Court of Appeal accepted that it had jurisdiction to supervise the activities of the Takeover Panel. The Master of the Rolls was concerned about interfering with the operations of the City in the takeover area and it is clear that the decision might well have been different if it were not for the flexibility of the remedy of a declaration and the safeguards which are built into the judicial review procedure including the ability to provide relief with remarkable rapidity where this is necessary.<sup>17</sup> The Court indicated that except in the most exceptional circumstances it would intervene by declaring the law for the future rather than seeking to disturb the decision of a panel in a particular case. As the Master of the Rolls said:<sup>18</sup>

“I wish to make it clear beyond peradventure that in the light of the special nature of the panel and its functions and the market in which it is operating the timescales which are inherent in that market and the need to

<sup>16</sup> [1987] Q.B. 815.

<sup>17</sup> The timescale bears repeating. On the same day as the application was first made it was considered by the single judge who refused leave and was then before the Court of Appeal. The Court of Appeal granted leave, continued with the hearing and announced its decision straight away but gave its reasons a few days later. The undesirable consequences of delay were therefore kept to a minimum. Lloyd L.J. stated that the proceedings, as a matter of policy “should be in the realm of public law rather than private law not only because they are quicker but also because the requirements of leave under Order 53 would exclude claims which are clearly unmeritorious.”

<sup>18</sup> At p.842.

safeguard the position of third parties who may be numbered in thousands all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions unless and until they are quashed by the Court, I should expect the relationship between the panel and the Court to be historic rather than contemporaneous. I should expect the Court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and will relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules."

Relief of the sort which the Master of the Rolls had in mind could only be granted in the form of a declaration. His use of the court's jurisdiction in this way was novel and important and provides a blueprint for the control of similar bodies in the future.

It is difficult to conceive how this extension of the role of the court would have been possible if the declaration had remained a private law remedy. The normal consequence of a party succeeding in private law proceedings is that he only seeks and obtains relief which is immediately effective to further his private interests. There is no question of a court confining itself merely to giving guidance for the future. Indeed, the giving of guidance of this nature would, at one time, have been regarded as being wrong in principle since the courts had turned their face against giving decisions which were purely advisory. There are, however, procedural problems which will arise if the court is only prepared to give an advisory decision. Litigants will normally not be interested in making applications if they are not going to be granted relief which is of more immediate benefit to them. This could lead to the need, particularly in the area of administrative law, of an independent person to bring

proceedings in the public interest.<sup>19</sup> It would be unfortunate if the lack of an applicant prevented the advisory role the Master of the Rolls had in mind being developed.

It could be a great advantage in this field if the courts were prepared to give declaratory judgments which clarified the legal position. Indeed, subject to not over-burdening the courts, it could be very much in the public interest for public bodies to avail themselves of the power of the courts to grant declarations when they are in doubt as to the legality of some important administrative decision which they are about to take. At present the approach of public bodies is no doubt conscientiously to come to their own decision as to whether the course which they are proposing to adopt is lawful and then to wait and see whether what they have done is challenged. Could there not be many situations where it would be more sensible to obtain an anticipatory ruling? Take, for example, a road enquiry where it is known that there is likely to be highly vociferous opposition. The Department wants to take steps to limit the access of the public, but does arrange for there to be an overflow meeting with audio visual communication with the main hall. The Department is, however, concerned as to whether it is entitled to hold an enquiry at more than one location and also wants to know whether if there is a disturbance at the meeting it can require all the public to attend the overflow meeting. The enquiry is likely to take up to a year and if the validity of the procedure is only challenged after the enquiry, the construction of the road could be delayed as the result of one objector who may or may not succeed. How much better in these sort of circumstances to obtain the guidance of the court prior to the enquiry.

At one time this would not have been possible because the application would be considered premature and academic.

<sup>19</sup> I return to this point in the fourth Lecture, "Recipe for the 90s."

But a different attitude could well be adopted by the courts today. This is indicated by the case of *R. v. Her Majesty's Treasury, ex p. Smedley*.<sup>20</sup> In that case Mr. Smedley sought a declaration that a draft Order in Council authorising the payment of funds to meet a supplementary budget of the EEC was unlawful although the draft order, before it could be made in Council by Her Majesty, required, but had not received, the approval of both Houses of Parliament. One of the many arguments advanced against the granting of such declaratory relief was that it was premature and that it would be an interference with the sovereignty of Parliament for the courts to declare the draft order *ultra vires* before it had been considered by Parliament. However, the Court of Appeal, while accepting that there was not in existence any Order in Council to which Mr. Smedley could object, rejected this argument because in the circumstances an expression of a view by the courts on a question of law which could arise for decision if Parliament were to approve the draft might be of service not only to the parties but also to each House of Parliament itself. It was pointed out that this was exactly the course which was adopted as long ago as 1923 in *R. v. Electricity Commissioners, ex p. London Electricity Joint Committee*.<sup>21</sup> In that case Younger L.J. had said:<sup>22</sup>

“The interference of the court in such a case as this and at this stage so far from being even in the most diluted sense of the word a challenge to its supremacy will be of assistance to Parliament.”

In fact declaratory relief was not granted because Mr. Smedley failed on the merits of his application. However,

<sup>20</sup> [1985] 1 Q.B. 657; [1985] 1 All E.R. 589.

<sup>21</sup> [1924] 1 K.B. 171.

<sup>22</sup> At p. 213.

but for this it appears he would have succeeded - the court being equally unimpressed by arguments that Mr. Smedley had no *locus standi* as a taxpayer to make the application.

However, the Court of Appeal did emphasise that the jurisdiction was one which had to be exercised with care. I would endorse this. Certainly I would not want the courts to be saddled with a large number of unnecessary applications and I recognise there could be a danger of administrative bodies seeking to play safe by trying to obtain anticipatory rulings of the court. The power should be preserved for cases where there is a real risk of challenge, and where the challenge were it to occur, could cause delay in implementing a decision, contrary to the public interests. I doubt whether there would be abuse of such a power. The *Smedley* case has not been followed by a succession of similar cases and if, as I would expect, the initiative would normally have to come from the public body to initiate proceedings, such bodies can be expected to exercise a degree of caution about drawing attention to possible weaknesses in their proposals. However, subject to these qualifications the development of the practice of seeking advisory opinions from the courts would appear to me to be sensible and constructive. The *Conseil d'Etat* has a section which provides a similar service in France and for the courts in this country to provide declaratory relief in these sort of circumstances could well not only improve administrative efficiency but also make a contribution to improving the attitudes of administrators to judicial review. It could result in their being more ready to regard judicial review as being constructive and not solely destructive, as I fear is frequently their attitude at present.

The significant difference between what happened in the *Smedley* case and what I am suggesting is that it was not the Department that took the initiative of bringing proceedings in the *Smedley* case. Where the application is brought by a department of central government, the problem would arise

as to who should be the respondent. Constitutionally, as matters are at present and in the absence of any other appropriate body, this would have to be the the Attorney-General. There has to be some party who can properly put before the court arguments against the proposal so as to make the decision binding thereafter. Wearing his hat as the guardian of the public interest the Attorney-General should be perfectly capable of ensuring all arguments are properly before the court. However, here again (as I indicate in the last of these lectures) I do believe that it would be much better if there were to be some other representative who would act as the respondent on behalf of the public, called perhaps a Director of Civil Proceedings, rather than the officer responsible for advising the government on legal matters.

Returning to the *Datafin* case, another feature of that case which is likely to be of immense importance in the future is the decision of the Court that the Takeover Panel was the subject of judicial review, albeit that prior to the *Datafin* case there was considerable doubt as to whether a non-statutory, self-regulatory body could be subject to supervision by the courts. As the Master of the Rolls, at the beginning of his judgment, made clear the Take-Over Panel is a most unusual body. He said:<sup>23</sup>

“The panel on take-overs and mergers is a truly remarkable body. Perched on the twentieth floor of the Stock Exchange building in the City of London both literally and metaphysically it oversees and regulates a very important part of the United Kingdom financial market yet it performs this function without visible means of legal support.”

<sup>23</sup> At p. 824.

He went on, however, to point out that while the panel lacks “any authority *de jure* it exercises immense power *de facto* by devising, promulgating and interpreting the City code on takeovers and mergers by waiving or modifying the application of the code in particular circumstance, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions.”<sup>24</sup> An important reason for the court being able to come to the conclusion that the Panel was subject to judicial review was that it was performing a public function. Prior to the *Datafin* case the question of amenability to judicial review tended to turn on the source of the body’s authority. However, as Lloyd L.J. said:<sup>25</sup>

“I do not agree that the source of the power is the sole test of a body subject to judicial review .... of course the source of power will perhaps usually be decisive. If a source of power is statute or subordinate legislation under statute then clearly the body in question will be subject to judicial review. If, on the other end of the scale the source of power is contractual as in the case of private arbitration then clearly the arbitrator is not subject to judicial review .... but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power.”

As I said in a case referred to by Lloyd L.J, “the application for judicial review is refined to reviewing *activities* of a public nature as opposed to those of a purely private or domestic character.”<sup>26</sup>

The ability to look at the activity performed by a body in order to decide whether it is subject to judicial review could

<sup>24</sup> At p. 825.

<sup>25</sup> At p. 847.

<sup>26</sup> *R. v. B.B.C. ex p. Lavelle* [1983] 1 W.L.R. 23.

be of real significance and importance to the public with regard to the present privatisation policy of this government. A particular activity which hitherto has undoubtedly been performed by a public body is just as likely to give rise to the need for judicial review if that body is privatised. In conjunction with privatisation, regulatory bodies will be established and those bodies will wield great powers. They could use those powers in an oppressive manner and so judicial review will be important in their case as well. The extent of the need is highlighted by the fact that in February 1988 plans were announced to reform the Civil Service by hiving off 70,000 jobs to new executive agencies.<sup>27</sup> These plans have become known as "The Next Steps" following the report of Sir Robin Ibbs entitled "Improving Management in Government - The Next Steps." These new agencies should be subject to judicial review and so should the guidelines given to such agencies by the department responsible for overseeing their activities. In exercising their supervisory role, the courts will have to be careful not to frustrate the proper endeavours of the new agencies or to interfere unnecessarily with the relationship between the agencies and their departments. However, the existence of the agencies must not be allowed to interfere with the residual ability of courts to protect the public against abuse of power by the growing number of bodies exercising functions which were previously exercised by the more conventional organs of central or local government.

The flexibility of declaratory relief will assist the courts to maintain the proper balance between not interfering unduly and protecting the interests of the public when it is necessary for the courts to grant relief. The *Datafin* case is a vivid example of what can be achieved. The courts have created a new creature - the prospective declaration.<sup>28</sup> The extent to

<sup>27</sup> See Robin Baldwin [1988] M.L.R. 622.

<sup>28</sup> See Clive Lewis's excellent article "Retrospective and Prospective Rulings in Administrative Law" [1988] Public Law 78.

which public bodies should be required to reopen decisions already taken as opposed to mending their ways in the future is now capable of being considered by the courts when granting relief. It has, however, to be the right case for this to be done and normally the litigant is entitled if he succeeds to have an *ultra vires* decision cast aside.<sup>29</sup>

There can be many considerations which make it undesirable to declare a decision retrospectively a nullity. In the I.C.I. case the Court of Appeal (disagreeing with Woolf J.) did not consider that the possible prejudice to Shell, Esso and B.P. of setting aside the valuation previously adopted by the Inland Revenue in assessing their liability to what could be a vast amount of tax sufficient to justify only granting prospective relief. On the other hand, in the *Chief Constable of North Wales v. Evans*<sup>30</sup> the judge at first instance (I regret to say, Woolf J. again) the Court of Appeal and House of Lords all agreed that the Chief Constable had acted in breach of the rules of natural justice in compelling a probationary constable to resign by threatening that otherwise he would be dismissed, but differed as to what form the relief should take. The judge at first instance was arrogantly of the opinion that his judgment gave the constable all that he could expect and did not grant any relief. The Court of Appeal granted the constable a declaration that the decision requiring the constable to resign was void but did not spell out the consequences of this though, presumably it meant that he was still a probationary constable - the sole remedy the constable was really interested in, as he was determined if possible to pursue his

<sup>29</sup> In *R. v. Att.-Gen., ex p. Imperial Chemical Industries plc* [1987] 1 C.M.L.R. 72, the Court of Appeal allowed an appeal against that part of the decision of the judge at first instance (Woolf J.) granting prospective relief only in relation to a challenge by I.C.I. as to the approach possibly adopted by the Inland Revenue in valuing ethane of I.C.I.'s competitors, Shell, Esso and B.P., at their proposed plants.

<sup>30</sup> [1982] 1 W.L.R. 1155.

career in the police force. The House of Lords, having found the question of what form of relief was appropriate difficult, concluded that in the circumstances it would be wrong to require the reinstatement of a probationary constable whom the police force did not want and awarded a declaration that Evans had, as the result of an unlawfully induced resignation, become entitled to all the rights and remedies short of reinstatement that he would have had if the Chief Constable had unlawfully dismissed him. By this means the House of Lords used the declaration with precision to protect the constable financially but not to put him retrospectively in the position he would have been if not compelled to resign.

I mention this saga because it is an excellent illustration of the value of declaratory relief in public law proceedings. I had refused any relief because I shied away from inflicting on the Chief Constable an officer whom he did not want. The Court of Appeal adopted the private law approach and did not concern itself unduly with the consequences of its decision. The House of Lords, however, used the declaration in a way which recognised the constable's interests to the extent that was consistent with the interests of the public in there being an efficient police force. In *Ridge v. Baldwin*<sup>31</sup> itself the House of Lords made it clear that there was no question of the Chief Constable being reinstated and the declaratory relief granted was also designed mainly to safeguard his financial situation.

The granting of only prospective declarations also fits in with the provisions of section 31(6) of the Supreme Court Act 1981. This subsection requires the court to take into account the effects of granting relief in cases where there has been undue delay which is likely to cause substantial hardship or substantial prejudice to third parties or be

<sup>31</sup> [1964] A.C. 40.

detrimental to good administration. A prospective declaration is less likely to have these undesirable consequences accordingly it would be open to the court having regard to the language of section 31(6) to refuse retrospective relief but be prepared to grant prospective relief.

As Clive Lewis points out in his article on prospective rulings in administrative law,<sup>32</sup> in tailoring the declaration to the needs of a particular situation, the English courts are following in the footsteps of the European Court.<sup>33</sup>

This is again a situation where a distinction can be drawn between the remedies available to a person who can claim that his private rights have been infringed and who normally will have those rights protected automatically by the courts, and the person who claims that he has been adversely affected by the manner in which a public body has performed its public functions where there is not the same automatic right to redress. Although in both types of proceedings the motive of the applicant for resorting to the courts may be the same, in the case of the public law proceedings the applicant is doing no more than seeking to enforce a duty which is owed to the public in general whereas in private law proceedings he is seeking to enforce a right to which he is entitled. Of the remedies which are now available in public law proceedings the declaration has

<sup>32</sup> [1988] Public Law 78.

<sup>33</sup> He refers in particular to the *Snupat* case and the *Hoogovens* case [1962] E.C.R. 253 and the first civil service salaries case 81/72 [1973] E.C.R. 573 and shows how the European Court has been more explicit than English courts in dealing with the interaction of the principles of legality with the principles of legal certainty. In situations such as that which arose in the *I.C.I.* case, above, the European learning indicates that the European Court will attach greater importance to the possible impact of declaring a decision void retrospectively on the activities of third parties who have relied in good faith on the decision and made their arrangements accordingly. Where a remedy is flexible this can be done and it is appropriate that it should be done in the public law area.

become the most beneficial because it enables the court to sculpture the relief which it grants so that it fits as closely as is possible both the needs of the individual applicant and the public.

### Damages

I turn to damages, which Lord Denning also regarded as being part of his "up-to-date machinery." In drafting the new Order 53 and when providing the statutory backing in section 31 of the Supreme Court Act 1981, damages could have been made a public as well as a private law remedy. The contrasting treatments of damages on the one hand and declarations and injunctions on the other make it clear that this course was deliberately rejected. The result is that the citizen's ability to obtain compensation for wrongful and arbitrary administrative action is extremely limited. He can obtain compensation in accordance with the normal principles of liability in cases of negligence, where a statute expressly or by implication provides him with a remedy or where he can show that the official in question has acted in bad faith. However, there can be many circumstances where as the law at present exists he has no remedy. In this situation the Justice All Souls Committee recommended a radical change, namely that a remedy in the form of compensation should be available:

- (a) When a person suffers a loss as a result of wrong administrative action not involving negligence.
- (b) Where a loss is caused by excessive or unreasonable delay in reaching a decision.

The Committee thought that the law relating to negligence could be left to develop on a case by case basis and that the

ordinary principles of causation, remoteness and measure of damage should apply. I have considerable sympathy for these recommendations but having regard to the width of their terms I cannot wholly endorse them.

That the proper protection of the citizen requires the court to have some new, wider power to award compensation I have, however, no doubt. Indeed, I am sure that it is in the interests of government, both central and local, that there should be such a power. The case of *Chief Constable of Wales v. Evans*<sup>34</sup> to which I have recently made reference illustrates the need. What the House of Lords was struggling to do was to ensure that the probationary constable was compensated for the Chief Constable's breach of the rules of natural justice; that was the appropriate remedy.

In the case of loss caused by conduct which in the case of a private body would create an estoppel, the public authority should be allowed only to pursue an alternative course dictated by the requirements of good administration if it is prepared to pay the appropriate compensation. Where a statutory scheme affects the public at large in many situations it would be preferable if, instead of using the blunt instrument of certiorari to quash the scheme, the court could compensate the few objectors and allow the scheme to proceed. In the case of delay the court in its discretion might consider that justice would be done if damages were awarded instead of granting an order of certiorari or mandamus which would have been appropriate if there had not been delay. Damages or compensation could be the most valuable additional weapon in the armoury of the High Court judge exercising his discretionary powers of judicial review.

However, the proposal put forward by the Committee

<sup>34</sup> [1982] 1 W.L.R. 1155.

does appear to go much further than is necessary. First of all if damages became a public law remedy, I can see that there could be public policy reasons for saying that the measure of damages should be different from those in a common law action. The applicant would be seeking compensation for the failure to comply with a duty or the failure to exercise properly a power which exists for the benefit of the public at large, not for the applicant alone, and this could be a material consideration in deciding what is the appropriate rate of compensation. The judicial restraint in the award of damages for loss of expectation of life provides a precedent for an entirely different scale of damages in the appropriate situation.

The Committee in making its recommendation took into account the risk of public bodies being inhibited from acting promptly or being encouraged to be over-cautious in their approach in order to avoid the risk of their incurring liability. The Committee felt that this risk could be discounted. However, I am by no means sure that this is right. In particular I do consider that there would be a considerable danger of the smaller public bodies being inhibited; certainly there have been dramatic stories in circulation about the consequences of making local authorities liable to pay damages for the negligence of their building inspectors. There is also the difficulty with the Committee's recommendations that they could result in the injured person's rights being greater if a particular injury is inflicted upon him by a public body than if exactly the same injury is imposed upon him in the same circumstances by a private body. This can hardly be a desirable result.

If there were to be reform, then I would advocate that a step by step approach should be adopted, albeit that this requires legislation. As a start I would limit the courts' power to grant compensation to those cases where the alternative remedies provided by judicial review are insufficient to secure substantial justice in the case and

material hardship would be caused to an applicant if compensation were not awarded in lieu of or in addition to other relief. There are many other formulae which could achieve the sort of result that I have in mind and the innovation, since that is what it would be, should be regarded as being an experiment to be reviewed thereafter. However, during the period of experiment the powers of the Omsbudman to recommend *ex gratia* compensation in the case of maladministration should be exercised so as not to result in greater compensation being granted than could be awarded by the courts. It is surely highly undesirable that the present situation, where the Omsbudman is able, in effect, to award compensation when the courts cannot do so, should continue, particularly bearing in mind that the Omsbudman is normally required to decline to exercise his jurisdiction where the person aggrieved has or had a remedy in any court of law.<sup>35</sup> An even more unattractive position can arise as a result of a litigant unsuccessfully exhausting his remedies in this country and then going to Strasbourg. In the Strasbourg proceedings he can and has obtained compensation which is not available from the courts in his own country.

I consider that the necessary reform, at least on the lines which I have suggested, is most likely to be of value and I would intend it primarily to apply in those cases which could be broadly described as being cases of non-feasance on the part of the administrative body.

As to the category (b) situation identified by the Committee, that is where a person is caused loss by excessive or unreasonable delay, I do regard it as a grave injustice that administrative delays can result in very real damage to the individual, yet that this damage can at present only be compensated, if at all, by the intervention of the Omsbudman.

<sup>35</sup> s. 5 of the 1967 Act.

The Justice All Souls Report was not able to take into account the Privy Council decision in *Rowling v. Takar Properties Ltd.*<sup>36</sup> which resulted in the decision of the High Court of New Zealand being reversed so that no compensation was recovered. If the outcome of the appeal had been known, I suspect that the Committee would not have been as confident about their recommendation to leave the law of negligence to develop on a case by case basis. The opinion of Lord Keith in that case strongly suggests that the distinction that Lord Wilberforce drew in *Anns v. Merton*,<sup>37</sup> between policy or planning decisions and operational decisions is likely to be consigned to the same fate as the test Lord Wilberforce laid down in the same case for ascertaining whether a duty of care exists. This would be unfortunate and, as Lord Keith was careful to indicate that their Lordships were not expressing any final conclusion, there still remains a prospect that my pessimism is unjustified. While I fully appreciate the dangers of administrators becoming over-cautious if they are exposed to actions for damages, I would expect the over-caution to manifest itself more in the policy area than in the operational area. An advantage of Lord Wilberforce's approach is therefore properly to exclude those cases where the development of the law is least desirable.

Lord Keith identified considerations which their Lordships felt "militate against imposition of liability."<sup>38</sup> I recognise that those considerations indicate the position is by no means easy, but I venture to suggest that there can be situations where delay can cause very substantial disadvantage to an applicant and that if he never has a remedy for delay he can suffer real injustice. In addition, I would suggest that the possible liability to make

<sup>36</sup> [1988] 1 All E.R. 163.

<sup>37</sup> [1978] A.C. 728; [1977] 2 All E.R. 492.

<sup>38</sup> At pp. 172-175.

compensation for undue delay could have a very salutary effect upon the speed of the decision-making process. Obviously where there is no fixed period in which a decision has to be taken, there will be a degree of flexibility as to the date by which the decision is to be taken and it is only in those cases which go beyond the limits set by that degree of flexibility that the right to compensation would arise. If real damage is caused by the delay and it should have been appreciated by the decision maker that the delay would cause real damage I am bound to say that this is the type of situation where I feel redress should be available. It would be necessary to show that there was a breach of duty which could be categorised as negligence and I appreciate, as Lord Keith points out, that this may be no easy achievement. However, if negligence can be established the difficulty of proof is not a reason for refusing relief. The ability to obtain compensation is surely going to become more valuable as the number of agencies grow which are responsible for taking decisions which can have a material affect on an applicant's livelihood.

Finally, I would draw attention to the existence of a limited route for possible progress which has the benefit of not requiring legislation. Frequently in seeking to persuade the court to exercise its discretion to refuse relief the public body against whom an application for judicial review is made stresses the undesirable consequences which could flow from quashing a decision. Returning to our proposed new motorway, years of work may be wasted if as a result of the intervention of the courts a new enquiry has to be held. In such a case it could be open to the court to say to the public body that if those who have been adversely affected are compensated then the court will not grant relief but otherwise the court will reluctantly be compelled to do so. I recognise this could be regarded as an unattractive way in which a public body would, in effect, be able to "buy off" the normal consequences of having acted in abuse of its powers.

It would, however, be a pragmatic way of protecting the public as a whole from the full adverse effects of what frequently may be no more than administrative incompetence. If justice can be done to the applicant by the provision of compensation, then the harmful effects of quashing a decision may be able to be avoided without causing injustice.

### The Injunction

I turn to the remaining feature of the new machinery of Lord Denning, the injunction.

The learned editor of the fourth edition of de Smith's *Judicial Review of Administrative Action*, Professor Evans, compares the progress which had been made in the use of injunctions with declarations as a public law remedy. He says:<sup>39</sup>

“Certainly its capacity for growth has not been fully exploited. The remarkable emergence of the declaratory order as a major public law remedy has been pointing for some years to the road ahead. For reasons not easy to identify with confidence, reasons connected, however, with its primary role as a private law remedy, the injunction has lagged behind.”

Since those words were written another decade has almost passed. However, they are still true today. The explanation which I would put forward for the lack of progress is that as a final order, prohibition is capable of achieving virtually the

<sup>39</sup> At p. 474.

same result as an injunction.<sup>40</sup>

Before the introduction of judicial review, the use of an injunction as a public law remedy was largely confined to situations where local and other authorities were proposing to act unlawfully or in aid of the criminal law, normally in proceedings commenced by the Attorney-General or with his authority. Except as an alternative to prohibition, that is still its role.<sup>41</sup>

Where, however, an injunction has great advantages over prohibition is that an injunction can provide interim relief. Although the procedure on an application for judicial review is expeditious, it is by no means rare for the court to have to hold the ring until it can permanently determine the legality of a proposed course of action. As a public law remedy the injunction has therefore come into its own as the prime method of obtaining interim relief. Indeed, it is the only way of obtaining interim relief save for the power contained in Order 53, rule 10, which permits the court when it grants leave to apply for judicial review in the form of an order of certiorari or prohibition to direct that the leave shall operate as a stay of the proceedings impugned until the final determination of the application or the court otherwise orders. Precisely what is meant by proceedings for this purpose is not clear.

Before the introduction of judicial review, it was always accepted that it was not possible to obtain an injunction against the Crown. Until recently it was accepted that judicial review had not altered the situation and therefore it was not possible to obtain interim relief against the Crown

<sup>40</sup> In the past prohibition may have been regarded as being primarily available against inferior courts and other tribunals but that is no longer true today.

<sup>41</sup> The position in the United States is very different. In Federal administrative law the injunction is probably the most important judicial remedy.

on an application for judicial review.<sup>42</sup> However, in 1987 Hodgson J. in a carefully reasoned judgment<sup>43</sup> advanced arguments which I personally found compelling based on section 31 of the Supreme Court Act 1981 as to why on an application for judicial review the court has power to grant an injunction. That reasoning was followed by the majority of the Court of Appeal, of which I was a member.<sup>44</sup> However, in a decision given on May 18, this year, the House of Lords rejected that reasoning and made it clear that there is no power to grant injunctions, interim or final, against the Crown.<sup>45</sup>

It must therefore be accepted that until Parliament intervenes, which it is most unlikely to do, the courts cannot grant interim or final injunctions against the Crown. I regret that this should be the position, notwithstanding the fact that in my experience the Crown is normally prepared to hold its hand where proceedings are pending before the court where if it did not do so irreversible damage would be done to the individual. My regret is primarily based upon the belief that it is not right that the protection of the individual should be entirely dependent upon the willingness of the Crown to

<sup>42</sup> It has always been clear that an interim declaration was not available in this country as in Israel.

<sup>43</sup> See *R. v. Secretary of State for the Home Department, ex p. Herbage* [1987] Q.B. 872.

<sup>44</sup> *Smith Kline and French Laboratories Ltd.* [1989] 2 W.L.R. 378.

<sup>45</sup> *R. v. Secretary of State for Transport, ex p. Factortame and Others*, [1989] 2 W.L.R. 997. I do not regard it as appropriate to defend my own reasoning against that of the House of Lords. However, I regret that the argument accepted by the House of Lords for rejecting "in the light of history" my reasoning which would otherwise have had "great force" was never advanced before the Court of Appeal since I consider there is at last a respectable argument for taking a different view from that of Lord Bridge (who gave the only speech) and that it would have been preferable if the arguments could have been considered by the Lords. Would a Director of Civil Proceedings' intervention in the House of Lords have helped?

hold its hand as a matter of grace. In the future the Crown may not be so sensitive to the rights of the individual. I also regret that this should be the position because frequently the inability of the court to rule on the issue as to whether interim relief should be granted causes the Crown to abstain from taking action pending the outcome of proceedings when in fact if the court were able to rule it would not be prepared to grant interim relief. It is particularly unfortunate that this should be the position since the House of Lords unlike the Supreme Court of Israel has sets its face against interim declarations which could be awarded against the Crown. (see *Gouriet v. A.G. supra*).

However, the position may not be quite as unsatisfactory as it seems as a result of the House of Lords decision, since on a careful reading of Lord Bridge's speech, which was agreed by the other members of the House, it is clear that he made no mention of the power of the court to grant a stay. I feel this was no accident. I am, however, somewhat sceptical as to whether this possibility will prove to be more than a mirage since the reasoning of Lord Bridge would appear to be as applicable to a stay as it is to an interim injunction. On the other hand if Lord Bridge had formed the clear view that a stay could not be granted, I would have expected him to have said so even though his opinion would have been *obiter*.

Certainly, for the time being at any rate, the injunction as a public law remedy will continue to lag behind the declaration.

### Conclusion

It will be apparent from the views that I have expressed that I am in favour of more declarations, more injunctions and more damages or compensation on applications for judicial review. I would, however, make it clear that this does not

mean that I am in favour of more judicial intervention into the activities of public bodies. It is my belief that if the changes which I would favour were to be implemented, they would result in more effective and efficient use of but not more judicial review and would assist the court in maintaining a proper balance between protecting the public and allowing those who have the responsibility for governing us to govern. Unfortunately the initiative and imagination displayed by the courts in relation to the declaration has not been shown in relation to the other remedies. The opportunity has been there but so far it has not been taken. I hope more attention will be paid to Lord Denning's words over the next 40 years.

### 3. *Non-Judicial Review*

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40 years ago Lord Denning also said:

“There is no doubt that the new tribunals in England do constitute a set of administrative courts: but they have grown up in so haphazard a fashion that it is difficult to fit them into any recognisable pattern: and one of the most important tasks of the lawyers of to-day is to mould them into a coherent system of courts which will keep a just balance between the claims of the community on the one hand and the freedom of the individual on the other.”<sup>1</sup>

The judiciary is very proud of what has been achieved by judicial review, which is generally accepted to have been a great success. But that success depends on the topics which I am now going to discuss and which I believe have not received the credit they deserve. These are “non-judicial” review by tribunals, and the ombudsmen. In addition I am going to deal with an old hobby-horse of mine - the need for administrators to give reasons for their decisions.

<sup>1</sup> Denning, *Freedom and the Law* (1949), p. 80.

Judicial review is not designed or equipped to ascertain or review the facts on which administrative decisions are based or, except where it is only possible to reach one rational decision, to decide what is the correct decision. On the other hand a tribunal is usually an ideal fact finding and decision making machine.<sup>1a</sup>

Both tribunals and the courts are equally ill-equipped to investigate for themselves the manner in which a decision has been reached and to come to a conclusion as to whether there has been maladministration. This is just the task which the Ombudsmen, or Parliamentary and Local Commissioners, are particularly well equipped to perform. However tribunals and the Ombudsmen are no substitute for judicial review of the legality of administrative action by the courts. However, the absence of reasons for administrative action or inaction makes the task of the courts on judicial review immeasurably more difficult.

### The Tribunals

Taking first tribunals, I have little doubt that, were it not for the explosion in the number of tribunals and the growth of their workload, judicial review would have been far less successful. The courts, and in particular the High Court, would have drowned under the clamour for judicial review but for the achievement of tribunals. The number of appeals which are disposed of by tribunals is quite staggering. It is far in excess of the total caseload of the courts. I give two examples. In the year ending April 1988 the President of the Social Security Appeals Tribunal announced that they had

<sup>1a</sup> Some problems however appear incapable of satisfactory solution by any forms of adjudicatory process see David Pannick "Second Among Equals" *The Independent* September 22, 1989

“processed,” his words not mine, approximately 300,000 cases per year. The processing was done by 650 Chairman and 7,000 members. The Commissioners of Inland Revenue, who can boast a history going back to 1798, have some 4,500 general commissioners, of whom 460 sit north of the border. In 1987 they dealt with a truly remarkable number of cases, almost 600,000; though the vast majority of these never resulted in a contested hearing, 8,000 did.

There is hardly an aspect of our life where there is not some tribunal which is prepared to adjudicate upon disputes between the citizen and the bureaucracy or the citizen and his fellow citizens. The Council on Tribunals is now responsible for over 70 different tribunals and the number has grown so haphazardly that it is even difficult to keep track on which tribunals are subject to the Council's jurisdiction with the result that in its recently published Annual Report for 1987/1988 the Council complains that one of its charges was abolished without the Council being consulted. Apparently this happened because it was not appreciated by those responsible for the relevant legislation that it was within the Council's jurisdiction.

### **Membership**

Tribunal work is a huge industry involving not only lawyers but members of the public from all walks of life. It involves not only lawyers who are practising members of the legal profession but non-practising and academic lawyers. Unlike the position in the courts, academics can and do play a direct part in the running of tribunals. The contribution they make as chairmen and members of the tribunals I am confident will continue to grow. I believe it is important that their contribution should do so because it provides an admirable method of bridging the gap which all too often is far too

wide between those engaged in the academic side of the law and those who are engaged in practice. Indeed if, as I hope will happen, the ties between the system of tribunals and the courts grows closer the experience of academic lawyers sitting as chairmen of tribunals could qualify them to become perhaps first recorders and then judges and so strengthen this link.

The part played by academics on tribunals is only one of the interesting aspects of the membership of tribunals. Unlike the United States where there has developed a whole new species of the judiciary, who are very conscious of their importance and dignity, known as administrative judges, in this country our tribunals are largely staffed by part-timers and a minority of members who are legally qualified. Without being able to call themselves justices of the peace, the lay members of tribunals perform in the administrative field a role which is as important as that of magistrates in the criminal field. I am sure that the involvement of the lay element explains why it is extremely rare for an allegation to be made that a tribunal has acted unfairly. The involvement of the community has always been a source of great strength of our legal system and while its enlargement may not be unconnected with the resulting economies, it is fortunate that, whatever the motives, the government has maintained the lay element in tribunal after tribunal as this undoubtedly gives the public confidence as to the independence of tribunals.

### ***The Education of Tribunal Members***

The fact that there is the lay element on most tribunals makes it very important that there should be proper training of members, both on the very complex legislation which tribunals have to administer and how properly to conduct

proceedings. Until recently the need for training was largely ignored. It was a case of learning on the job. This used to be the position with judges but at least they usually had experience through their practice prior to appointment. The same is not true with regard to the majority of newly-appointed members of tribunals. However, fortunately this shortcoming has now been accepted. As with magistrates, training provides a double benefit: the members not only increase their skills but also acquire a sense of professionalism which motivates them to maintain high standards.

Now under the chairmanship of a very experienced judge, Judge Sir David West-Russell, who is also President of the Industrial Tribunals, a committee of the Judicial Studies Board has been formed to provide training for members of tribunals sitting as chairmen. The Council on Tribunals has for some time emphasised the need for training and the Presidents of the Industrial Tribunals and Social Security Appeal Tribunals have initiated their own training programmes. The President of the S.S.A.T., Judge Byrt, has also recognised the need for training of members and chairmen. While the lay members need training primarily in adjudicating skills, the legally qualified chairmen should already have these skills and their training needs to be primarily devoted to the labyrinth of benefit law. This is a new growth area for legal education which I am sure is going to be of growing importance in the future.

### **The Participation of Judges**

The role of Judge Sir David West-Russell within the Judicial Studies Board and his role as President of the Industrial Tribunals and Judge Byrt's position as the first and so far only President of S.S.A.T. underline another feature of

tribunals, that is, the benefits of having a judge as the head of a system of tribunals. This, I hope, is going to be the pattern for the future, at least for the larger tribunals. It already exists in the case of many other tribunals. The Social Security Commissioners are presided over by Judge Bromley. Judge Medd is President of the VAT Tribunal and the Mental Health Review Tribunals have a number of judges among their legal chairmen. The Employment Appeal Tribunal is unusual in being both a tribunal and a court of record and is unique in having as its President<sup>2</sup> and among its members High Court judges. No doubt because of the E.A.T.'s special status it is not supervised by the Council on Tribunals. However, the fact that a body is both a tribunal and a court of record does not mean it cannot be subject to the supervision of the Council. The Transport Tribunal presided over by Judge Inskip Q.C. is both yet is subject to the jurisdiction of the Council. The Lands Tribunal is not presided over by a judge but its President, Sir Douglas Frank, certainly has the same status and many is the time I appeared before him when his presidential duties allowed him to sit as a deputy High Court judge.

This limited judicial presence has undoubtedly proved to be a great success. The judges bring with them not the formality of the courts but the standards of fairness and justice which exist in the courts. In addition they provide another and even more important bridge, bearing in mind the important contribution which tribunals now make to administrative justice, that is the bridge between the tribunals and the courts. The presence of the judges has underlined the independence of the tribunals and given the presidency of certain tribunals a prestige which it would not otherwise have. This admirably compliments the community involvement of the lay and other part-time members. The

<sup>2</sup> The Hon. Mr. Justice Wood.

combination of judicial and non-judicial membership is particularly important in creating public confidence in those tribunals which are still very closely linked with the government departments whose administrative actions are the subject of their jurisdiction.

However, the benefit is not all one way. The courts benefit from the insight which judicial members obtain into a different method of adjudication from that normally adopted by the courts and the skills which have been developed by tribunals in handling cases involving unrepresented litigants whose treatment by the courts has sometimes fallen below acceptable standards.

### **The Social Security Appeal Tribunal**

A very good example of the contribution that a judge can make is provided by the Social Security Appeal Tribunal. That tribunal, which can trace its history to the National Insurance Act 1911, was and could have remained in the public's eye very much the creature of what used to be the D.H.S.S and is now the D.S.S. Until 1984 the tribunals were administered by the D.H.S.S., which was responsible for their staffing and for appointing their members. In practice this meant they were first recruited and then assessed for performance and reported upon to the Department by its own local office managers. The legislation was, of course, promoted by the same Department, administered by it and it was members of its staff acting as adjudicators which gave rise to most of the decisions which were the subject of the appeals to the tribunal. These incestuous arrangements hardly reflected what should be the image of a tribunal and many an appellant who lost his appeal must have felt that justice had not been seen to be done. However, having represented the National Insurance Tribunals, the

Supplementary Benefit Appeals Tribunals and the Medical Appeal Tribunals in the High Court I can say that, contrary to all expectations, they did exercise a considerable degree of independence from the Department.

However, in 1984 a radical change was made. The D.H.S.S. by statute combined the National Insurance Local and Supplementary Benefit Appeal Tribunals with the Social Security Appeal Tribunals. These new tribunals and the Medical Appeal Tribunals were then placed under the supervision of a new independent administrative structure led by its President, who was appointed, as were the other regional chairmen, by the Lord Chancellor.

The new tribunal is, however, still dependent upon the Department for all its manpower and financial resources and theoretically the Department could, by failing to provide the necessary resources, undermine the tribunal. The 1983 Act confers wide powers on the President but states that critical powers are only to be exercised with the consent of the Secretary of State and (ominously) of the Treasury. The reference to the Treasury, which is also made in relation to the power to appoint adjudicators, means it would be extremely difficult to challenge a refusal of resources by the Secretary of State on judicial review as was recently attempted.<sup>3</sup> Fortunately, however, the Department, having created the tribunal, has supported it, and here I quote the President,<sup>4</sup> "With enthusiasm and much goodwill" so that

<sup>3</sup> See *R. v. Secretary of State for Social Services, ex p. Children's Poverty Action Group* [1989] 1 All E.R. 1047.

<sup>4</sup> This support has not however extended to providing for a right of appeal from decisions in relation to the Social Fund. For stringent criticism of the decision see, *The Social Fund - Discretion or Control?* Drabble and Lynes Public Law 1989, 297.

“we are all receiving all such resources as we reasonably need.” The President’s only complaint is the time “it takes to negotiate an agreement on such needs.” While the negotiations are primarily conducted by the appropriate officers of the tribunal I have little doubt that if he only had the support of a career chairman of tribunals rather than a judge who is not dependent on being re-appointed after the expiry of his term of office his position would be considerably weaker.

From a theoretical point of view it would appear obvious that it would be preferable if the Social Security Appeals Tribunals were wholly independent of the Department. However, in practice I am not sure that is the case. It may be that this is one of the pragmatic arrangements which in this country, contrary to all expectations, work peculiarly well. The tribunals’ clients normally come from the most deprived sections of the community and in the vast majority of cases they have the task of arguing their appeal against a very complex system of law without assistance. The appellant is therefore peculiarly dependent upon the tribunal itself pursuing an inquisitorial role. While the appellant is dependent on the tribunal, the tribunal is assisted by the member of the Department’s staff who acts as presenting officer and who may also be the adjudication officer whose decision is the subject of the appeal. Although primarily responsible for supporting the decision of the adjudicating officer, the presenting officer also recognises that he has a responsibility towards the tribunal and he is encouraged in his training to adopt the role of *amicus curiae*, though the help he can give is proportionate to his level of experience.

Because of the close relationship between the Department and the Appeal Tribunal, the President and the Regional Chairmen of the tribunals are able to make a real contribution to the training of adjudicating and presenting officers by explaining the working of tribunals and their needs. There is therefore a sense of co-operation between

those responsible primarily for administering legislation and the tribunal. Of course the President and chairmen must not appear uneven in their approach. The system which they are administering is highly sensitive and it is fortunate that the tribunal has also taken considerable care to foster good relations with the welfare rights organisations.

The first, and so far the only, President is cautiously optimistic about how the tribunal is working. He is, however, conscious that even an amalgamated tribunal, with a fluctuating staff of between 550 and 800 servicing 650 chairmen and 7,000 members, does have problems in providing a career structure. The staff normally returns to the Department after a three year secondment. Although the return of staff in this way tends to foster knowledge of the work of the tribunal in the Department, it is clearly unsatisfactory that the tribunal should lose its staff just when they become of the greatest value.

In addition there can be dramatic changes in the volume of work for even a combined tribunal of this sort. For example, the withdrawal of single payments benefit in April 1988, led to a vast increase in the number of appeals. However, over the same period there was a reduction in the number of appeals to Industrial Tribunals because of changes in the qualifying periods for redundancy payment. Because of this it would be desirable if some system for the sharing of resources were introduced. Although this is difficult where more than one Department is involved it should be possible to devise a method of ensuring mutual co-operation between tribunals, while still maintaining their independence from each other, so that they are better able to relate to the differing requirements of their respective clients. Perhaps the key to this cooperation will be provided by the periodic meetings of presidents and chairmen which have now been initiated, the first having taken place in May 1987.

### **The Relationship Between the Non-judicial Adjudication of Tribunals and Judicial Review**

The next point I wish to make on tribunals is to clarify the point that I made at the beginning of this lecture to the effect that judicial review would not have been the success it has been if it were not for the non-judicial review undertaken by tribunals. The truth of this is illustrated not only by the volume of cases dealt with by tribunals but also by the decisions in a series of cases in the courts, including the *Pulhofer*<sup>5</sup> case and *Swati*<sup>6</sup> cases, which have excited the criticism of distinguished academic writers, and which reflect the need in one case to have a new tribunal and in the other the need to extend the jurisdiction of an existing tribunal.

The *Pulhofer* case is the decision of the House of Lords which strongly discouraged the granting of judicial review in Homeless Persons Act cases. The House of Lords pointed out the difficulties which the legislation created for the local authority who had to administer its provisions with limited resources and suggested that it was not for the courts to interfere with the allocation of those resources. Having heard a number of applications for judicial review concerning homeless persons, I fully accept and understand the reasoning of the House of Lords for regarding judicial review as being an inappropriate remedy in the normal case. However, on the other hand I equally recognise the hardship which can be caused to the homeless by a wrong decision and I feel that what is required is a counterpart of the Social Security Appeal Tribunal in the housing field. Such a tribunal would be well qualified to deal with the sort of

<sup>5</sup> *R v. London Borough of Hillingdon ex p. Pulhofer* [1986] A.C. 484

<sup>6</sup> *R v. Secretary of State for the Home Dept ex p. Swati* [1986] 1 W.L.R. 977.

issues which arise under the Homeless Persons Act in the public sector and also the problems which arise in the private sector, dealt with for many years by Rent Assessment Committees and Rent Tribunals. It would also overcome the difficulty highlighted by what might be irreverently referred to as the “flip side” of *O’Reilly v. Mackman*<sup>7</sup>; that is, the case of *Cox v. Thanet District Council*,<sup>8</sup> which was decided by the House of Lords at the same time. If the jurisdiction was entrusted to a tribunal there would not be the need for the two sorts of proceedings, one of judicial review in the High Court and the other for damages in the county court, which has been the subject of strident academic criticism.

This is also the practice of the courts not to make available judicial review to immigrants who are refused leave to enter this country and who have a right to appeal to a tribunal but only after they have left this country. This was the subject of the *Swati* decision. The issues raised in the case of such immigrants are much more appropriate to resolution by a tribunal than the courts on judicial review. To protect such immigrants, a change which avoids the courts being choked by applications which raise no point of principle and frequently appear to be designed merely to delay the immigrant’s removal, albeit that they are immensely important to the immigrant involved, is needed. The restrictions on appeals to the immigration tribunals should be relaxed at least to the extent of giving the tribunal the power to dispense with the requirement that the immigrant should leave the country before appealing when

<sup>7</sup> [1983] 2 A.C. 237.

<sup>8</sup> [1983] 2 A.C. 286. Lord Bridge with impeccable logic indicated that if a homeless person wanted to bring proceedings for damages against the local authority for breach of duty, he should first bring proceedings for judicial review and if he succeeded in having the decision of the housing authority quashed subsequently bring proceedings in the County Court for damages for the breach by the housing authority of its duty to provide him with accommodation.

the tribunal concludes that undue hardship would be caused by insisting on this requirement.

The same is especially true of the *Khawaja*<sup>9</sup> case for a different reason. If an immigrant is alleged to have entered this country by fraud the House of Lords have rightly held uniquely in the case of an application for judicial review, that the court must decide not whether the Secretary of State had reasonable grounds for regarding the immigrant as having obtained entry to this country by fraud but whether there was in fact fraud. If the Home Secretary cannot prove fraud the immigrant cannot be removed. Judicial review is not the ideal forum for this sort of fact-finding exercise which would be better performed by a tribunal. However, the immigration tribunal at the present time has no jurisdiction in this type of case so the courts must do their best.

Another series of decisions which have been criticised are those of which *Calveley*<sup>10</sup> is an example. In these cases the courts have established the principle that an applicant for judicial review will except in exceptional circumstances be required to exhaust his statutory rights of appeal before he will be allowed to bring the matter before the courts. I have no doubt that this is a principle to which the courts should adhere. It can be traced to pre-judicial review days.<sup>11</sup> If there is a tribunal which can appropriately deal with the issues raised on an application for judicial review, then I can see no basis for criticising a court if it normally declines jurisdiction in favour of the specialist tribunal, which is often better qualified to resolve the issue. It should not be forgotten that, although judicial review is now dealt with by nominated judges, in many of the fields in which the tribunals have great expertise even the nominated judges have little

<sup>9</sup> [1984] A.C. 74.

<sup>10</sup> [1988] 3 W.L.R. 1020.

<sup>11</sup> See *R. v. Hillingdon Borough Council, ex p. Royco Homes Ltd.* [1974], Q.B. 720.

experience. Quite apart from this the pressures on the High Court mean that it is sensible to preserve judicial review as the remedy of last resort. It is of the greatest importance that the High Court should be able to deal expeditiously especially, but not only, with urgent applications for judicial review. If cases with which they can deal are not decided by tribunals this results in unnecessary congestion of the High Court. Furthermore even if there is right to appeal to the High Court from the tribunal it is often preferable for the High Court to know the reaction of the expert tribunal to the point involved.

Sometimes it is suggested that it is wrong for the courts to refuse to intervene where it is alleged that a body whose acts can be reviewed by a tribunal or a minister has exceeded its jurisdiction and gone beyond its statutory powers. It is said matters of *vires* must be appropriate to be dealt with by the courts. However, even in such cases I regard it as preferable for the administrative appeal body to express its views first. The appeal body can deal with the merits and the jurisdictional point at the same time and frequently this will avoid the need for an application to the High Court, so it should at least reduce the risk of a multiplicity of proceedings. In *Royco Homes* Lord Widgery C.J. indicated that certiorari "will go only where there is no other equally effective and convenient remedy" but then went on to indicate that the court should intervene "where a decision is liable to be upset as a matter of law because on the face of it it is clearly made without jurisdiction or made in consequence of an error of law."<sup>12</sup> The trouble with this sort of test is that it is only after the *inter partes* hearing you can tell whether it is a clear case - litigation over issues which ultimately prove to be without any practical application are not confined to snails in ginger beer bottles. It is better to

<sup>12</sup> See pp. 728-729.

regard the power of the court to intervene as being exceptional and confined to the rare and special case.

### **The Need for High Court Judges to Have Greater Experience of Tribunals**

Since sitting as a member of the Court of Appeal, I have been made aware of the difficulty and the importance of the issues which arise on appeals from the Employment Appeal Tribunal. In addition to the appeals which raise questions of considerable importance in industrial relations, there are also the appeals which raise astonishingly difficult problems involving race and sex discrimination. There has been some justifiable expression of complaint that the decisions of the courts on such appeals have been unduly restrictive. If this criticism is justified, then I suspect that a contributing factor is that many of my colleagues like myself, have had no experience of sitting as a member of the Employment Appeal Tribunal. I have been very conscious when sitting with colleagues who have had this experience that they are better qualified to deal with these appeals. I would therefore like to see more High Court judges, particularly nominated High Court judges, sitting for a period as members of administrative tribunals such as the E.A.T. so that they can obtain a better insight into the workings of the very important legislative fields with which tribunals have to deal. They would also have the advantage, and I am told it is a very great advantage, of sitting with lay members. It is an impressive testimony to the quality of the contribution of lay members that, on what I have been told, those High Court judges who have had the experience of sitting with them are unreservedly in favour of having the assistance of lay members even though their jurisdiction is confined to hearing appeals on points of law.

### The Council on Tribunals

That the standard of tribunals is generally so good is an endorsement of the admirable work of the Council on Tribunals. The Council was one of the beneficial results of the Franks Committee Report and the Tribunals and Inquiries Act 1958 which implemented its recommendations. I have to acknowledge that its membership, consisting of a majority of lay members, some lawyers but no judges, has been successful. For the purpose of this lecture I read the annual report which it has presented to Parliament for the last four years and I am full of admiration for the manner in which, without any executive function, and in the words of Sir William Wade "being designed to bark but not to bite,"<sup>13</sup> the Council has by dogged perseverance again and again been responsible for significant improvements in the way in which a tribunal is structured or operates.

With considerable astuteness the Council has recently focused primarily on one body of tribunals at a time, revealing the shortcomings of that tribunal when set against its standards of openness, fairness, impartiality, efficiency, expedition and economy. It complains loudly if it is not consulted as it should be. If its very practical advice is ignored it comes back relentlessly again and again to the same subject until even the resolution of the most hardened department weakens and gives way. The Council has indeed achieved great things and has done so on a tiny budget of 500,000 per year. Provided with the greater resources it needs, its record would not compare unfavourably with its Australian counterpart.

<sup>13</sup> Wade, *Administrative Law* (6th ed., 1988) p. 916.

### **The Need for an Extension in Legal Aid**

Of course, the Council is far from being a story of total success. In particular it has failed so far to make any real progress on the question of legal aid before tribunals. However, it is still campaigning on this supported by the Lord Chancellor's Advisory Committee, Justice and nearly everyone else who knows anything about tribunals, and I cannot believe but that in the end this substantial blot on our administrative tribunal system will not succumb to what appear to me to be manifest advantages in enlarging the provision of legal aid before tribunals. Not universal legal aid but legal aid in those cases where it is justified is what I envisage. After all, as the Council has pointed out, there are tribunals with a multi-tiered structure such as the Social Security Tribunals, providing for an appeal from one appellate tribunal to another appellate tribunal. It must be uneconomic to have a second tribunal putting right errors which occur in a lower tribunal when these mistakes would not have occurred if the appellant had been represented before the lower tribunal. If proof is needed it is provided by research sponsored by the Lord Chancellor's Department which indicates that specialist lay representation increases the probability of success in Social Security Appeal Tribunals by 30 per cent. to 48 per cent. and in immigration hearings representation will increase success by 20 per cent. to 38 per cent. (see the Effectiveness of Representations at Tribunals by Hazell Genn and Yvette Genn.)

### **The Failure of Social Security Commissioners to Give Reasons for Refusing Leave**

The Council have also so far been unable to resolve two pet

concerns of mine. The first involves anticipating the last subject of this lecture, and is the failure of Social Security Commissioners to give reasons for refusing leave to appeal. Unlike the majority of tribunal decisions which are subject to a statutory obligation to give reasons, the Commissioners are under no statutory obligation to give reasons for refusing leave. This was emphasised by the Court of Appeal<sup>14</sup> on an appeal from a judge then sitting at first instance, whose identity I leave you to guess, who merely invited the Commissioners to give reasons. However, the fact that they are under no statutory obligation to give reasons does not mean that they should not, at least in those cases which cry out for reasons, voluntarily give reasons. There has not been the same increase in appeals to the Social Security Commissioners as there has been to the Social Security Appeal Tribunal. The Commissioners are lawyers of considerable standing and I cannot believe that the pressure to which they are subjected prevents them, at least when requested to do so, from giving the sort of reasons which are given as a matter of course by High Court judges when dealing with a vast number of criminal appeals. The Commissioners' decisions to refuse leave are subject to judicial review but to deprive would-be appellants and the court on review of any understanding of the basis of their decision in my view creates a wholly reprehensible situation, for which there can be no justification, where the citizen's right to seek judicial review is rendered worthless. My views I am pleased to say are shared by the Council.

<sup>14</sup> *R. v. Social Security Commissioners, ex p. Sewell*, *The Times*, January 2 and February 2, 1985, and *R. v. Social Security Commissioners, ex p. Connolly*, [1986] 1 W.L.R. 421.

### The Absence of a Co-ordinated System of Appeals

My other complaint has been in itself the subject of a previous lecture<sup>15</sup> I have given. It is the total lack of consistency as to the manner in which different tribunals' decisions can be brought before the High Court. Tribunals now play such an important part in the administration of justice that their relationship with the High Court should be straightforward and simple and not, as is the present situation, a labyrinth of conflicting procedural provisions. Judicial and non-judicial review should be integrated but at present there is not even a common basis as to the *locus standi* required for invoking the jurisdiction of the different bodies. For example, to apply for judicial review you need a sufficient interest, but to appeal to many tribunals you have to be a person aggrieved. Who has a sufficient interest and who is aggrieved is far from clear.<sup>16</sup>

What is needed is a thorough overhaul of the jurisdiction of tribunals of first instance, on appeals from tribunals of first instance to appellate tribunals and appeals from appellate tribunals to the High Court. So far as tribunals of first instance are concerned, and I use that term in its widest sense, care should be taken to ensure that the body who is given the role of making the primary findings of fact is an appropriate body to perform that function. As an example, in the case of disqualifying or surcharging councillors for wilful misconduct this task is at present given to the district auditor from whom there is an appeal which takes the form of a rehearing before a Divisional Court.<sup>17</sup> Although district auditors struggle bravely to perform this task it is one which

<sup>15</sup> "A Hotchpotch of Appeals - The Need for a Blender" (1988) 7 C.L.Q. 44.

<sup>16</sup> See *Cook v. Southend Corp.*, July 1989.

<sup>17</sup> s. 20 of the Local Government Finance Act 1982 and R.S.C., Ord 98.

can involve highly charged situations for which they are not suited by training or experience and which can on appeal cause problems for the Divisional Court.<sup>18</sup> It would be more satisfactory if this task were given to a tribunal before whom the district auditor could present his findings.

The question of whether there is any need for a tribunal or an appellate tribunal and whether that tribunal should be a general or special tribunal should also be scrutinised. There should not be an unnecessary proliferation of tribunals: it should be borne in mind that if the primary purpose of the second tier tribunal is to be to decide questions of law on the whole those questions are better determined by the courts and instead of having a second tier a right of appeal to the courts should be given. If there is a second tier appellate tribunal there should still be a right of appeal to the High Court with leave, as is usually now the case. However, the court hearing the appeal should not differ from tribunal to tribunal without any discernible rationale between the three divisions of the High Court and the Court of Appeal and should normally include at least one judge who has first hand experience of the adjudication process of tribunals.

There is also the need to survey the other sources of administrative decisions which give rise to appeals to the High Court. Take, for example, planning appeal decisions. These are now more often than not no longer taken by the Department let alone the Minister after an inquiry to discover the facts by an inspector, but by the inspector himself. Local authorities are notoriously dilatory in giving the decisions which lead to the appeals. There is at least an argument for replacing the whole of the present procedure by a tribunal system which combines the necessary local knowledge and planning expertise. A review of this sort

<sup>18</sup> e.g. *Lloyd v. McMahon* [1987] A.C. 625.

could also help to re-establish the proper role and proper machinery for local inquiries. Should the distinction which has been blurred between local issues which are a suitable subject of local inquiries and national policy issues which should be resolved in Parliament be maintained? As the unattractive scenes caused by understandable frustration by the public in the past at road enquiries have shown the present position though improved is far from satisfactory.

Unfortunately, this subject has not been officially surveyed since Franks. The explanation for this neglect may be that it is a subject which is not within the sole responsibility of the Lord Chancellor's Department and the Council has not the resources. However, the present unsatisfactory situation could be readily resolved (assuming the interests of differing departments of government could be reconciled) and, given the resources, I am confident the Council would produce a solution.

### The Ombudsman

I turn now to the other great success story, that of the Ombudsmen or, to be more accurate, the Parliamentary Commissioner and the Local Government Commissioners. This Scandinavian import has integrated itself into our constitution in a most remarkable way. If any testimony to its success is required, it is provided by the way in which it has been flatteringly copied by the private sector. We now have banking ombudsmen, insurance ombudsmen and apparently we may even be going to have a legal ombudsman. This suggestion of a legal ombudsman is particularly interesting since in the past an issue of acute sensitivity has been the extent to which the running and the functions of the courts are appropriate subjects for investigation by the Ombudsman.

Although the introduction of the Ombudsman has been an undoubted success there has surprisingly been no explosive demand for the use of the services of the Ombudsman. Since the introduction of the office by the Act of 1967, one Ombudsman after another has been concerned as to why there has been such a modest response to the services they provide. One Ombudsman has suggested that the explanation is that, on the whole, the public regard themselves as well governed. Another explanation, which is put forward by the present office holder, is that the public are required to channel complaints through their Members of Parliament who act as their constituents' Ombudsman by raising matters with the Department direct. However, whatever the explanation it would be unwise to weaken the links between the Parliamentary Commissioner and Members of Parliament and through the Select Committee on the Parliamentary Commissioner for Administration with Parliament. The links give authority and status to investigations and assist in achieving the effective implementation of any recommendation which is made. The Local Government Commissioners have not the same support and this partly explains the much less satisfactory record of their recommendations being implemented.

The way in which the Ombudsman seeks to redress the complaints of the citizen as to maladministration bears no resemblance to the adjudicative powers of a court or tribunal. Its efficiency is largely derived from the ability of the Commissioners to obtain access to the complete records of the administration: these would not normally be available on judicial review where discovery is rarely ordered. The Ombudsman, however, is in the same position as the *Conseil d'Etat* when it is conducting a review of administrative action. The *Conseil* and the Ombudsman, by having access to the files, are in the best possible position to ascertain what has happened and what, if anything, has gone wrong. The Ombudsman's inquisitorial investigation, which is conducted

at no cost to the member of the public who initiated the complaint, is much more searching than that of the court. I know from my period as Treasury Devil the dread with which his investigations are treated by government departments.

Unlike the courts the Ombudsman can of course only make recommendations which are not directly enforceable. However, in the case of central government any recommendation is normally implemented and a recommendation can be more beneficial to a member of the public who has been the subject of maladministration than an order of the court since the Ombudsman can recommend the payment of compensation in circumstances where the courts have no power to award damages.

Particularly because of the developments which have taken place in judicial review since 1967 there is a substantial overlap between the jurisdiction of the courts and the Ombudsman. Parliament catered for this by providing in the Act that the Ombudsman may not investigate any administrative action in respect of which the person aggrieved has or had a right to go before a court or has or had a remedy in any court of law. However, the protection provided by these provisions, which are contained in section 5(2) of the 1967 Act, are undermined by a proviso which allows the Parliamentary Commissioner to investigate action where he is satisfied in the particular circumstances that the individual cannot reasonably be expected to resort or to have resorted to his right or remedy before a tribunal or before the courts. It would not be surprising if the Ombudsman tended to take a generous view of the cases which fall within this proviso especially where there is no right of appeal to a tribunal. It would also be understandable if he were reluctant to discontinue an investigation after he had started even though it subsequently became apparent that the question being investigated was one which could appropriately be dealt with in court. This probably does not

normally matter since the remedy which he provides is so effective. There have, however, been instances recently of the Local Government Ombudsman coming close to abrogating to himself a role much better suited to the courts. The remedy for this is judicial review, but although judicial review is available in respect of investigations by ombudsmen the courts will naturally be reluctant to interfere with the manner in which the Ombudsman chooses to exercise his discretion.

The All Souls Justice Review (see pp. 97-99) although conscious of the overlap thought the best solution was to allow matters to develop as at present and leave it to the Ombudsman and the courts to work out how they should co-exist. I am sure there is a great deal of good sense in this suggestion. However, my preferred solution would be to give the Ombudsman the power when he considers it appropriate to do so, whether before, during or after an investigation, to refer an issue to the court either because there is a point of law of significance involved or because the courts are in a better situation to provide a remedy than he is. The court could treat the material obtained by the Ombudsman as *prima facie* evidence so the investigation need not be wasted and the court could then exercise its proper jurisdiction. A similar power of referral has been canvassed in Australia by the Administrative Review Council although the present P.C. doubts the need or value of the power.

Giving the Ombudsman access to the courts could benefit both the courts and the Ombudsman and make the best of both systems available to the public. The Ombudsman could bring cases before the court where he considers the issue an important one albeit that the complainant would not be prepared to go to court, and the court will have the benefit of his investigation without the Commissioner going beyond his proper investigating role and being drawn into controversy. He could also avoid having to reach debatable conclusions of law which could result in the embarrassing

intervention of the court on an application for judicial review.<sup>19</sup> So far as declaratory relief is concerned, the Ombudsman probably already has the right to obtain a declaratory judgment from the court under the court's general powers as to the scope of his jurisdiction where this is challenged.<sup>20</sup> But as far as I am aware this power of the courts has not yet been invoked and a more extensive and clearly defined power would in any case be preferable.

If the Ombudsman were to have the power of referring to the court matters which are more appropriate to be dealt with by the courts, then there would be something to be said for the courts having power to refer for investigation by the Ombudsman questions which can be more effectively investigated inquisitorially than in accordance with usual court procedure. Such a power could be particularly useful to overcome problems connected with discovery of sensitive material and cases involving what used to be called Crown Privilege. However, it would require statutory authority.

These are, however, minor suggestions. The fact of the matter is that the Ombudsman provides a remarkably effective alternative method to judicial review of rectifying maladministration. The Justice All Souls Report goes so far as to say "We are convinced that the Ombudsman in many situations is a more effective way of securing redress against the administration than recourse to the courts."<sup>21</sup> This may be surprising but I would endorse this view.

I do unhesitatingly recognise in agreement with the Justice All Souls Review that there are situations where both tribunals and the Ombudsman can better serve the citizen than the courts, and that were it not for the tribunals and the Ombudsman the courts' resources would be stretched to an

<sup>19</sup> See *R. v. Local Commissioner for Administration, ex p. Croydon London Borough Council* [1989] 1 All E.R. 1033.

<sup>20</sup> See the address by Sir Cecil Clothier to Justice, July 11, 1984.

<sup>21</sup> At p. 99.

extent which would endanger the High Courts' ability to perform its most important and sole constitutional role of finally determining the legality of administrative action. What we must foster is a partnership between judicial and non-judicial review so that there is a more closely integrated system of review which fully protects the citizen from the abuse of administrative power. A judicial member of a Council on Tribunals with proper resources could help in achieving this aim.

### Reasons

That integrated system of review would undoubtedly benefit from a more extensive obligation to give reasons for administrative decisions than at present exists. Normally in English law a decision does not become unlawful because no reasons are given as to why it was taken, nor does a decision which is unlawful become lawful merely because reasons are given which are unexceptional.

However, I regard the giving of satisfactory reasons for a decision as being the hallmark of good administration and if I were to be asked to identify the most beneficial improvement which could be made to English administrative law I would unhesitatingly reply that it would be the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions. The only exception which I would countenance is one to cover those few situations where there is a compelling case for saying that the giving of reasons would be harmful in the public interest. Unless the reasons for a decision are known it may be impossible to tell whether it is fair or unfair, whether or not it has been properly considered and whether or not it is lawful. If a member of the public does not know why a decision which affects him

has been taken, he cannot have confidence in that decision. If reasons are given for a decision and the member of the public can establish that the reasons disclose that the decision is unlawful or unjust it is normally relatively simple for him to seek a remedy before the courts or a tribunal.

However, it is not only the public who benefit and are protected by the requirement to give reasons. Administrators benefit as well. As any judge knows, the process of formulating reasons helps you to come to a correct decision. The need to give reasons imposes a discipline upon the decision-maker resulting in a better quality of decision. If satisfactory reasons for a proper decision are provided, then this reduces the risk of a decision being challenged by judicial review.

Over the years I have repeatedly tried to encourage administrators to give reasons when not required by law to do so because the result of giving reasons should be to show that an application for leave to apply for judicial review is ill-founded. As I pointed out in my first lecture, it is the commendable practice of most government departments, on applications for judicial review, to explain their decision although they are not obliged to do so. This enables the court to perform effectively its reviewing role without the expense of discovery. However, in cases where reasons are not given, this disclosure normally takes place only as a result of the department concerned being faced with an application for judicial review for which leave has already been given. Would it not be better for the reasons to be given before the application? Then it would only be in those cases where the reasons are arguably defective that leave would be given for an application of judicial review. The giving of reasons would not avoid decisions being successfully challenged by judicial review but it would reduce the number of cases which have to be defended.

The one general requirement to give reasons is now contained in section 12 of the Tribunals and Inquiries Act

1971. This in turn reproduced the provisions previously contained in the Act of 1958, which had such a beneficial effect on tribunals and was introduced as a result of the Franks Report. This requirement has been bolstered by the policy of the Council on Tribunals to require that the procedural rules for particular tribunals should incorporate a duty to give reasons for their decisions; this requirement exists in the case of the Social Security Appeal Tribunals and Industrial Tribunals to which I made reference earlier. However, section 12 of the 1971 Act only applies to specified tribunals and where a minister notifies a decision taken by him when there is a right to require a statutory enquiry to be held.

In the cases to which the 1971 Act applies and those other limited situations where there is a duty to give reasons, the courts have insisted on full and adequate reasons. Indeed, if any criticism could be made of the courts' approach it is that on occasions it has been too strict. A clear distinction should be drawn between the differing types of adjudicating bodies. An inspector producing a decision at his leisure after the conclusion of a planning enquiry can be expected to give a wholly different response to that of an immigration officer dealing with someone who is seeking entry as a visitor and who if he is to be refused leave to enter is entitled to have a decision within a very short timescale. In the latter case all that may be required is a phrase of the type which can be provided by a High Court judge in refusing leave to appeal in a criminal case. "The summing up accurately and fairly sets out the issues which the jury had to decide" tells the would-be appellant all he needs to know. Setting too high a standard of reasons can produce the unfortunate result of over-legalising what should be an informal procedure.

However, in those cases where there is no requirement to give reasons, the courts could have adopted a more robust approach. The key was provided by the speeches of the House of Lords as long ago as 1968 in the case of *Padfield v.*

*Minister of Agriculture, Fisheries and Food.*<sup>22</sup> In that case Lords Pearce and Upjohn provided in their speeches the ingredients which could have been developed into the medicine for overcoming the reluctance of administrators, contrary to their best interests, to give reasons for their decisions. Lord Pearce said:<sup>23</sup>

“I do not regard administrative failure or refusal to give any reasons as a sufficient exclusion of the courts surveillance. If all the prima facie reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reasons whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions.”

Lord Upjohn said:<sup>24</sup>

“A decision of the minister stands on quite a different basis; he is a public officer charged by Parliament with the discharge of a public discretion affecting Her Majesty’s subjects; if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion and order a prerogative writ to issue accordingly;”

Although the prescription has been available, over the intervening 20 years only isolated use has been made of it. The approach of the appellate courts has on the whole been to indicate that it is wrong to draw adverse inferences from

<sup>22</sup> [1968] A.C. 997.

<sup>23</sup> At p. 1053.

<sup>24</sup> At p. 1061; see also Lord Reid at p. 1032 and Lord Hodson at p. 1049.

the failure to give reasons. The contemporary position has recently been authoritatively restated by Lord Keith in these words in the *Lonhro* case:<sup>25</sup>

“The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for 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 has had no rational reason for his decision.”

I regret that this should be the position. However, in defence of the English courts' approach, it is only right that I should mention that in Australia, where the courts have been even more vigorous in developing judicial review than they have been in this country, an initiative by the President of the New South Wales Court of Appeal<sup>26</sup> in seeking to establish a right to be given reasons was emphatically reversed by the High Court of Australia.<sup>27</sup> Without going quite as far as the President of the Court of Appeal of New South Wales I would have hoped that the English courts would at least have stressed that in those cases where there is no duty to give reasons there is a discretion to give reasons and that good administrative practice dictates that that discretion should normally be exercised by the giving of reasons unless there is some explanation for not doing so. If this message had been clearly pronounced by the courts then I believe there would have been a response. There is at least a prospect that if this had been done by now there would be a

<sup>25</sup> *R. v. Trade and Industry Secretary, ex p. Lonhro* [1989] 1 W.L.R. 539H.  
<sup>26</sup> Mr. Justice Kirby.

<sup>27</sup> See *Public Service Board of New South Wales v. Osman* [1986] 60 A.L.J. 209.

more general recognition that reasons are good for both the public and administrators.

Not all is darkness, however. First of all most public bodies against whom applications for judicial review are made conduct the proceedings adopting a "cards face up on the table" approach.<sup>28</sup> There are good reasons of self-interest which should encourage public bodies to adopt this course, since otherwise they may be subjected to more frequent orders for discovery and cross-examination. Furthermore there are still cases where the courts do rigorously apply the Lord Pearce approach. For example, eight days after the *Lonhro* case the Court of Appeal, presided over by Parker L.J., in a majority decision, were prepared to hold that a notice under section 20 of the Taxes Management Act 1970 had been wrongly issued by the Inland Revenue, notwithstanding that the notice was served as it had to be, with the consent of the Commissioners of Income Tax, in the absence of any evidence or reasons justifying the issue of the notice where there was substantial evidence to indicate that the notice should not have been served.<sup>29</sup>

## Conclusion

So, even with this lack of progress, I am still confident that by combining our methods of judicial and non-judicial review we have the machinery which is fully capable of protecting the interests of the citizen. The machinery could of course be improved and I have already identified more

<sup>28</sup> See *R. v. Lancashire County Council, ex p. Huddleston* [1986] 2 All E.R. 941.

<sup>29</sup> See *R. v. Inland Revenue Commissioners, ex p. T.C. Coombs*, *The Times*, June 1, 1989.

than one improvement that I would like to see. The remaining improvements are the subject to which I will return in my next and last lecture.

## *4. A Recipe For The 90s*

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### **Introduction**

In my three preceding lectures I have sought to highlight some of the developments which have taken place over the 40 years since Lord Denning gave the first Hamlyn Lecture in protecting the public. Mindful that this year marks the bicentenary of the French Revolution, the end of the first Thatcher Decade and the publication of the Green Paper on the Legal Profession, I should stress that while there has been remarkable progress in administrative law in this country the changes have not been revolutionary but evolutionary. In my previous lectures I started by emphasising the importance of the procedure for judicial review in encouraging the developments which have taken place. I have also attempted to illustrate the developments which have taken place by reference to the use of declaratory relief, - by way of contrast, I referred to the use made by the courts of damages or injunctions as public law remedies, where there has been virtually no progress, and I expressed what I fear will be no more than a pious hope that some compensation should be available to the victims of

improper activities by public bodies. In my third lecture I acknowledged that it is not only to the courts to which a member of the public turns when he feels that he is being subjected to maladministration. I paid tribute to what has been achieved by tribunals and the ombudsmen, and tried to highlight how important is their role and the need for that role to be integrated with that of the courts. I also stressed the need for courts to encourage administrators to give reasons for their decisions.

However, together with Parliament, the courts are and will remain the ultimate safeguard of the public against oppression and in this, my final lecture, I will try and identify the other steps which I believe could be taken to improve the ability of the courts to protect the public. I will concentrate on ways in which we can make the courts more accessible and more effective. You can aim to have the best possible system of justice but unless access to it can be readily obtained and affordable and speedy remedies are provided the system is of little value.

### Legal Aid

Although there have been a remarkable increase in the number of applications for judicial review - I have previously described it as an explosion - in fact the number of applications which are actually heard is still relatively modest. In the year to December 31, 1988, there were 1,229 applications for leave to apply for judicial review of, which 55 per cent were allowed, and there were 409 applications heard of which 151 were successful.<sup>1</sup> These are hardly startling figures when compared with those heard by some of

<sup>1</sup> I am grateful to the Crown Office for these figures.

the tribunals to which I referred in my last lecture. In part, the relative paucity of applications can be attributed to the limits on the availability of legal aid and the raising of the limits on eligibility must be at the forefront of any list of reforms. There must be other factors which are also at work since the outstanding defect of the tribunal system is the absence of virtually any legal aid and the growth of the number of cases before tribunals has proportionally far outstripped the growth in judicial review. Nonetheless, it cannot be right that individuals of limited means should be required to do battle with public bodies, with unlimited resources, at their own expense.

### Reducing Costs

By High Court standards the costs of the average application for judicial review are already modest. The procedure is streamlined, there is normally no discovery, the evidence is usually on affidavit without any cross-examination and the hearings tend to be short. By doing an immense amount of reading out of court time and out of what could be called "ordinary" working hours the nominated judge can normally despatch at least two applications each day. Thus the simplified procedure and the length of the hearings normally keeps the costs within reasonable bounds. There is therefore little risk of those who are moderately well off not being able to afford the costs of an application for judicial review.<sup>2</sup> However, although limited, the costs of a contested hearing are still substantial and could deter any but the most public-spirited from challenging a decision which they would regard

<sup>2</sup> The unattractive scenario recently exposed in the Guinness criminal proceedings is unlikely to be repeated in the public law field.

as wrong because of the principle at issue. There are not that many Mr. Congreves who are prepared to take on the Home Office about the date on which a television license comes into force<sup>3</sup> or Mr. Gouriets prepared to take on the Attorney-General and the Post Office Unions,<sup>4</sup> nor Mrs. Gillicks who are prepared to take on the Department of Health and Social Security as to the guidance it issued on the provision of family planning advice to teenagers.<sup>5</sup>

Respondents to applications for judicial review must also be considered. They are not always government departments or local authorities though the expense of litigation is relevant in their case as well. For example, they could be governors of a school who are alleged to have acted unlawfully by their local education authority, who may be motivated to bring proceedings by political considerations. I find it deeply worrying that individuals who are sufficiently public spirited to play a part in their local community could as a result be subjected to judicial review and faced with a risk of having to pay costs if they have unwittingly broken the law.

The courts are therefore under an obligation to ensure that costs, particularly in proceedings involving the public interest, are curtailed as far as possible. The simplified procedure for applying for leave to make the application for judicial review is in accord with this obligation, requiring as it does no more than the completing of a simple form and the preparation of one affidavit in support. However, I do believe that the courts could at least experiment with going further. Because contested applications for judicial review are mainly disposed of without any oral evidence they are ideally suited for disposal without the need for an oral

<sup>3</sup> *Congreve v. Home Office* [1976] Q.B. 629.

<sup>4</sup> *Gouriet v. Union of Post Office Workers* [1978] A.C. 435.

<sup>5</sup> *Gillick v. West Norfolk and Wisbech Area Health Authority and D.H.S.S.* [1986] A.C. 112.

hearing. At first instance at any rate, I would like to see introduced a procedure where, with the agreement of the parties, no oral hearing need take place. The evidence, as at present, would be on affidavit, the parties could be entitled to make written submissions, which need be in no more than skeletal form referring to any relevant authorities, and the judge should be entitled to give a decision on the written material. As in the case of applications for leave to apply for judicial review, I would allow a party a right to a re-hearing within a strictly limited timescale before the same judge if this is required at which oral argument could be presented. However, I would anticipate that if a party is dissatisfied, instead of insisting on a re-hearing, he would normally appeal and except in a criminal cause or matter he would not require leave to do so. The judge as well as the parties should be entitled to require oral argument if the case is not suitable to be resolved on written submissions and his judgment should at least be handed down in open court, although it should not be necessary for it always to be read. I would expect many applicants and the majority of respondents to be quite content with procedural changes of this nature and it could make a substantial contribution to reducing costs, a matter of considerable significance at least to the losing party who normally has to bear the costs of both sides.

However, it is difficult to see what else could be done to reduce costs substantially and if, as I believe is the case, the public expect and are entitled to expect that the courts where necessary will ensure that public bodies properly and lawfully perform their duties, the public interest requires more fundamental changes.

### **The Role of the Attorney-General**

It is unfair to expect the individual to have to shoulder the

whole responsibility of upholding the rule of law whether as applicant or respondent. Traditionally it is the Attorney-General who has the primary responsibility for bringing proceedings for protecting the public interest. Prior to the development of judicial review and statutory authority being given to local authorities to bring proceedings which affect the public interest in their locality, the private individual was not in a position to bring proceedings unless he could show that some interest of his was adversely affected. It was this problem which frustrated Mr. Gouriet's efforts in the House of Lords when the Judicial Committee overruled the Court of Appeal where Lord Denning had as usual adopted a more radical approach. The cases in which the Attorney-General now intervenes in his capacity as guardian of the public interest are few and far between. His intervention can, however, still be very effective. A modest example of this occurred this year as a result of the activities of a clerk employed by a licensing authority.<sup>6</sup> The clerk had defeated the attempts of various residents living in the vicinity of a storage depot to oppose the grant and modification of various hauliers' licences. He took the view that his workload would be reduced if he filed or rather concealed the notices of objection, which had been duly made, in the back of a drawer. As a result a considerable number of licences were granted or modified without the licensing authority considering the objections. When the clerk's activities were discovered, instead of a multiplicity of applications being made by the individual objectors to quash the various licences which had been granted, involving considerable expense, the Attorney-General himself brought proceedings on behalf of each of those who were entitled to object to the grant of licences and still wished to do so. The Attorney-General with the help of the Treasury Solicitor

<sup>6</sup> *R v. Licensing Authority for Eastern Traffic Area ex p.* April 13, 1989.

obtained the agreement of those to whom licences had been granted or whose licences had been modified to their being quashed after steps had been taken to protect their position by the granting of interim licences until such time as their application could be re-heard when the opposition could be taken into account. In this way the Attorney-General safeguarded the interests of the licence-holders, the objectors and the rule of law without putting any of the parties who were directly involved to any expense and incidentally minimised the costs for which the licensing authority would inevitably have been responsible. A considerable amount of court time was also saved - not an unimportant consideration having regard to the importance of the speedy disposal of applications for judicial review.

However, while the Attorney-General clearly has the power to intervene and as the example cited indicates can do so effectively, I do not believe that it is apt any longer for him to perform directly this most important traditional role of his office. First of all in controversial cases involving the government it seems virtually impossible for the public or the media to identify when he is wearing his guardian of the public interest hat rather than his governmental hat. This was true in the days when I was Treasury Devil. In the *Crossman Diaries* case, in the *Grunwick* dispute and in *Gouriet*,<sup>7</sup> Sam Silkin constantly reiterated that he was not appearing in his governmental capacity but this was not accepted by the media or indeed, in the *Gouriet* case, by the Court of Appeal. The burdens of his other responsibilities, in particular as principal legal adviser to the government and to Parliament, and as Attorney-General of Northern Ireland and, through the Director of Public Prosecutions, for the enforcement of the criminal law, not to ignore his recent responsibility for all government lawyers, mean that however

<sup>7</sup> *Att.-Gen. v. Jonathan Cape Ltd* [1976] Q.B. 752

distinguished the holder of the office, he has little if any time to spare.

In addition, there is the problem that the Attorney-General always has arising from the fact that although he is not a member of the Cabinet, he is still a member of the government. In reality it would be extremely difficult if not impossible for any Attorney-General to bring proceedings against a colleague or a department of the very government of which he is a member. In addition, for the Attorney-General to bring proceedings in right of the Crown as *parens patriae* would involve the difficult legal concept of the Crown suing the Crown. It is perhaps not surprising that the Justice report points out that<sup>8</sup>

“while there are some situations in which the Attorney-General will feel moved to bring civil proceedings to restrain illegality the Attorney-General has never intervened to uphold the law by bringing civil proceedings against Ministers or government departments.”

Where he is not prepared to bring proceedings himself, the Attorney-General can allow a private person to sue in his name in relator proceedings, but this does not provide a satisfactory solution. Before any Attorney-General will “lend his name to the proceedings” he has to be satisfied that the party suing in his name has the necessary means to be responsible for costs - so the only benefit to the party seeking to bring a relator action is that the fiat of the Attorney-General overcomes any problem with regard to *locus standi*. The number of applications which are made for the Attorney-General's consent are therefore not surprisingly very small - during the last five years for which figures are available the number of relator proceedings

<sup>8</sup> At p. 180.

commenced totalled 13.<sup>9</sup> Furthermore the record of Attorney-Generals giving their consent to relator proceedings against ministers or government departments is no different from that where he is the actual, as opposed to merely being the nominal, plaintiff.

We are fortunate at the present time in having law officers who are greatly and universally respected by the legal profession and the bench. They have upheld the traditions of their predecessors and distinguished between their two roles as legal advisor to the government and guardian of the public interest. I am sure this tradition will be mentioned. But, is the Attorney-General still the most suitable champion of the public interest in civil proceedings.

I deliberately say nothing about criminal proceedings where I would not recommend any change and if the Attorney-General is no longer the suitable champion of the public interest, who else is? During the *Gouriet* saga, after the headlines had announced that Denning had given Silkin a bloody nose, Lord Devlin wrote an article in "The Sunday Times"<sup>10</sup> under the title "Don't Shoot the Attorney." Lord Devlin pointed out that

<sup>9</sup> The Law Officer's Department kindly made available the following figures:

Year	Applications	Consents	Refusals
1983	6	4	0
1984	5	4	0
1985	4	2	1
1986	1	0	1
1987	5	2	2
1988	3	1	2
TOTAL	24	13	6

<sup>10</sup> July 31, 1977.

“the delicacy of his position raises the question whether a decision of this sort should not be taken aloof from party politics. But who else is there? It must be someone with a political sense, someone who knows or can ascertain what the law enforcement resources of Government are, and someone who can be questioned in Parliament.”

If these are prerequisites for performing the role, then I would agree with Lord Devlin that there is no-one else. However, I am by no means sure that there would not now be advantages in having someone performing the role who is not directly but indirectly responsible to government and Parliament.

There are in administrative fields a growing number of bodies who have already limited roles to bring proceedings. By section 222(1) of the Local Government Act 1972 a local authority can bring proceedings whenever it “considers it expedient for the promotion or the protection of the interests of the inhabitants of their area” in their own name. While this mitigates the problem it certainly does not solve it because frequently it is a local authority against whom the inhabitants are seeking to be protected. In respect of monopolies, mergers and restrictive trade practices, etc., the Director General of Fair Trading can bring proceedings. In relation to racial and sexual discrimination, the respective Commissions can bring proceedings. Particularly in relation to wardship and contempt proceedings the Official Solicitor, while not normally initiating proceedings, does protect the interests of those who could not otherwise be represented before the courts. An interesting recent addition to this list is the Commissioner who, under section 19 of the Employment Act 1988 has a role to play in relation to trade unions. The Commissioner, among his other responsibilities, under section 20 is required in respect of certain trade union and industrial relations proceedings to consider applications by individuals who are prospective actual parties to those

proceedings for assistance and is empowered to meet the legal costs of the applicant. In deciding whether to grant assistance the Commissioner can take into account whether the case raises a question of principle, its complexity and whether it involves a matter of substantial public interest. If the government has now recognised that a citizen may require assistance of this sort as against his union surely it should also recognise that there are many other bodies against whom the same citizen might require protection, including the government itself. It is nowadays not unknown for a minister to justify legislation by saying that a proposed statutory body or new statutory power will not be able to be used oppressively because of judicial review but they do not make any offer to relieve the financial burdens involved in making an application.

When I first touched on this subject in a lecture in 1986 I thought the best solution was that there should be a Director of Civil Proceedings, a counterpart of the then Director of Public Prosecutions. I was contemplating not the role of the present Director of Prosecutions as head of the Crown Prosecution Service but the Director who previously had a more limited role prior to the introduction of the Crown Prosecution Service. Having given some thought to the subject in the meantime, I have not found a better alternative. The Attorney-General could indirectly, through the Director of Civil Proceedings, perform the functions which Lord Devlin thought were so important. The Director himself, however, would be outside politics and would hold office independently and irrespective of the government of the day. He would have no responsibilities for advising the government or acting on behalf of the Government. While the Attorney-General would be answerable for him in Parliament, his responsibilities would be to the courts. Although there could be situations where it would be advisable for him to seek information from government departments or the Attorney-General there would be others,

as in the case of the Director of Public Prosecutions, when he would act wholly independently of the government and the law officers. As I see it he would have at least the following responsibilities:

1. He would initiate proceedings whenever in his judgment this was required in the public interest. He would do so either on his own initiative or on the instigation of members of the public. He could also do so at the instigation of the Parliamentary or Local Commissioner. I at one time thought that the Ombudsman could well be an alternative candidate for this role, but on reflection I prefer my Director of Civil Proceedings since the combined roles could dissipate the energies, so successfully applied to his existing functions, by the Ombudsman. The ability of the Director to bring proceedings in many cases would solve the problem of the burden having to be shouldered by the member of the public. He could provide an alternative to class actions and avoid multiplicity of proceedings.

2. He would be responsible for providing arguments to assist the court not only in cases where at present the Attorney-General would provide an *amicus* at the request of the court but also in those cases where in his view the issues were such that *inter partes* argument might not adequately draw attention to the broader issues. He could provide a channel for placing before the court arguments on behalf of interested bodies.

3. if he were not prepared to bring proceedings himself, he could authorise a member of the public to do so. This would clothe the member of the public with all necessary standing to bring proceedings. Unlike the Attorney-General there would be no constitutional objection to his decision being subject to the supervision of the courts. I do not anticipate that the courts would be likely to interfere otherwise than

exceptionally in the manner in which he exercises his discretion, but the fact that his decision was subject to the supervision of the courts would avoid the unedifying and damaging conflict which arose between the courts and the Attorney-General in the *Gouriet* case.<sup>11</sup>

4. The D.C.P. would be responsible for initiating and conducting proceedings for contempt to hear a litigant who is vexatious prevented from bringing proceedings without the leave of the court and proceedings relating to charities and coroners' inquisitions. He could also be responsible for enforcing or seeking the discharge of injunctions when the party in whose favour they were granted is unwilling to do so but the law is being brought into disrepute by the injunction being openly flouted. This may result in the heavy burdens of the Treasury Devil being reduced. This would not only be in the interests of the holder of that office but also of the public since his present multiplicity of activities as counsel to government departments, as *amicus*, counsel to the courts, and as counsel to the Attorney-General, defender in the courts of the public interest, must confuse all but the most well informed onlooker.

5. The Director would have general responsibility for the development of the civil law and in particular public law. In this part of his role, he would work closely in conjunction with the Law Commission and he should have a power, in appropriate cases, to refer cases to the Court of Appeal or, with leave, to the House of Lords. The advantages of this role in the field of public law could be of the greatest

<sup>11</sup> The sort of considerations both the Director and the courts would take into account are happily summarised in the recommendations in the Justice Report in Chap. 8, pp. 208-209, where the report recommends that the present role of the Attorney-General in this regard should be transferred to the judges.

importance. It could help to remove the uncertainty of which administrators complain. It could help to establish the principles of public law for which Professor Jowell and Anthony Lester Q.C. have so persuasively recommended. He could accelerate the process of law reform without the necessity of Parliamentary intervention. The present situation is hardly satisfactory, as I know from my own experience. During my period as Treasury Devil I only heard of a case<sup>12</sup> which could have had a very adverse effect on planning law because of a chance remark over lunch at the Inner Temple by a member of the court. I missed the rest of my meal and at 2 p.m. I was seeking leave to intervene on behalf of the Department to advance arguments to demonstrate the adverse consequences of what was being proposed should be the law. The Court gave me leave and accepted most but not all of my arguments. However, on a number of points the Court deliberately refrained from expressing an opinion because they realised their importance as a result of my intervention. This is hardly the best way to cultivate the development of public law.

6. He would have the responsibility for co-ordinating the provision of information for the public as to the appropriate manner in by which they can protect themselves against the unlawful activities of public bodies whether in the courts before tribunal or enlisting the assistance of the Parliamentary Commissioner.

It may well be that the D.C.P. could also play an important role in helping to integrate the various bodies which also now have the responsibility for protecting the public. While in theory there should be little danger of conflict between the jurisdiction of the courts, tribunals and Ombudsman, in

<sup>12</sup> *Western Fish Products v. Penwith D.C.* [1981] 2 All E.R. 204.

practice there has to be an overlap and which jurisdiction should take precedence in situations which fall within the grey area is often a delicate question. I have earlier suggested that the courts, the Ombudsman and tribunals should each have the power in appropriate cases to refer questions for determination to the most appropriate body. The position now is that if there is a tribunal which has the special expertise to determine a dispute which is the subject matter of an application for judicial review, the courts will normally dismiss the application. It would be preferable for the courts to have as well a discretion where the application has merit to refer the application to the other body. In situations where there is doubt about which is the appropriate forum the D.C.P. could be authorised to give guidance as to the appropriate forum, and save in the exceptional case if proceedings are brought in accordance with his guidance, jurisdiction would be accepted by the courts to exist. This should at least reduce the need for costly arguments over jurisdiction and the complaints as to the *O'Reilly v. Mackman* divide.

### The need for consistency

It would also assist if in those cases which are properly heard by tribunals there was a simplified structure and procedure for appealing from decisions of ministers and tribunals to the courts. The present situation is chaotic but readily amenable to improvement.<sup>13</sup>

<sup>13</sup> See my third lecture and "A Hotch-Potch of Appeals: the Need for a Blender" (1988) 7, C.J.Q. 44.

These shortcomings also exist in the arrangements for hearing appeals from decisions at first instance on applications for judicial review. One of the undoubted virtues of the system which existed prior to the introduction of judicial review was, as I indicated in the first lecture, that the great majority of public law cases came before a court presided over by the Lord Chief Justice of the day. This enabled him to impose a greater degree of certainty than at present exists as to how appeals and applications would be determined. It was hoped that the consistency which was previously provided in this way could be retained by limiting the number of judges who handle applications for judicial review. However, the number of judges who are now required to hear applications has grown considerably with the increase in work, so inevitably there is greater scope for variation in approach. Nevertheless, the consistency which previously was provided at first instance, could now be provided by the Court of Appeal. If this is to be achieved, however, then it is important that a limited number of or the same members of that court should preside on the hearing of those appeals. Indeed I would diffidently suggest that the court hearing the appeals should normally be presided over either by the Lord Chief Justice or the Master of the Rolls of the day. However, they have many commitments and if what I would regard as the ideal position cannot be adopted, then the appeal could still be more restrictively considered than at present. I limit this suggestion to the judge who presides. I consider that it is not only healthy but essential that judicial review should in addition be continuously scrutinised by judges who are not pre-programmed by an over-exposure to administrative law. Public lawyers are as good as other specialists at seeking to disguise elementary principles of justice in high sounding technical statements of principle. In

the *Fairmount Investments Ltd.* case<sup>14</sup> Lord Russell, a distinguished Chancery judge, epitomised the essence of natural justice and two days of argument in the phrase “a fair crack of the whip.”

### Widening judicial experience

There has, of course, over the years since the introduction of judicial review developed a cadre of judges who, because they were nominated to hear cases in the Crown Office List, have developed considerable expertise in dealing with the application which has contributed to the success of judicial review. However, I do believe that even the most experienced judge would benefit from greater exposure to how administrators and tribunals perform their role.

There are now regular meetings in London and Paris between members of the *Conseil d'Etat* and members of the English judiciary who are familiar with administrative law. Although the background of the members of the *Conseil d'Etat* is so different to ours, in the majority of situations, although adopting a very different procedure, the *Conseil* will come to exactly the same decision as our courts. As a result of our meetings I have a profound respect for the quality of the *Conseil* but I am still in no doubt that we are right in this country not to follow the example of the majority of countries in Europe and to adopt a *Conseil d'Etat* model. One reason for not doing so was identified at a meeting by Lord Scarman and was readily accepted (not surprisingly, as the meeting consisted of French administrators and English judges) was that the French

<sup>14</sup> *Fairmount Investments v. Secretary of State for the Environment* 1976 120 S.J. 801; [1976] 2 All E.R. 865.

public trust their administrators but not their judges and the English public trust their judges and not their administrators.<sup>15</sup>

While not going so far as to suggest that English judges should for a time act as administrators, I do believe we could follow the French example at least to the extent of exposing judges to the practical problems with which administrators and administrative tribunals are constantly being faced. I am ashamed to say that it was only as a result of a visit by our French colleagues that I came to attend for the first time a hearing of an immigration tribunal and had an opportunity of discussing their work with members of that tribunal. I have still never seen an immigration adjudicator at work, yet I have had to deal with numerous applications for judicial review in respect of their determinations.

The Judicial Studies Board are now taking on the responsibility for training members of tribunals. They should also take on responsibility for training High Court judges dealing with administrative law cases. We should have discussions with administrators at which they explain their problems to us and we explain the way in which we perform our role. We should have opportunities of seeing how administrators work. We should visit government Departments. There is also a need to understand the

<sup>15</sup> It may be of interest that when I repeated Lord Scarman's comment to an audience of Italian academics their response was that the Italian public did not trust administrators or judges but trusted academics and it was accordingly academics who were responsible for preserving the Italian constitution. There are also biannual meetings of representatives of the Judges' Supreme Administrative Courts of the European Community which I have attended which reflect the same common approach. The need for someone equivalent to a Director of Civil Proceedings has been acknowledged by many commentators including Dr. Carol Harlow and Professor Griffiths and Michael Beloff, Q.C. Most significantly when I was giving these lectures, Sir Gordon Borrie supported the recommendation while giving the Fourth Harry Street Lecture.

problems of regulating bodies. For example, whether justified or not, it has been suggested that the courts have stifled the initiative of the Commission for Racial Equality.<sup>16</sup> I would be much happier in rebutting this suggestion if judges knew more of the practical problems with which that body is faced. We must not of course impair our independence and we should mirror our practical experience of the problems of administrators with exposure to the problems of the agencies responsible for looking after the interests of disadvantaged sections of the public, that is, bodies such as the Child Poverty Action Group, Shelter and those seeking to avoid discrimination. In deciding whether a procedure is fair it is necessary to have some understanding of the needs of those who avail themselves of that procedure.

Mounting such a programme would undoubtedly place great strains upon the existing resources of the Judicial Studies Board, but if help is required, as I think it would be, then I am sure it would be readily available from the Institute of Advanced Legal Studies<sup>17</sup> which is ideally placed to to organise any assistance which is needed. I regard it as being of the greatest importance that there should exist among the judiciary a body of judges which has the necessary insight into the process of administration.

A fundamental change which involves removing from the direct control of central and local government many of the services on which we all depend is taking place in many of our institutions. As part of this process powers of considerable importance are being conferred on numerous regulatory bodies which in their respective fields exercise significant autonomous powers. Some of these bodies will be

<sup>16</sup> See Baldwin and McCudden, *Regulation and Public Law*.

<sup>17</sup> This is a well-deserved "plug" for the Institute where I was kindly allowed to deliver these lectures and whose management committee I am honoured to chair.

the subject of a detailed statutory framework; others, such as the Take-Over Panel, may be without any statutory backing. However, whatever their framework it is clear the courts are going to have to play a very important role. In the case of the Take-Over Panel, the courts have already been required to intervene to a greater extent than was originally anticipated, but that intervention has been successful and was welcomed by the Chairman of the Take-Over Panel because the judges concerned exhibited considerable insight into the workings of the City institutions with which they were dealing.<sup>18</sup> The courts have just been faced with the initial wave of litigation over the attempts of governors to exert their new powers which could profoundly influence the future of individual schools for which they are responsible. The courts have been required to fill in the statutory framework<sup>19</sup> to define the extent to which the local education authority can dictate to the governors and the extent to which governors must be beyond all suspicion of personal interest. The passions of those directly involved have to be understood and allowed for. It is necessary to know how local government works. A sensible and delicate balance has to be established. The legal principles to be applied can be gleaned from the authorities and textbooks but the laying down of the necessary parameters within which the education authority, the governors, the teachers and parents can perform their allotted role without being frustrated by over-legalisation requires insight of the administrative process as well. There is always looming the danger that the courts will do no more than create a minefield which will hinder any progress and

<sup>18</sup> See *ex p. Datafin* [1987] Q.B. 815 and *ex p. Guinness* [1989] 2 W.L.R. 863 and Lord Alexander's lecture to A.L.B.A. "Judicial Review and City Regulations" (February 1, 1989).

<sup>19</sup> See *R. v. Governors of Haberdashers' Aske's School* [1989] 1 W.L.R. 542, *Bostock v. Kaye* (April 17, 1989), and *R. v. Governors of Small Heath School* (May 26, 1989).

benefit no one but the lawyers who have to try and provide safe passage. The intervention must not be overdone. We should remember the wise advice again of Lord Denning in relation to the Supplementary Benefit Tribunal before there were appeals to the Commissioners.<sup>20</sup>

“It is plain that Parliament intended that the Supplementary Benefit Act 1966 should be administered with as little technicality as possible. It should not become the happy hunting ground for lawyers. The courts should hesitate long before interfering by certiorari with the with the decisions of the appeal tribunals. Otherwise the courts would become engulfed with streams of cases just as they did under the old Workmen’s Compensation Acts: .... The courts should not enter into a meticulous discussion of the meaning of this or that word in the Act. They should leave the tribunals to interpret the Act in a broad reasonable way, according to the spirit and not to the letter: especially as Parliament has given them a way of alleviating any hardship. The courts should only interfere when the decision of the tribunal is unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision: .... Nevertheless, it must be realised that the Act has to be applied daily by thousands of officers of the commission: and by 120 appeal tribunals. It is most important that cases raising the same points should be decided in the same way. There should be uniformity of decision. Otherwise grievances are bound to arise. In order to ensure this, the courts should be ready to consider points of law of general application.”

<sup>20</sup> *R. v. Preston Supplementary Benefits Appeal Tribunal, ex p. Moore* [1975] 1 W.L.R. 624, at p. 630.

I recently heard an appeal<sup>21</sup> from a police disciplinary hearing and I was horrified to learn of the consequences of the intervention of the courts in relation to previous disciplinary proceedings. The senior officer conducting the inquiry was advised by his own counsel. The constable was also represented by counsel and solicitors as was the "prosecuting authority." This abundance of legal talent had worked out after argument a complex procedure which had to be followed and this resulted in a journey to the Court of Appeal on a preliminary point. This certainly is not the way disciplinary proceedings of this sort should be conducted and the courts had clearly failed to send the right message, that informal proceedings are just as capable of being fair as formal proceedings. This brought home to me the wisdom of Lord Denning's advice and the need to be circumspect about intervening with disciplinary proceedings of that sort.

### Human Rights

The same experience is required to meet the challenge provided by the European Court of Human Rights. As was pointed out by Mr. Laws in a recent paper,<sup>22</sup> the House of Lords recently appears to have developed a new "enthusiasm for perceiving a harmony between Common Law and Convention Law" which is applied at Strasbourg.<sup>23</sup> Some would add and about time too. It cannot in my view be right that a situation should be allowed to continue where there is such a significant difference between the approach adopted in the English courts and at Strasbourg. It is

<sup>21</sup> *R v. Chief Constable of the Merseyside Police, ex p. Merrill* C.A. (1989) (unreported, May 17, 1989.)

<sup>22</sup> Bar Conference 1988 and [1989] Public Law 28.

<sup>23</sup> *Att.-Gen. v. Guardian Newspapers* [1987] 1 W.L.R. 1287

unacceptable that, having progressed through the English courts unsuccessfully, the citizen should then be able to advance up the Strasbourg hierarchy and possibly achieve a different result and a remedy of compensation which, even if he had succeeded in his own country the English courts would have had no power to provide. This is the result of the present position where this country fulfils its duty to comply with the Convention and therefore gives effect to its obligations once they are established in Strasbourg but the Convention is no part of our domestic law.

Without becoming involved in the dispute as to whether the Convention should become entrenched in our domestic law, the courts could have done more to develop our law in accordance with the Convention. Regrettably until recently this has not happened, partly because of an ignorance of the Convention on the part of all lawyers including the judges and partly because of a natural reluctance of the judges to take on the role of applying the Convention's broad principles without the necessary administrative skills. The training to which I referred earlier could provide the judiciary with the confidence which they need to embark upon this important task. It is not only a question of looking at the language but understanding the approach adopted to the principles which I believe are already largely part of our common law tradition. Given the will the common law is quite capable of showing the necessary flexibility to incorporate the benefits which the Convention could provide without the necessity of subjecting our Parliamentary process to the constraints of a written constitution. There are doors which can be opened wider by the courts if they wish to do so without offending any principle of our law. The courts in their interpretation of legislation and in particular of delegated legislation should be much more strenuous in interpreting the language used to bring it into accord with the Convention. In reviewing the exercise of discretionary powers on *Wednesbury* grounds the courts could justifiably

assume that ministers and their officials do not wish to act inconsistently with this country's treaty obligations under the Convention and the reasonableness of their actions could be judged against the background of that assumption. In this way a process of harmonisation could be encouraged and in time this process, combined with the direct effect of Community legislation, would alleviate the present unhappy position.

### **Principles of Good Administration**

In performing these tasks and meeting the ever-increasing demands which are being placed upon the courts by the greater expectations of the public, I believe that the courts would be greatly helped by the adoption of at least two of the important recommendations which the Justice All Souls Review made. The first of these is the production of an updated and comprehensive set of non-statutory "principles of good administration" to which the public and all administrators would have access.<sup>24</sup> The second is the establishment of an administrative review commission,<sup>25</sup> perhaps based on the Council on Tribunals, independent of government, charged with the duty of overseeing all aspects of administrative justice and drawing attention to defects and proposing reforms. In my view the Australian experience of such a body establishes the value of the role which it can perform. The scene is constantly changing and the law must keep up. Privatisation can result in bodies no longer being subject, or so readily subject, to judicial review although their activities are of the greatest significance to

<sup>24</sup> Chap. 2 pp. 6-23.

<sup>25</sup> Chap. 4 pp. 75, 83

the public. A multiplicity of agencies can be created to supervise these activities but their actions can require scrutiny. The relationship between central and local government is changing. The proper divide between the jurisdiction of the courts, tribunals and the ombudsmen must be defined and redefined as circumstances change. The courts on a case by case basis can find solutions, but how much better it would be if these decisions were taken bearing in mind generally accepted principles and with the help of the advice of an expert body with judges, administrators and representatives of the public of great experience among its members.

That brings me almost to an end of what I wanted to say in these lectures but before I conclude I feel I should offer a word of explanation. Throughout the lectures I have been talking about the machinery of administrative law, the procedures which we use, the remedies available, and the bodies who provide the remedies. There has been very little about the product which the machinery produces, that is, the law which results from the decision of the courts and the principles which do guide, or should guide, the courts in exercising the exceptionally wide discretion which they are given by the machinery.

In part the explanation is that, as Windeyer J. stated in the passage I quoted in my first lecture, this is the task that academics are better qualified than judges to perform. It is also partly because for the time being I am largely content with how the law has and is developing. The basic principles identified time after time in the authorities are working well. For me the need for observance of the law of reasonableness and fairness says it all. I find it convenient at times to refer to legitimate expectations and proportionality and I recognise that there are other principles which can be identified. However, I do not at this stage feel a great need to categorise reasonableness and fairness. If a response by

an administrator to a situation is sufficiently out of proportion to justify the court intervening then it is unreasonable. Fairness does not stop with the procedure adopted but spills over into the actual decision. To say one thing one day so as to give a legitimate expectation that a particular course will be followed and to do something quite different the next day without giving any warning can be unfair and justify the court intervening. It does, however, depend on the circumstances. What the courts should in my view be doing and what I believe they are normally doing is to look at all the circumstances and, as part of the process of judicial review, apply those broad principles of lawfulness, reasonableness and fairness to the multiplicity of different situations brought before them. The treatment of a decision of the Employment Appeal Tribunal presided over by a High Court judge cannot be the same as that of a rent assessment committee or a rent officer. The approach to a decision of a minister must differ from that of an immigration officer.

What I regard as vital and what I feel qualified by my experience to comment on is the efficiency and effectiveness of the machinery which is available to the public, including both individual and corporate members and other bodies, for the redress of the abuse of power by those whose duty it is to serve the public. Without the need of fundamental constitutional changes, but helped by the improvements I have sought to outline, I believe that the progress in the development of our administrative law can and will continue. It will need to do so if it is to meet the new challenges with which it will be confronted in the next decade. Lord Denning 40 years ago thought the primary responsibility for meeting this challenge was that of the judges. I believe the responsibility is now wider but from what I know of the standards which the judges set for themselves I am confident that they will strive to meet the challenge so far as it is open to them to do so. As Lord Wilberforce said, based upon a

life-time in the law, at this Institute a few months ago “do not write off the judges yet.”

However, whether it depends on the judges alone or on Parliament, the judges, members of tribunals, the ombudsmen and all those responsible for administrative decisions, I am hopeful that the “common people” referred to in the scheme for the administration of Miss Hamlyn’s trust will remain able to “realise the privileges which in law and custom they enjoy ”even “in comparison with other European Peoples.”



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# Justification and Excuse in the Criminal Law

by

J. C. Smith, C.B.E., Q.C., LL.D., F.B.A.

Honorary Bencher of Lincoln's Inn;

Honorary Fellow of Downing College, Cambridge;

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