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Express and implied limits on judicial review: ouster and time limit clauses, the prerogative power, public interest immunity

17.1 Introduction

We have already seen that the expansion of judicial review is one conspicuous feature of English administrative law over recent decades. This chapter will, first, be concerned with examining how far is it possible to exclude the jurisdiction of the courts by the careful drafting of objectively worded statutory ouster provisions, and by the use of subjective language allowing considerable discretion to the decision-taker. In particular, secondly, we will focus on two areas where *implied*, rather than *express*, limits are central: the prerogative power, and the use of public interest immunity by government and other bodies. This is important because, if in advance of any action it is recognised that the exclusion of the courts has been achieved, this is a clear signal to decision-takers that they may operate without fear of intervention by the courts at a later stage. However, judges are aware of their constitutional position, and particularly of the doctrine of the rule of law. The result is that they have been unwilling to permit any subordinate authority to obtain uncontrollable power which would exempt public authorities, or other bodies, from the jurisdiction of the courts, as this would be, theoretically, tantamount to opening the door to potentially dictatorial power. For example, strong opposition was expressed in political, judicial and academic circles to a recent proposal by the government to insert an Ouster Clause in the Asylum and Immigration Bill 2004 which sought to exclude entirely the jurisdiction of the courts in relation to the operation of the Asylum and Immigration Tribunal. The measure was intended to rule out the established grounds of judicial review and by so doing it would have taken away an important constitutional safeguard. In the face of strong resistance, especially in the House of Lords, the government relented and the clause was dropped from the Asylum and Immigration Act 2004. Indeed, the courts have, since the 1960s, made a strong, even, on occasion, rebellious, stand against the creation of pockets of power which they hold to be in violation of the rule of law and an abuse of power.

> Although lawyers appearing for government departments may argue that some Act confers unfettered discretion they are guilty of constitutional blasphemy, for unfettered discretion cannot exist where the rule of law reigns. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review. (Wade and Forsyth 2004, p. 35.)

This is clearly in line with one strongly held view of the role of the judiciary, working within the parameters set by the constitutional convention of the separation of powers, although a number of judges have historically appeared to agree with the view that the courts should always accede to the wishes of Parliament, or the decisions of ministers, however controversial (see, e.g., Viscount Simonds in *Smith v East Elloe Rural District Council* [1956] 1 All ER 855, at 17.2.3). However, as differing judicial *dicta* indicate, the question of how far decisions made by governmental and other administrative bodies should be subject to control by the courts is far from being an uncontroversial one. Ousters, for example, may well be regarded as a useful device to keep at bay a conservatively inclined judiciary. Griffith, articulating the 'green light' view (see chapter 1) recognises and encourages the need for specialist bodies to act as adjudicators in certain areas of administration. Considered from this perspective, precisely the same type of ouster restrictions may, with significant qualifications, satisfy the desire of administrators for consistency and finality in the implementation of policy decisions (Griffith 1997, pp. 340*ff*).

It will become apparent as we work through this chapter that this is one area in which the language of the law can become very complex, largely because of historical distinctions that were previously made by the courts. We return to some of the corresponding definitional issues below (see 17.4), but before beginning our analysis we should clarify one point about use of the term 'jurisdiction'. In short, judicial review used to fasten upon what may be termed a 'jurisdictional' theory of law, whereby the courts spoke of a decision-maker's 'jurisdiction' over a matter as a synonym for what would now be called 'power'. On this basis, the courts drew a distinction between 'errors of law that went to jurisdiction' (essentially, an error about whether the decision-maker had the power it purported to have) and 'errors of law that were made within jurisdiction' (i.e. an error that did not take the decision-maker outside the four corners of its power). While errors of law that went to jurisdiction were always subject to judicial control—any other approach would allow a decision-maker to assume for itself power beyond that delegated Parliament—the courts were less willing to intervene in relation to errors within jurisdiction, However, to the extent that the jurisdictional theory limited the reach of review, it should be noted that the courts no longer rely on the old distinction and that they now regard any error of law as reviewable. As will be seen below, this is widely regarded to be the result of the *Anisminic* case that is often credited with the emergence of *ultra vires* doctrine that we analysed in chapters 9–16 (*Boddington v British Transport Police* [1999] 2 AC 143).

17.2 Ouster and time limit clauses

17.2.1 Finality

Finality clauses are sometimes inserted in statutes to indicate that the decision of a particular justice or tribunal cannot be challenged by any court. However, there is overwhelming authority, going back 300 years, which suggests that such finality clauses will not be recognised by the courts as excluding judicial review. *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, is regarded as a leading decision

on this point. Here, the National Insurance (Industrial Injuries) Act 1946, s 36(3), provided that 'any decision of a claim or question . . . shall be final'. The applicant sought the remedy of *certiorari* (a quashing order) when there had been an error of law on the face of the record (on which see 17.4). Although the remedy was refused in the Divisional Court, it was allowed in the Court of Appeal. Denning LJ held that, while these words may have been enough to exclude an appeal they did not prevent judicial review—'I find it very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words'—and he was in no doubt that such a formulation as 'shall be final' was not sufficient to achieve this objective. With regard to 'no *certiorari*' clauses, the case for not readily accepting exclusion is explained persuasively by his Lordship when discussing the effect of old statutes and cases: '. . . the court never allowed those statutes to be used as a cover for wrongdoing by tribunals. If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end'. Despite express words taking away *certiorari*, therefore, it was held (in these older cases) that *certiorari* would still lie if some of the members of the tribunal were disqualified from acting. See also *R v Cheltenham Commissioners* [1841] 1 QB 467, where Lord Denham CJ noted that, 'The statute cannot affect our right and duty to see justice executed.'

Similarly, there is well-established authority to suggest that a finality clause will be ineffective when there is error which goes to the jurisdiction. For example, in *Pearlman v Harrow School* [1979] QB 56, the decision of a county court judge on the matter in question was to be 'final and conclusive'. In addition, the County Court Act 1959, s 107, contained a non-*certiorari* clause, but this did not apply and prevent the supervisory jurisdiction of the High Court. Moreover, it was suggested, more controversially, in Lord Denning's *obiter* remarks in this case, that a finality clause may not even exclude more general appeals on points of law. Although *ex p Gilmore* and *Pearlman v Harrow School* are concerned with applications for the remedy of *certiorari*, it should be noted that, whatever remedy is being sought, a finality clause will not exclude judicial review when an error is deemed to go to the jurisdiction.

17.2.2 Total ouster clauses and the *Anisminic* case

We shall see below (17.2.3) that the decision in *Smith v East Elloe Rural District Council* [1956] 1 All ER 855, exemplified a view of time limitation clauses reached towards the end of a recognised period of judicial quietism. In this instance the House of Lords interpreted a statutory provision which limited the court's jurisdiction to review a compulsory purchase order on land so broadly that even fraud by public servants was not considered by the court to entitle the owner to a remedy by way of *certiorari*. In striking contrast, we can now consider the landmark decision in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 157. This case is regarded as one of the high points of judicial intervention. Before becoming involved with the finer details raised, it is useful to keep in mind that the two central issues for our purposes are:

(a) the applicability of statutory exclusion clauses contained in the Foreign Compensation Act 1950; and

(b) the extent to which judicial review was confined to errors going to the jurisdiction of the decision-maker.

The background of the case needs to be outlined briefly in order to highlight the claim that was to give rise to the eventual House of Lords decision. Anisminic Ltd was a British mining company which had owned property in Egypt, but during the Suez Crisis in 1956 the property was taken over by Israeli troops and £500,000 worth of damage was caused to it. It was then sequestrated in November 1956 by the Egyptian government. In 1957 the Egyptian government authorised the sale of the property, including a substantial quantity of manganese ore for less than its real value to TEDO of Egypt. Anisminic Ltd was very dissatisfied with this deal and sought to discourage any purchases from the stockpile of ore by former customers. This response by the company prompted an agreement between the Egyptian government and Anisminic, whereby £500,000 was paid in compensation as a full settlement with the Egyptian government. This arrangement deliberately left open the question of compensation from other sources. In 1959, a treaty was negotiated between the UAR (Egypt) and the British government which provided for £27.5 million compensation to be paid to the UK for any property confiscated in Egypt in 1956. Responsibility for distributing these funds was vested in the Foreign Compensation Commission. Anisminic Ltd duly submitted a compensation claim.

The Commission operated under the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962. A claim could be established under the order if:

(a) the applicant was the person referred to in the relevant part of Annex E of the order as the owner of property or their successor in title;

(b) the person referred to in the relevant part of Annex E and any person who became successor in title of such person on or before 28 February 1959 were British nationals on 31 October 1956 and 28 February 1959.

The Commission interpreted the order (which their Lordships criticised as being very badly drafted) as meaning that not only the applicant had to be British but also that its successors in title had to be British. Such an interpretation of the clause appeared to defeat almost any claim since it was most unlikely that a successor in title would be British; and in any event, once such a deal (sale to a non-British company) had been reached by Anisminic (or any other company) it was powerless to do anything about it. (We should not lose sight of the fact that the object of these provisions was to ensure that only persons of British nationality would be entitled to compensation, be they the original owners or their successors in title.) The Commission found that Anisminic failed in its claim for compensation solely on the grounds that TEDO, its successor in title, was not a British national. Anisminic sought a declaration that the order had been misconstrued by the Commission.

A major obstacle to overcome was whether a statutory ouster clause could prevent the intervention of the courts. The House of Lords considered the meaning of the Foreign Compensation Act 1950, s 4(4), which had provided in unequivocal language that 'the determination by the Commission of any application made to them under this Act shall not be called into question in any court of law'. Taken at face value this provision would appear to indicate that any consideration in a court was excluded by the clause, including any action to establish that the determination was itself a nullity. The logical consequences of this are plain enough, i.e., that a decision may well have been a nullity but there was no way of knowing

this because the statutory exclusion clause prevented the courts from reviewing the matter. However, Lord Reid asked, in his judgment:

> Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly—meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court . . . No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity.

The exclusion therefore related to valid determinations only. It was held that, because the Commission was acting *ultra vires*, its determination in this case was void *ab initio* and thus judicial intervention could not be excluded by any such clause.

The case depended upon the way an inadequately drafted order in council had been interpreted when the Commission was deciding who were successors in title. This in itself raised questions about the jurisdiction of the decision-maker. Lord Reid stated that: 'If they [the Commission] base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and . . . their decision is a nullity.' The Commission had in effect considered the questions it had been granted jurisdiction to determine by recourse to totally irrelevant considerations. Lord Reid added that:

> In themselves the words 'successor in title' are . . . inappropriate in the circumstances of this Order to denote any person while the original owner is still in existence, and I think that it is most improbable that they were intended to denote any such person. There is no necessity to stretch them to cover any such person. I would therefore hold that the words 'and any person who became successor in title to such person' in article 4(1)(b)(ii) have no application to a case where the applicant is the original owner. It follows that the commission rejected the appellants' claim on a ground which they had no right to take into account and that their decision was a nullity.

As an *ultra vires* determination was regarded as not being a determination at all, the decision was a nullity which could have no effect. Their Lordships unanimously held that such exclusion clauses only protected determinations which were *intra vires*. The decision in this case was however *ultra vires* as it was based upon a misconstruction of the scope of the relevant Order; in other words the decision-maker had made an error that went to the basis of its jurisdiction (on errors that go to jurisdiction see further 17.4). It is worth remembering (as is implicit from Lord Reid's first statement above) that even when there is any such clause purporting to exclude judicial review (total ouster), the determination of whether the decision is valid will inevitably be made by a judge on application for judicial review. In this sense the courts are not excluded.

An almost immediate response was that the relevant legislation was amended by the passing of the Foreign Compensation Act 1969, with provision for appeals to the Court of Appeal on a question of law concerning the construction of the order in council. In turn, this raises the question of whether limitation clauses will ever have any effect in ousting the jurisdiction of the courts.

17.2.2.1 *The impact of Anisminic*

At first encounter it appears that *Anisminic* could be taken to mean that virtually any action committed in error by an administrative agency/body might be regarded as

being fundamental, in the sense that the error will go to the jurisdiction and thus render the resulting decision, or other administrative action, beyond that body's powers. But it is important to consider whether the decision went too far by providing almost an open door for intervention by the courts in many situations where the judges had previously been reluctant to tread (see, e.g., Lord Morris's dissenting judgment in *Anisminic*). In fact the dangers of over-eager judicial involvement were subsequently raised in *Pearlman v Governors of Harrow School* [1979] QB 56. The county court was given the right to determine a matter, and it was provided by the Housing Act 1974, Sch 8, para 2(2) that any determination by the court 'shall be final and conclusive'. Further, s 107 of the County Courts Act 1959 provided that 'no judgment or order of any judge of county courts . . . shall be removed by appeal, motion, or *certiorari* or otherwise into any other court'. Lord Denning held that even if s 107 did apply, it would only exclude *certiorari* for error of law on the face of the record and it would not limit the power of the High Court to issue *certiorari* for absence of jurisdiction. His Lordship considered that, by misconstruing the words in the statute, the judge had made an error of law that went to jurisdiction. However, Lane LJ strongly dissented from the majority view:

> The judge is considering the words (in the Schedule) which he ought to consider . . . [he] is not embarking on some unauthorised or extraneous or irrelevant exercise. All he has done is to come to what appears to this court to be a wrong conclusion on a difficult question. It seems to me that, if this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law.

This raises the question of whether Lord Denning's solution is blurring the distinction between law and fact.

This dissenting view of Lane LJ in *Pearlman* was ultimately endorsed by the House of Lords in *Re Racal Communications* [1981] AC 374. The statutory exclusion in this case had been provided under s 441(3) of the Companies Act 1948. This stated that a decision by a High Court judge on an application 'shall not be appealable'. Nevertheless, the Court of Appeal entertained an appeal on the grounds that the section had been misconstrued by the judge and that this error went to jurisdiction, as it had in *Anisminic*. Accordingly, the Court of Appeal reversed the decision of the High Court. On final appeal, however, the House of Lords rejected this judgment for several reasons. First, it held that the jurisdiction of the Court of Appeal itself was entirely appellate and therefore it had no power to deal with an original application for judicial review, which this amounted to. (The court was acting beyond its own powers!) Secondly, Lord Diplock explained that judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only, although it was acknowledged that errors of law by these bodies would go to the jurisdiction and thus be reviewable. In other words, no public body has the right to act unlawfully under Dicey's doctrine, so that even if there is an ouster clause, where there is a mistake of law the public body concerned is in a sense acting outside its jurisdiction (the important point here is to distinguish mistakes of fact where final determination can rest with the decision maker. By fact we mean the issues that the inferior body is meant to decide e.g. the level of a pension or benefit, to grant or refuse planning permission etc). Further, it was pointed out that in some cases, e.g., *Pearlman v Harrow School*, it would still be possible to isolate questions of fact, which Parliament had intended should be determined entirely by the inferior tribunal (not by an appellate body). Thirdly,

Lord Diplock was satisfied that the clause excluding the appeal should be taken at face value as excluding jurisdiction. Lastly, his Lordship believed that corrections of mistakes of law in the High Court were to be achieved by appeal alone (not review). If a statute excludes an appeal, as this one did, then there can be no correction at all. This judgment of Lord Diplock can be considered to have set boundaries to the impact of *Anisminic*. Further confirmation of a limitation on the possible implications of *Anisminic* can be found in the Privy Council case of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363.

More recently, in *R v Secretary of State for the Home Department, ex p Fayed* [1997] 1 All ER 228, where the court applied and followed *Anisminic*, the Fayed brothers appealed against a decision by the Home Secretary who had refused to grant naturalisation. In order to provide a remedy the court had to override s 44(2) of the British Nationality Act 1981, which states that 'the Secretary of State . . . shall not be required to assign any reason for the grant or refusal of any application under this Act . . . and the decision of the Secretary of State . . . on any such decision shall not be subject to appeal to, or review in, any court'. It was held that this clause did not oust jurisdiction and prevent the court from reviewing the decision on procedural grounds. *Attorney General v Ryan* [1980] AC 718 was cited as authority in support of the inference that Parliament was not intending to exclude from review a decision which failed to comply with the need for fairness.

On the other hand, ostensibly weaker 'conclusive evidence' clauses have been recognised as excluding review. In *R v Registrar of Companies, ex p Central Bank of India* [1986] 1 All ER 105 the Court of Appeal was of the opinion that the Registrar, operating under the Companies Act 1948, had made an error of law; but it went on to hold that no evidence could be brought before the court to prove this because of a clause in s 98(2) containing the words 'and the certificate shall be conclusive evidence that the requirements of [Part III] of the Act as to registration have been complied with'. A successful challenge to the Registrar's decision on these grounds would effectively undermine the certainty offered by a scheme of statutory regulation which specifically allowed the Registrar to make decisions on issues of mixed law and fact.

It should finally be noted that, despite repeated failures in coming up with a formula that excludes the courts, parliamentary draftsmen have continued in their quest to devise completely effective clauses. For example, the Interception of Communications Act 1985, s 7(8), attempts to deal with the reasoning developed in *Anisminic* by providing that any decisions of the complaints tribunal into telephone tapping set up under the Act '(including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court'. See also the Security Services Act 1989 s 5(4): 'decisions of the tribunal . . . (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.' The same formulation is repeated in the Police Act 1997, s 91(10). Wade and Forsyth (2004, p. 722) reaffirm the view here that such formulations as these will not oust the jurisdiction of the court. It is already clear that there is a fine dividing line between the courts declaring all errors to be jurisdictional, and therefore laying themselves open to the charge of disobeying Parliament, and the acceptance of such clauses with the corollary that this may lead to injustice.

17.2.2.2 *Tribunals and Inquiries Act 1992, s 12*

As we have remarked, there have been many attacks on complete ouster clauses, and following the recommendations of the Franks Committee, the Tribunals and Inquiries Acts 1958 and 1971 contained a provision to prevent ouster clauses from excluding the prerogative orders as a remedy. This has now been incorporated in the 1992 legislation by s 12(1), which states that:

(a) any provision in an Act passed before the 1st August 1958 that an order or determination shall not be called into question by a court, or

(b) any provision in such an Act which by similar words excludes any of the powers of the High Court,

shall not have effect so as to prevent the removal of the proceedings into the High Court by order of *certiorari* or to prejudice the powers of the High Court to make order of *mandamus*.

This provision is restricted in two situations by s 12(3):

(a) to an order or determination of a court of law;

(b) where an Act makes special provision for application to the High Court within a specified time.

It can be seen that this provision has the effect of preserving judicial review as a remedy in the face of ouster clauses passed before 1 August 1958, save where the decision in question is that of a court of law or where primary legislation specifies that proceedings in the High Court must be brought within a prescribed time-frame. However, it should be noted that the Act refers specifically to *certiorari* and *mandamus*, but not to declarations and injunctions which are also available under the Supreme Court Act 1981. (*Note:* Ouster clauses are only relevant to judicial review: in order to prevent the courts from exercising an appellate role Parliament simply needs to omit to grant such a jurisdiction. This is because all rights of appeal are statutory, whereas judicial review follows from the inherent jurisdiction of the courts.) It should also be remembered, in regard to s 12, that the Tribunals, Courts and Enforcement Act 2007 which sets the seal on the Leggatt reforms of tribunals (see chapter 7) reorganises most of the important statutory tribunals into single system with a revised appellate structure. Section 11 provides a right of appeal to the Upper Tribunal from the First-tier Tribunal which will redirect cases that would previously be heard in the High Court while s 13 of the Act allows for a right of appeal to the Court of Appeal. Such appeals are restricted to points of law of general importance. A further innovation under s 19 is to grant the Upper Tribunal (presided over by a High Court judge) a limited jurisdiction to hear judicial reviews that would previously have been directed to the Administrative Court.

17.2.3 Time limit clauses (partial ousters)

While finality clauses have not generally been successful in barring the courts, partial ouster clauses have managed to achieve this objective much more effectively. A method that is frequently employed to restrict intervention is specifying a restricted period of time after which no remedy will be available. For example, this is especially popular in planning and compulsory purchase statutes. The Acquisition

of Land Act 1981 now deals with compulsory purchase orders and provides that a person may apply within six weeks for the order to be quashed, and that this time runs from the date of publication. But even in these circumstances, if the question of bad faith arises no statutory formula may turn out to be judge-proof, in the sense of guaranteeing that a judge will have respect to the ouster clause.

A significant decision regarding the justiciability of a case where the time limit stipulated had not been adhered to was *Smith v East Elloe Rural District Council* [1956] 1 All ER 855, mentioned at 17.2.2 above. This concerned a challenge to a compulsory purchase order under the Acquisition of Land (Authorisation Procedure) Act 1946. The Act allowed a court to quash an order in cases in which the order was beyond the powers of the enabling Act itself or outside the procedural requirements contained in the Act, as long as substantial prejudice had been caused to the applicant. However, the statute had stipulated that any challenge was to be made within a six-week period of the order being made, and that otherwise a compulsory purchase order 'shall not be questioned in any legal proceedings whatsoever'. No challenge was made during the specified period. In fact, some five and a half years elapsed before the plaintiff, Mrs Smith, claimed that the order had been wrongly confirmed; but crucially she claimed that it had been made in bad faith. It was therefore contended that in these circumstances, i.e., where there had been bad faith, the time limit clause did not apply. Their Lordships concluded by a majority that they could not impugn the order because, according to Viscount Simmonds, notwithstanding the alleged fraud, 'plain words must be given their plain meaning'. The consequences of such an approach were recognised in a dissenting judgment by Lord Reid (perhaps a pointer to later developments) in which he doubted whether such an order that had been obtained by corrupt or fraudulent means could be protected from being questioned or attacked in any court. His Lordship stated in his judgment: 'In every class of case that I can think of the courts have always held that general words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty.' Notwithstanding these remarks, the validity of the order was allowed to remain intact. (Incidentally, it was unanimously held by the House of Lords that Mrs Smith's claim against the clerk to the council could proceed on the ground of bad faith, etc.) As we shall see, there are obvious practical advantages to setting such a limitation in this kind of area, and this may go some way to accounting for the much later decision of the Court of Appeal in *ex p Ostler*, below.

It has already been noted that the *Anisminic* case, and certain other authorities that followed in its wake, appear to suggest that complete ouster clauses will not be a safeguard against errors of law, but the decision by the Court of Appeal in *R v Secretary of State for the Environment, ex p Ostler* [1976] 3 All ER 90 confirms that there will be a very different approach when time limit clauses are included in the legislation. In *ex p Ostler*, there had been an inquiry and publication of proposals for a ring road scheme in Boston, but it was not until the publication of supplementary plans that the applicant realised that the first set of proposals was also likely to affect his business premises in the centre of the town. The Highways Act 1959, Sch 2, para 2, set a time limit of six weeks for applications to the High Court and the Act further stipulated (Sch 2, para 4) that an order, once it had been confirmed, should not be questioned in any legal proceedings. The applicant sought *certiorari* to have the Scheme quashed. No objections were allowed because the time limit in

respect to the first proposals was regarded as being final. It is noteworthy that the challenge was on grounds of bad faith and breach of natural justice, since secret assurances had been given to a trader behind the back of the applicant.

The facts of *ex p Ostler*, were distinguished from *Anisminic* on several grounds, some of which were spurious. First, it was decided that the questionable authority of *Smith v East Elloe Rural District Council* could be followed because this was not a complete ouster clause but approximated to a limitation period, and thus a potential six-week period to make a challenge was available under the statute (although, of course, Ostler did not know of the defect until long after the six weeks had elapsed and therefore no remedy was in reality obtainable). Secondly, it was distinguished on the now discredited basis that the determination in *Anisminic* was judicial, while the present question was considered more in the nature of an administrative decision. Lastly, the Court of Appeal believed that a distinction could be drawn here because the matter did not go to jurisdiction as it had in *Anisminic*. The decision, the court maintained, was made within the statutory jurisdiction.

Although this case shows that the strict rule was still applicable, the judgment, and particularly the reasoning distinguishing *Anisminic* on this point, has been the focus of much criticism, not least by Lord Denning who (extra-judicially) withdrew some of the reasons for deciding as he did in the case (see Beloff 1998, p. 286). The point was that time limit clauses were invented for the purpose of public interest, and if the courts were to allow plaintiffs to come to them for a remedy long after the time limit had expired (i.e., retrospectively) it would be productive of much disruption to the public good, in that property would have been acquired and demolished. It is important to note that Mr Ostler's case was finally referred to the Parliamentary Commissioner for Administration who found serious deficiencies in the manner in which the matter had been handled by the department. As a result he eventually received an *ex gratia* payment from the department.

This general reluctance of the courts to intervene in planning cases is vividly demonstrated in more recent decisions. In *R v Secretary of State for the Environment, ex p Kent* [1990] COD 78, *Ostler* is followed and applied. Racal Vodafones applied for planning permission to construct a radio base and transmitter. K was not informed by the council about this application as he should have been. Planning permission was refused at this stage and the company appealed to the Secretary of State. Under the appeals procedure an inquiry was set up and the Secretary of State wrote to the council asking it to notify local residents. Once again, because of the inefficiency of the council in contacting and informing local people, K, the applicant, was not informed about the appeal. Some two months later he did find out about the plans and set about challenging the grant of planning permission on grounds of natural justice. This was after the statutory period of six weeks had elapsed. The application for judicial review relied on *Anisminic* as authority. It was maintained that this error went to jurisdiction. However, *Anisminic* was again distinguished on the ground that it had been concerned with a total ouster provision, whereas here Parliament did allow there to be challenges within a specific time limit. The result was that a faultless applicant was left without a remedy because of a partial ouster clause, despite the ineptitude of a public authority.

In another example, *R v Cornwall County Council, ex p Huntington* [1994] 1 All ER 694, the applicant's farm had been affected by a public right of way under the Wildlife and Countryside Act 1981, s 53(2)(b). It was specified by Sch 15, para 12(3)

of the Act that a challenge had to be made within 42 days, after which the validity of the order 'shall not be questioned in any legal proceedings whatsoever'. *Certiorari* was applied for outside the statutory period, on the ground that the council had acted beyond the statutory powers conferred upon it by Parliament. Once again, this led the court to consider the argument for fundamental invalidity advanced in the House of Lords in *Anisminic*. Assuming the grounds to be correct, and that the council was acting *ultra vires* in a quasi-judicial capacity, it was submitted for the applicants that the decision was a nullity thus defeating any statutory exclusion. Mann LJ rejected any suggestion of degrees of invalidity linked to the functions being exercised by the decision-making body. Parliament had followed a standard formula in drafting the legislation which provided an opportunity to challenge on specified grounds, and this had been combined with an ouster clause limiting the time allowed. In such cases, any challenge must be within the time laid down in the Act. It was held that any jurisdiction to grant review had been ousted by the above clause and the application for judicial review failed. Mann LJ pointed out that the principle in *Smith v East Elloe Rural District Council* has been affirmed as binding authority in a number of other cases (including *ex p Ostler* and *ex p Kent* above), all of which can be distinguished from *Anisminic*:

> The intention of Parliament when it uses an *Anisminic* clause is that questions as to validity are not excluded… [W]hen paragraphs such as those considered in *ex p Ostler, ex p* are used, then the legislative intention is that questions as to invalidity may be raised on the specified grounds in the prescribed time and in the prescribed manner, but otherwise the jurisdiction of the court is excluded in the interests of certainty.

However, see now also *R v Wiltshire County Council, ex p Nettlecombe Ltd* [1998] 96 LGR 386, where *Huntingdon* is distinguished on a challenge to an 'antecedent step' and for simple error of law.

Note also that clauses of this nature may be open to attack under Art. 6 of the ECHR (the right to a fair trial) arguments because they may preclude the granting of a judicial remedy (Wade and Forsyth 2000, p. 712).

17.2.4 Conclusion to ouster and time limit clauses

The crucial issue to resolve in respect of partial exclusion and time limit clauses has been whether, following the landmark judgment in *Anisminic*, the courts would be prepared to go beyond the strict statutory provision to allow an applicant a remedy. It appears that the position adopted in *ex p Ostler* and *ex p Kent* has marked at least a qualified return to *Smith v East Elloe Rural District Council*. However, we should remember that the underlying reason for accepting these clauses is the complication that would be caused in declaring something void retrospectively. In other words there are good policy reasons identified by the courts which have led them to adhere to strict time limits. For example, it would clearly be unsatisfactory if the prospect of some future challenge caused public development schemes to be suspended or delayed on a prolonged basis. Accordingly, the reluctance of the courts to intervene in these circumstances has not simply been because of judicial deference to parliamentary provisions, but because of the widespread potential disruption to administrative decision-making that would result if they did so.

17.3 Subjective words

One method of restricting review by the court has been to cast statutory language in a subjective form. For example, it is a fairly standard drafting practice to find a discretion granted to a minister, local authority or other agency in the following terms: 'If the minister in any case so directs' (*Padfield v Minister of Agriculture* [1968] AC 997) or 'such . . . wages as [the Council] may think fit' (*Roberts v Hopwood* [1925] AC 578; other such formulations appear in the cases below). This might seem to suggest that the discretion rests entirely with the minister, local authority, or agency. The question will be, therefore, whether the failure to exercise the discretion contained in an Act will be considered a ground for review. It should be noted, however, that the courts have traditionally displayed resistance to such clauses. See, e.g., the remarks of Lord Denning in *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574.

One of the most celebrated cases is *Padfield v Minister of Agriculture* [1968] AC 997. Here it was stated (in s 19 of the Agricultural Marketing Act 1958) that complaints could be heard against the milk marketing scheme 'if the minister in any case so directs'. A farmer complained after the minister had refused to refer a complaint to the relevant committee of investigation. The minister claimed an absolute discretion and suggested that any reference to this committee would oblige him to follow its recommendations because these investigations would raise wider issues, thereby nullifying the discretion given to him by statute. The House of Lords rejected this argument and held that, by not acting, he was effectively frustrating the intentions of the statute, read as a whole. This landmark decision has been regarded as extending the scope of judicial review into areas where statutory powers appeared clearly to define in very wide terms the parameters of ministerial or administrative action (see further 10.4.1).

The criteria for the exercise of subjective powers have also been discussed in other cases. In *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 2 All ER 609, the challenge was based on whether the minister had acted properly by, first, not publishing the inspector's report pursuant to powers under s 437 of the Companies Act 1985, which gave the minister the power to publish the report 'if he thinks fit', secondly, by not referring the Harrods takeover to the Monopolies and Mergers Commission pursuant to his powers under s 64(4)(b) of the Fair Trading Act, which allowed the Secretary of State to make such a reference 'if it appeared to him that there were new material facts about the merger'. In accepting that the minister had acted within the discretion allowed by these statutes, Lord Keith, in the House of Lords, rejected the approach of the Divisional Court, which his Lordship believed had led them into considering questions of merits rather than simple *vires*. He explained that the question is not whether the minister came to the correct solution or made the right decision, but simply whether the discretion is properly exercised. In other words, was the decision-making process conducted in accordance with the statutory procedure. The discretion under the legislation could not be converted into a duty to act.

In *R v Secretary of State for the Environment, ex p Hammersmith and Fulham London Borough Council* [1990] 3 All ER 589, very similar sentiments are expressed in the

judgment of the court. The challenge here had arisen because, under s 100 of the Local Government Finance Act 1988, the minister was empowered to decide if local budgets were excessive as part of the determination of the level of the community charge (local taxation). The Act stated that 'the Secretary of State may designate a charging authority if in his opinion…'. Although in his pace-setting judgment in *Padfield* Lord Reid had not been prepared to accept the subjective wording contained in the statute at face value, this decision by the House of Lords provides further confirmation that, where policy implications are present, the courts are reluctant to intervene. The alarm bells sound for judges when the court is required to, in effect, force the particular exercise of a minister's subjective powers under a statute. The appeal by the councils was unsuccessful; moreover, Lord Bridge held that once it is established that ministerial action does not contravene the requirements of a statute dealing with national economic policy it will not be open to challenge for irrationality short of extremes of bad faith, improper motive or manifest absurdity (so-called 'super *Wednesbury*' grounds). Note also the case of *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1015.

17.4 Error of law on the face of the record

17.4.1 Historical background

Error of law on the face of the record (not itself an aspect of the *ultra vires* principle) was an ancient device for quashing the decision of a body by *certiorari* even though it was acting within its jurisdiction. A mistake of law (not of fact) was revealed by perusal of the record of the proceedings. Such errors—which were traditionally regarded as *intra vires* errors—normally related to the blatant misconstruction of a statute, and in limited circumstances the courts could intervene to correct the erroneous decision. Error on the face re-emerged in the early 1950s, following a period in which it had rarely been used, after it had been held that reasons for decisions could form part of the record of the tribunal (see *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122).

The *Anisminic* case—above—raised important questions about how far the courts could review errors of law that were *intra vires*; that is, 'within' the jurisdiction of the decision-maker. The decision in *Anisminic* itself had in fact been one that went to the question of whether the decision-maker had jurisdiction and was in that sense *ultra vires*, although the various judgments delivered in the House of Lords pointed to the possibility of judicial review lying for any error of law (whether 'going to jurisiction' or 'within' jurisdiction). Was judicial review now available in respect of all errors of law, or were the courts limited to reviewing errors within jursidiction on the basis of error on the face of the record? Uncertainty as to the answer to this question was reflected in a significant division of judicial opinion on the scope for the courts to intervene to correct errors within certain jurisdictions. However, in an important decision, *R v Lord President of the Privy Council, ex p Page* [1993] AC 682, the House of Lords once more turned its attention to this issue and appears finally to have resolved the question. The facts concerned a university lecturer who

was made redundant after having worked for the university since 1966. It was held that the decision of the university visitor (an individual appointed to hear disputes within the university in respect of its own internal rules) was not amenable to judicial review in respect of any ruling in fact or law that he might make in exercising that jurisdiction in a judicial capacity (see *Re Racal* at 17.2.2.1 above). Nevertheless, Lord Browne-Wilkinson affirmed that the decision in *Anisminic* meant that it was no longer possible to distinguish errors of law on the face of the record and other errors of law because:

> Parliament has only conferred a decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*. Therefore . . . in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.

Another issue is that, following the decision in *Anisminic*, the position was clarified for administrative bodies; but some doubt persisted concerning the capacity to intervene to correct the decisions of inferior courts. Certain problems had been identified by Lane LJ in his dissenting judgment in *Pearlman v Harrow School* [1979] QB 56 (see 17.2.2.1). In particular, as we have seen, he pointed out the difficulties involved with the distinctions Lord Denning drew in his judgment in *Pearlman* between matters within and outside the court's jurisdiction.

It should be emphasised again that Lane LJ is referring to the control of courts and not administrative authorities. This view has been approved by Lord Fraser in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Union* [1981] AC 363. Further, in *Re Racal Communications* [1981] AC 374, Lord Diplock held that a distinction could be made in regard to situations where Parliament intended the matter to be determined by an inferior tribunal and to decisions by the High Court which in no circumstances would be amenable to judicial review.

In *ex p Page* Lord Browne-Wilkinson referred specifically to the reasoning of Lord Diplock, noting that:

> In my judgment, therefore, if there were a statutory provision that the decision of a visitor on the law applicable to internal disputes of a charity was to be 'final and conclusive', courts would have no jurisdiction to review the visitors' decision on the grounds of error of law made by the visitor within his jurisdiction (in the narrow sense). For myself, I can see no relevant distinction between a case where a statute has conferred such final and conclusive jurisdiction and the case where the common law has for 300 years recognised that the visitor's decisions on questions of fact and law are final and conclusive and are not to be reviewed by the courts. Accordingly, unless this House is prepared to sweep away long-established law, there is no jurisdiction in the court to review a visitor's decision for error of law committed within the jurisdiction.

Decisions by a visitor within jurisdiction merely apply the internal law of the body concerned and cannot therefore be unlawful in the wider sense (i.e., in terms of the laws of the land) and are thus immune from review. This aspect of *ex p Page* has since been applied in *R v Visitors of the Inns of Court, ex p Calder and Persaud* [1993] 3 WLR 287.

In sum, once it was accepted that the interpretation of *Anisminic* that had been followed by Lord Denning and Lord Diplock, which holds that every error of law by a tribunal and inferior court is a possible excess of jurisdiction, then the technical distinction between some errors of law which were taken to go to the jurisdiction,

and other errors of law which were not, is removed. It is now apparent that the categorical assertion by Lord Browne-Wilkinson in *ex p Page* has settled the issue and has rendered any distinction between jurisdictional errors and errors of law on the face of the record obsolete. We can therefore conclude that error on the face of the record is merely of continuing historical interest and that any error of law is reviewable (subject to the exception of decisions about the 'internal' law of a body or organisation).

17.5 Implied limits on judicial review: (I) judicial oversight of the prerogative power

17.5.1 Introduction

Once again, this is an aspect of administrative law that should clearly be situated within the context of the development of judicial activism since the early 1960s. The prerogative power is considered here not as an aspect of constitutional law, but with regard to its justiciability by the courts, and on the implied limits to that justiciability.

Generally speaking, government operates within the parameters conferred by Parliament under statutory provisions, but in certain areas the prerogative provides the legitimation for the use of a common law power and confers certain immunities on those using it. Particular attention has been paid in academic circles to how the significant residual powers of the monarch that still remain under the prerogative are controlled by the courts; nevertheless, some controversy remains about their extent, and about the implications of some important legal decisions. At its very essence, this centres on the definition of the prerogative in the works of Blackstone in the eighteenth century and Dicey in the nineteenth century.

But before we discuss this further, it is worth emphasising that the powers encompassed by the term 'prerogative' are of great importance for the effective working of government. They range from the conduct of foreign affairs, the making and ratification of treaties, the preservation of national security, the maintenance of the defence of the realm, and the exercise of the enormous powers of patronage available to the executive/Crown.

17.5.2 Definition: The distinction between Blackstone and Dicey

As we have said, legitimate power within our uncodified constitution is enjoyed only by way of Act of Parliament and under the common law through the prerogative. While the powers of the executive are subject to the rule of law, at the same time it has been recognised by the courts that the Crown enjoys certain powers, rights, immunities, and privileges necessary for the maintenance of government. Some of this power, whether exercised by the monarch herself or by the executive, is still available under the prerogative. But what is the 'correct' understanding of the term 'prerogative'?

Blackstone commented that:

> By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies . . . something that is required or demanded before, or in preference to, all others . . . it follows that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities that the king enjoys alone. (Blackstone 1825, Book 1, p. 238)

This means that for him prerogative powers were unique, in the sense that the term 'prerogative' can be historically attached only to those rights which the Crown alone enjoys. Essentially, these are the traditional powers of the monarch. They include, among others, the declaring of war, the making of peace, the granting of honours and the royal assent to bills, i.e., not to those rights enjoyed in common with his subjects such as conveying land. In short, they are legal attributes of the Crown which are significantly at variance with those enjoyed by private persons.

For Dicey, writing when the transition to constitutional monarchy was almost complete, the prerogative includes much more than powers that are exclusive to the monarch:

> The prerogative appears to be both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which is at any given time legally left in the hands of the Crown . . . Every Act which the executive government can lawfully do without the authority of the Act of Parliament is done in virtue of this prerogative. (Dicey 1959, pp. 424–5)

This definition is broader, embracing all the non-statutory powers of the Crown of a residual (i.e., left over) nature, e.g., see the controversy over whether the granting and revoking of British passports is a matter of the prerogative (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett* [1989] 1 All ER 655, see 17.5.5.5).

Judicial decisions have tended to reflect the Diceyan position (see, e.g., *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508, at 526; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), permitting the courts some discretion to intervene further in the area of executive decision-making. (For comment on this matter, see Lloyd LJ in *R v Panel on Takeovers and Mergers, ex p Datafin* [1987] 1 All ER 564.) Despite this apparent judicial affirmation of one position, however, it is still difficult to settle definitively upon a definition of the residual powers involved in the prerogative as the concept itself is intrinsically vague. This ambiguity was captured by Maitland (1888) when he observed that there was 'often great uncertainty as to the exact limits' of the prerogative: 'Thus our course is set about with difficulties, with prerogatives disused, with prerogatives of doubtful existence, with prerogatives which exist by sufferance, merely because no one has thought it worthwhile to abolish them.'

Today many would argue that this discussion is rather arcane and that since *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the *GCHQ* case, at 17.5.5.4) it is debatable whether any distinction between Blackstone and Dicey is of any real continuing practical significance so far as the judiciary are

concerned. Yet two points are worth affirming:

(a) that *all* government action is important in its effect on the citizen, while actions of private individuals are not, in the same sense;

(b) that the political prerogative is exercised by, or on the advice of, the Crown, remembering that the term 'Crown' as it is employed in the UK is a product of constitutional history which could now be described as anachronistic. Comparable powers in Europe or the USA would be constitutionally exercised by, or on the advice of, what is called the state, executive or government.

17.5.3 History and context

Traditionally, prerogative powers had their origins in custom, and they were legal in so far as they were recognised and enforced by the courts. It was the courts' responsibility alone to determine the existence and extent of such powers, e.g., general laws could not be made by way of the proclamation, only Parliament could enact laws. However, the courts did not determine the legitimacy or adequacy of any particular exercise of prerogative power (see the *Case of Proclamations* (1611) 12 Co Rep 74). Earlier, *Prohibitions del Roy* (1607) 12 Co Rep 63, had established that certain prerogatives were exercisable only through the courts, i.e., the King himself could not act as a judge but must act through his judges. Subsequently, the prerogative courts were abolished in 1641, e.g., the Court of Star Chamber.

These cases and events should be viewed in the context of the civil war which marked the years from 1640 until mid-century, and the 'Glorious Revolution' of 1688. Both of significance in English constitutional history because they signalled the decisive end of absolute monarchy, with most powers over legislation and delegated legislation eventually passing to Parliament. The trend was reinforced in the eighteenth century with the Hanoverian succession to the throne, when ministers became directly responsible for the day to day running of government, and culminated in the nineteenth and twentieth centuries with the doctrine of the Supremacy of Parliament. Equally, while in the eighteenth century the scope of government activity was much smaller, with only a few key Whitehall departments (such as the Treasury or Foreign Office), the foundation of the modern administrative state in the twentieth century saw the role of government being greatly expanded and the monarch becoming peripheral to the central activities of the executive. In this sense, Bagehot (1963) was correct in stating that the Queen 'reigns she does not rule . . . she has the right to be consulted, the right to encourage and the right to warn', meaning by this that the monarch had become a 'dignified' rather than an 'efficient' (i.e., working) element of the constitution.

The monarchy may represent tradition and continuity, but the link with the past has special significance, since this is a nation that has not experienced a political revolution in modern times and the prerogative power itself has very largely devolved to Prime Minister and ministers over the years. Certain of these prerogatives are now regulated by constitutional conventions to enable government to function, e.g., the royal assent, and the appointment and dismissal of ministers. But the majority of issues involving the use of the prerogative are concerned with governing the country, e.g., defence and national security. These matters, by their very nature, are likely to call for political judgment rather than judicial control.

If this view is correct, then Parliament is the most appropriate forum for debate and best qualified to control the executive. But while ministers are nominally held individually responsible to Parliament in constitutional doctrine, in practice, parliamentary accountability of ministers is rather ineffective. This has been the result of several developments: the strength of party control over Parliament and party loyalty within Parliament; inadequate facilities available to MPs and committees when questioning the executive; and the ability of the executive to avoid accountability (see further chapter 5).

Taking account of these definitional problems and given the shortcomings in available non-legal remedies, the residual prerogative powers that remain in the hands of ministers, theoretically exercised on behalf of the Crown, can all too easily have detrimental effects on the citizen. One disquieting example of the use of the prerogative, where the executive arguably used these powers to by-pass Parliament in order to stymie opposition to its policies, is seen in *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1988] 1 All ER 556 (see 17.5.4).

Given such facts, and the creative evolution of administrative law (particularly judicial review) since the 1960s in response to them, it is hardly surprising that the courts should have taken an increasing interest in the manner in which the prerogative has been exercised by ministers on behalf of the Crown.

17.5.4 Judicial control of the prerogative

It has long been recognised by the courts, on the relatively few occasions when cases concerning the prerogative come before them, that Parliament has the power to modify, limit, or replace (abrogate) prerogative powers by statute. One case of abrogation is that MI5 and MI6 (set up under the prerogative) have been placed on a statutory basis in the Security Services Act 1989 and the Intelligence Service Act 1994, respectively. However, the courts have been called on to decide upon the status of prerogative powers when they appear to be in conflict with those contained in a statute. The leading case illustrating this is *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508. In 1916, the government, acting in the name of the Crown, took control of a hotel to house the headquarters of the Royal Flying Corps under the Defence of the Realm Regulations. It then denied the legal owners any right to compensation, apparently available to them under the statutory provisions of the Defence Act 1842. It was argued by the Crown that compensation for requisition of a hotel was within its discretion, acting under the prerogative in wartime. However, it was decided by the court that the requisition and compensation were now governed by statute which had superseded the regulation of these matters by the prerogative where there was any inconsistency. To this extent, the prerogative power remained in abeyance during the exercise of the statutory power. Lord Atkinson said (at pp. 539–40):

> It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance… after

the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, howsoever unrestricted the Royal prerogative may therefore have been.

Although this is the classic doctrine with regard to statutory provisions, it is qualified in one significant respect, which is that an enacted statute may include a reservation preserving, or partly preserving, a prerogative power. The interpretation of Parliament's intentions in one such area where the reservation relates to immigrant aliens—see the Immigration Act 1971, s 35(5)—was considered in *R v Immigration Appeal Tribunal, ex p Secretary of State for the Home Department* [1990] 1 WLR 1126, at p. 1133. However, the application of such limitations is a complex issue, discussed with regard to immigration cases, by Vincenzi (1992).

In *De Keyser's* case there was inconsistency between the statute and the prerogative; both were covering the same ground and this led to the issue being resolved by the courts in favour of the statutory provision. What would be the position, however, if the statutory power only duplicated prerogative power without expressly restricting such powers of the Crown? In these circumstances, would statute and prerogative co-exist, or is the prerogative power abolished, potentially for ever?

A more recent, and controversial, judgment on the question of statute in relation to the exercise of the prerogative is *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1988] 1 All ER 556. The authority of the Home Secretary in setting out the procedure for the issuing of baton rounds was challenged as being outside the powers of the Police Act 1964, s 4(4) (now s 6 of the Police Act 1996). The Court of Appeal considered whether there was a prerogative corresponding to the one granting the right to make war and peace, which was to enforce the 'Queen's peace within the realm'. It was contended by the local police authority that since no such prerogative was in existence at the time of Peel's reforms in 1829, it followed that all powers that police forces exercised, and also those exercised by the Home Secretary, emanated from statute. Croom-Johnson LJ (at pp. 598–601) rejected this argument: '. . . I have no doubt that the Crown does have a prerogative power to keep the peace, which is bound up with its undoubted right to see that crime is prevented and that justice is administered'. Crucial to this view was that s 4(4) did not give local police authorities an express monopoly over the supply of such equipment, i.e., s 4(4) had not replaced the prerogative.

Considering the facts above, it would seem that, following *De Keyser*, where a statutory provision is enacted which covers the same grounds as a prerogative power, the latter is not destroyed but falls into abeyance only. That is, if the statutory provision is repealed, then the prerogative power could be used again. Whether these powers are then reviewable by the courts can only be decided by recourse to the substance of the case in any particular situation.

Secondly, *ex p Northumbria Police Authority* raises the crucial issue of how broadly or narrowly the royal prerogative is interpreted by the courts when statutory ambiguity is an issue. The Home Office believed that it had good grounds for its action under s 4 of the Police Act 1964 in denying the Chief Constable certain equipment. Indeed, there was no definition of how broad the original prerogative power really was, except that there was an ancient prerogative power necessary to keep the peace. Further, although the Act did not expressly restrict the prerogative in every contingency, it did not allow for its operation either.

By interpreting the inevitable imprecision of statutory language in this way and permitting the prerogative to prevail, the court here seems to be inferring that the constitutional principle enunciated in *De Keyser*, that where statute law and prerogative power cover the same subject-matter statute law always prevails, is very much narrower than has generally been supposed. Does this then allow the use of the prerogative in almost any ambiguous circumstances where national security or the keeping of peace is an issue? There is no definitive or conclusive answer possible to this question.

17.5.5 The prerogative and the supervisory role of the courts

We have already pointed out that the prerogative often involves the exercise of powers that are central to the regulation of executive action in crucial areas such as foreign policy, defence, national security, and the prerogative of mercy. The intervention of the courts until recently had been restricted by what appeared to be judicial reluctance to intervene, an approach which marked an acknowledgment that certain types of ministerial discretion, exercised as part of the prerogative, were beyond the scope of judicial scrutiny because they involved issues of substantive policy.

17.5.5.1 *The traditional view*

The courts were prepared to intervene only to clarify the existence and ambit of powers which the executive claimed to be exercising under the prerogative. Furthermore, it has been held that, in principle, the courts will not recognise the existence of new prerogative powers and that no new prerogatives can be created by the common law—see *BBC v Johns* [1965] Ch 32, per Diplock LJ: 'It is 350 years and a civil war too late for the Queen's courts to broaden the prerogative.' They can be abrogated by statute, but not enlarged either by the Crown or by the courts. Other than that, prerogative powers were traditionally considered not to be reviewable, i.e., to be beyond the jurisdiction of the courts. A series of judicial pronouncements have lent support to this orthodox position in a variety of circumstances. Some of these cases are reflective of the judicial caution prevalent until the mid 1960s, but there is no generally accepted means of locating these decisions. For our purposes they can be broadly assigned under the following criteria:

(1) *Treaties. Blackburn v A-G* [1971] 2 All ER 1380. Blackburn was challenging the legality of the government's accession to the EEC by signing the Treaty of Rome, but the Court of Appeal rejected the contention of the plaintiff. Lord Denning MR was subsequently (in *Laker Airways Ltd v Department of Trade* [1977] QB 643) to comment favourably on the courts' ability to review Crown prerogative more broadly; here he reaffirmed the court's unwillingness to intervene, stating that the actions of ministers in this context 'cannot be challenged or questioned in these courts'. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] QB 552, concerning the dispute over the ratification of the Treaty on European Union, for a reaffirmation of the essentially non justiciable nature of the treaty-making power; *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Butt* [1999] COD 470 and see also *Bancoult* cited below at 17.5.5.3.

(2) *Prerogative of mercy*. In *Hanratty v Lord Butler* (1971) 115 SJ 386, an attempt to sue a former Home Secretary for negligence because of a decision reached while in office was not allowed to proceed. Lord Denning MR stated that the prerogative of mercy is 'one of the high prerogatives of the Crown', and the court concurred in affirming that they could not interfere in the exercise of this function. But see now *ex p Bentley*, at 17.5.5.5.

(3) *Exercise of discretion by Attorney General. Gouriet v Union of Post Office Workers* [1977] QB 729 (CA), [1978] AC 435 (HL). The case considered whether the courts could review the action of the Attorney General, who had refused consent for relator proceedings. In the Court of Appeal, Lord Denning MR believed this could be the subject of review, but the House of Lords held that the Attorney General's discretion, in this instance, was part of the prerogative and, as such, unreviewable. One of the factors was that the House reaffirmed that the Attorney General was responsible to Parliament for his actions, so confirming the doctrine of the separation of powers.

(4) *Refusal to grant passports*. See *Secretary of State for the Home Department v Lakdawalla* [1972] Imm AR 26, and contrast *ex p Everett*, discussed in 17.5.5.5.

17.5.5.2 *The trend towards reviewability*

The question is then: in what circumstances will the courts intervene? Although the courts have increasingly inclined towards greater intervention with regard to their common law powers of review, it remains true that many of the cases cited in 17.5.5.1 above, under the traditional view, would have the same outcome if they were decided today. Despite this fact, we can nevertheless trace the development of a new position which has come to focus on the substance of the issues at stake in the case, rather than simply accepting that the prerogative is non-justiciable *per se*, i.e., on the *subject-matter* rather than the *source* of the power. But it should be pointed out that there are substantial variations in the approach of the courts, the implications of which are sometimes controversial.

One example of the evolution of this new position is *Burmah Oil v Lord Advocate* [1964] All ER 348. Compensation was claimed for acts carried out by British troops in Burma acting under the prerogative in wartime. The House of Lords decided that compensation was payable as of right in respect of property destroyed and seized; however, there was no discussion as to whether this exercise of the prerogative was unlawful in itself. Rather, the issue was simply whether compensation was payable to the claimants. This case was decided against the conventional wisdom of the time, and indeed the War Damage Act 1965 was subsequently passed by Parliament to overturn retrospectively the decision of the House of Lords, thus legalising past illegality.

17.5.5.3 *The prelude to the GCHQ case*

The decision in *Chandler v DPP* [1964] AC 763 apparently supported the established view of the prerogative, when it was held that CND protestors, who had been convicted under the Official Secrets Act 1911, s 1 of having conspired to enter a military base, were not entitled to contest whether this was prejudicial to the safety of the state. This was because the disposition and armament of the

armed forces had been for centuries in the exclusive discretion of the Crown. Lord Devlin stated (at p. 810): 'It is the duty of the courts to be as alert now as they have always been to prevent any abuse of the prerogative. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be'. However, the judgments of Lord Devlin and Lord Reid also contained hints as to the future reviewability of other aspects of the prerogative. These remarks were extensively commented upon in *GCHQ*. (See also *R (on the application of Marchiori) v Environment Agency* (2001) *The Times*, 29 March, where *Chandler* is applied; and *R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office* [2001] 2 WLR 1219, where judicial review was granted regarding an Ordinance removing a people inhabiting one of the islands of the Chagos archipelago in order to make way for a military base of the USA. The action was declared by the court to be beyond the power (see Tomkins 2001 in further reading; and for further developments here see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* ([2007] 3 WLR 768 and 13.4)

Lord Denning's judgment in *Laker Airways Ltd v Department of Trade* [1977] QB 643, pursues a similar line of reasoning to that suggested by Lord Devlin. In respect of the issue that we are concerned with here, whether the minister had the power to cancel the route because this was a treaty matter and thus came within the prerogative, Lord Denning, anticipating future changes, reasoned that prerogative powers were as reviewable, in principle, as any other power and that they could not be used as a shield by the government when they were removing the protection granted to parties under a statute. He stated, *obiter* (at p. 192):

> The law does not interfere with the proper exercise of discretion by the executive in those situations; but it can set limits by defining the bounds of the activity; and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution…

And that (at p. 193):

> Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.

However, the majority, including Roskill LJ (as he then was), took a more conventional view and held that, as we have seen, once the power had been classified as prerogative in nature it was unreviewable unless replaced or limited by statute.

R v Criminal Injuries Compensation Board, ex p Lain [1967] 2 All ER 770, is an important decision repeatedly cited in *GCHQ*. The Board had been set up under the prerogative, and it was contended that *certiorari* did not lie since the Board was not a body amenable to the supervisory jurisdiction of the court in that it did not have legal authority of statutory origin. However, the court held that its powers were in principle reviewable. Lord Parker stated that it made no difference that the Board was established under the prerogative. Judicial review had been extended to tribunals and other such bodies and the Board itself was recognised by Parliament in debates and through its financial provision. The approach followed, in extending the grounds of review to the prerogative, was to look not only to the source of the power, but also at the *nature* of the power and its effect.

17.5.5.4 *GCHQ: a modern view of the law?*

We now come to what is widely considered to be the most significant modern decision on the prerogative power. This did not involve a direct exercise of the prerogative, but an exercise of delegated power conferred by the prerogative. *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 concerned the government communications headquarters at Cheltenham. A prerogative order in council (the Civil Service Order in Council 1982, Art. 4) was used in December 1983 to ban trade union activities (allowed since 1947) by civil servants working at this sensitive defence establishment. The order was issued by the Prime Minister, as minister in charge of the civil service, without any prior consultation with the trade unions. (It was argued that consultation might have led to further disruptive industrial action.) The House of Lords had to decide on the scope of the prerogative and the application of judicial review in such circumstances. Despite the applicants losing their appeal, it was unanimously held by their Lordships that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from common law, or the prerogative, rather than a statutory source. It was the *subject-matter* that counted, not the *source*; and in this case the trade unions had a legitimate expectation of prior consultation before a ban was imposed. However, although the House of Lords considered that the failure to consult the unions was unfair, this lapse from proper procedure was overridden by national security considerations.

The judicial opinions that were expressed here varied considerably. Lord Fraser regarded the regulation of the civil service through an order in council as an indirect exercise of prerogative power, and while he saw that there was no obvious reason why the mode of exercise of that power should be immune from review, he did recognise that to do so would be against the weight of accepted authority. Further, he declined to use the opportunity to discuss the matter, considering this unnecessary in view of the supervening considerations of national security which led the applicants to lose their case. Lord Brightman joined him in this cautious approach. Lord Roskill expressed the view, *obiter*, that certain prerogative powers such as the exercise of the prerogative of mercy, the making of treaties, the granting of honours and the defence of the realm were not susceptible to judicial review because their nature and subject-matter were not, as such, amenable to the judicial process. But he supported the majority in thinking that the time had come to answer the question. Lord Scarman cited the authority of *Chandler v DPP, ex p Lain* and *R v Secretary of State for the Home Department, ex p Hosenball* [1977] 3 All ER 452 in stressing that the developing modern law of judicial review had overwhelmed the old restrictions on the justiciability of the prerogative:

> . . . the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter [i.e., subject-matter] upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. . . . Today . . . the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. [That is, the issue is not the prerogative but the justiciability of the issue before the court.]

(Note that the rights of the applicants in *GCHQ* to join a trade union were restored by the government in May 1997.)

17.5.5.5 *The legal implications of GCHQ*

In theory, the implications of *GCHQ* were far-reaching, in that many areas once considered unreviewable were now potentially open to judicial scrutiny. Substantial evidence for this view appears in *R v Secretary of State for the Home Department, ex p Everett* [1989] 1 All ER 655. The facts involved the refusal of the British embassy in Spain and the Foreign Office to renew a passport because there was a warrant out for Everett's arrest in the UK. It was held by O'Connor LJ, citing the comments of Lords Scarman, Roskill and Diplock in *GCHQ*, that the High Court had the jurisdiction to review this administrative decision and that, although the government's policy was sound, Everett should have been given detailed reasons for the refusal of his passport. Contrast this decision with *Secretary of State for the Home Department v Lakdawalla* [1972] Imm AR 26.

However, a review of the case law subsequent to *GCHQ* reveals a more ambiguous picture. For example, in *R v Secretary of State for the Home Department, ex p Harrison* [1988] 3 All ER 86, the applicant was convicted of conspiracy to defraud and sentenced to three years' imprisonment. He later successfully appealed on the ground that he should originally have been granted full legal aid at his trial. Subsequently, he applied for compensation from the Home Office. When this was refused, without reasons being given, the applicant sought judicial review, claiming that the refusal by the Home Secretary to grant compensation was unfair. *Ex gratia* payments in these circumstances were made under the prerogative, and in the instant case the court held that decisions of this kind could not be called into question in the absence of bias or fraud on the part of the Home Secretary. Further, it was claimed that following the comments of Megarry V-C in *McInnes v Onslow-Fane* [1978] 3 All ER 211, a mere applicant was not entitled to reasons for a decision when a discretion was left in the hands of the decision-maker (i.e., in the absence of statutory or contractual obligations). (The student of legal decisions might pause here to consider whether this outcome fundamentally conflicts with the position enunciated in *GCHQ*, since the source of the decision has, in effect, ruled out a favourable conclusion for the applicant.)

A yet more controversial decision, discussed above, is that in *R v Secretary of State for the Home Department, ex p Northumbria Police Authority* [1988] 1 All ER 556. The case has been extensively commented upon, as it has further constitutional and legal implications. We have already noted that the *De Keyser* principle (17.5.4) dictates that where a statutory provision covers the same grounds as the prerogative then the latter falls into abeyance. This was construed very narrowly here, as the prerogative was arguably resurrected to supersede, in certain circumstances, s 4(4) of the Police Act 1964. The statute appeared to provide that powers to supply equipment resided with the police authority. Nevertheless the judgment appears to display a willingness to permit ministerial discretion to prevail as a matter of policy. This not only cast doubts on statutory intentions, but also challenges the rule of law in the form of parliamentary control over the executive, for, in allowing ministerial discretion to prevail over statute, there may be an avenue by which parliamentary intentions are being thwarted by use of the prerogative. See also *Lord Advocate v Dumbarton District Council* [1990] 1 All ER 1, per Lord Keith at pp. 12 and 13.

An interesting case involving review of the prerogative power is *R v Secretary of State for the Home Department, ex p Bentley* [1993] 4 All ER 442. Judicial review was

granted for Iris Bentley to seek a declaration that the Home Secretary's refusal to grant a posthumous pardon to her brother, hanged for the murder of a policeman in 1953 despite his having the mental capacity of an 11-year-old at the time, was an error of law. The Home Secretary argued that free pardons were granted only when the moral and technical innocence of the convicted person could be clearly established. Although the court accepted that the ultimate decision was for the Home Secretary and not for the court, they did find that the minister had not adequately considered all the relevant circumstances of the case in relation to his power to grant a pardon, and in so doing had made an error of law. While it would not be right for the court to make any general order, the Home Secretary was invited to reconsider his decision in the light of the widely supported view that Bentley ought to have been reprieved. The court applied *GCHQ* in accepting that they could review exercise of the prerogative, and qualified the *obiter* statement of Lord Roskill in the case. In November 1997 the case was referred to the Court of Appeal. In July 1998 Bentley's conviction was quashed (see *R v Bentley* [1999] Crim LR 330). However, *ex p Bentley* (1993) does not constitute a general proposition regarding the justiciability of the prerogative of mercy, it will depend upon all the circumstances. The case was distinguished for the Commonwealth in *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] 1 AC 527, PC. The judicial committee of the Privy Council ruled that the exercise of the prerogative of mercy under the constitution of the Bahamas was not subject to review. It remained the position that, per Lord Diplock in *de Freitas v Benny* [1976] AC 239, 'Mercy is not the subject of legal rights. It begins where legal rights end.' See also *Lewis v A-G Jamaica* [2001] 2 AC 50 and compare with *Reckley*. Here the prerogative of mercy was reviewable because of the nature of the procedures followed by the decision-taker; and *R v Peter Hughes* [2002] UKPC 12; [2002] 2 WLR 1058 where the court, *inter alia*, decided that the prerogative of mercy had not been exercised in such a way as to provide a sufficiently individualised assessment of the death sentence.

Judicial review, as we have seen, concentrates on challenging a decision which is defective procedurally rather than challenging the underlying policy basis for that decision. It appears from the case law above that a distinction has been arrived at which regards the strategic policy element as part of a prerogative-based responsibility beyond the reach of the courts. For example, in *R v British Coal Corporation and the Secretary of State for Trade and Industry, ex p Vardy* [1993] ICR 720, a decision seeking to close a number of coal pits was successfully challenged. The court held that the basis for review arose because the issue concerned whether British Coal had complied with its statutory obligations under s 46(1) of the Coal Industry Nationalisation Act 1946, and whether the minister was acting under statutory powers conferred under s 3 of the Coal Industry Act 1987. In the light of such obligations, failure to consult the trade unions before ordering the closures did not satisfy a legitimate expectation and was found to be unlawful. Nevertheless, judicial review succeeded only in challenging these manifest procedural irregularities. Glidewell LJ appears to have taken the view that *prerogative* based actions of the President of the Board of Trade were unreviewable. This left the underlying policy, originating from the Electricity Act 1989, untouched and the government was able to proceed with its plans, after a period of consultation, to open up the contractual market for fuel (see Freedland 1994, pp. 97*ff*). The consequence of such an approach is to allow any government to use privatisation as a tool to transform its

activities into commercially-based functions that are (normally) beyond the reach of judicial review and of full public accountability, although the restraint shown in reviewing prerogative powers does reflect an understandable judicial reluctance to trespass upon sensitive areas of government policy-making.

Two other controversial cases have highlighted the problems for the courts in holding the exercise of the prerogative power to be justiciable. The first of these is *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244, which concerned the Criminal Injuries Compensation Scheme set up under the prerogative in 1964 to provide compensation for victims of crimes of violence. This non statutory scheme was codified in ss 108 to 117 and Sch 6 and Sch 7 of the Criminal Justice Act 1988, leaving awards to be decided in future on a common law case by case basis. Section 171(c) provided that the new scheme would come into force on a day to be decided by the Secretary of State. In December 1993 a White Paper (Cm 2434) outlined details of a new scheme whereby victims of violent crime would be compensated by means of a flat rate tariff. This operated by designating the amounts received according to which category the victims' injuries fell into. The outcome was that substantially reduced awards would be paid in future, resulting in a 50 per cent reduction in the annual cost of the scheme by the year 2000. The new scheme came into force on 1 April 1994. The applicants sought judicial review of:

(a) the Secretary of State's decision not to bring ss 108–117 of the 1988 Act into force;

(b) the exercise of the prerogative power to implement the new tariff scheme of reduced awards.

By a majority of 3:2 the House of Lords held that the new scheme was *ultra vires* and an abuse of the Secretary of State's power. It was recognised that the Secretary of State was not under a legally enforceable duty to bring the sections of the Act into force on any particular date, and that if the courts were to compel him to do so by *mandamus* this would be judicial interference in the legislative process. Nevertheless, the Secretary of State's discretion was not wholly unfettered and he was required (under s 171) to keep under regular review the question of whether or not ss 108–117 should be brought into force. Further, it was an abuse of power to use the prerogative power, which still existed on the *De Keyser* principle in that the relevant sections of the 1988 statute were not in force, in a manner which was inconsistent with this statutory scheme, thus frustrating the will of Parliament. This would only have been possible if the Secretary of State had said that he would *never* bring the statutory provisions of the inconsistent statutory scheme into effect. In other words, in the view of the majority, the Secretary of State by introducing the new tariff scheme was frustrating the will of Parliament as expressed in the 1988 Act.

It is clear that this case raises significant constitutional issues. While Lords Lloyd and Nicholls agreed with the reasoning of Lord Browne-Wilkinson in finding an abuse of power, Lords Keith and Mustill delivered strong dissenting judgments, arguing that to interfere in the decision of the Secretary of State as to whether ss 108–117 should be brought into force was for the courts to step over the boundary (conceptualised in the idea of the separation of powers) between the province of Parliament, the executive and that of the courts. As Ganz (1996) commented:

'The fundamental difference between them is that the majority regarded the Home Secretary's decisions as giving rise to legal issues subject to judicial review, whereas the dissenters treated them as political decisions for which he was answerable to Parliament but not to the courts'. Here, then, the courts are at the very margin between law and policy.

R v Ministry of Defence, ex p Smith [1996] QB 517 is another case with an intensely political dimension to it. The Ministry of Defence had a policy which regarded homosexuality, as a sexual orientation, in itself incompatible with service in the British armed forces. The four applicants, three men and one woman, had been administratively discharged from the armed forces under this policy. All four had outstanding service records and nowhere was it suggested that their sexual orientation had affected their ability to carry out their duties. Each sought judicial review of the joint forces policy, made in the exercise of the prerogative power. They argued, *inter alia*, that:

(a) the policy was in breach of Arts. 8 and 15 of the European Convention on Human Rights and Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women regarding access to employment, vocational training, promotion and working conditions;

(b) that the threshold of *Wednesbury* unreasonableness/irrationality should be lowered because human rights issues were involved;

(c) that the policy was irrational, in the light of evolving international and national moral standards and the treatment of homosexuals in the armed forces around the world.

The court held (affirming the decision of the Divisional Court) that the appeal would be dismissed on the grounds that, although the policy of the armed forces was justiciable and the human rights context was important, the policy of the Ministry of Defence could not be described as meeting the high threshold of irrationality required (see chapter 11 for a discussion of irrationality). This was because the policy had been supported by Parliament and the government's operational policy advisers from within the Ministry of Defence. Further, it was considered that changes in policy towards homosexuals in other countries were too recent in origin to yield much experience of value to the court. In addition, it was recognised that, since the ECHR had not been incorporated into English domestic law, it was only indirectly relevant for the case in hand and that the EC Equal Treatment Directive was never intended to cover issues of sexual orientation. Lastly, the court was not prepared to assume the role of primary decision-taker by acting to regulate conditions of service in the armed forces, not simply because it lacked the expertise to do so but because this was not its constitutional function. Here we find two elements the courts can rely on in cases when they do not find for the applicant(s): sensitive policy issues; and the court's lack of expertise in the matter at hand. The government, following *Lustig-Prean v United Kingdom* (2000) 29 EHRR 548, changed its policy to allow homosexuals to join the armed forces. Note that the Human Rights Act 1998, incorporating the European Convention of Human Rights into English law, is likely to have a more radical impact on the exercise of the prerogative power in due course. (See Billings and Pontin (2001) in Further Reading below.)

17.5.6 Conclusion: new directions or tradition reinforced?

We are now in a position to add some concluding remarks.

We began by explaining the conflicting interpretations of the prerogative provided by Blackstone and Dicey. The *GCHQ* case appeared to throw judicial weight behind a Diceyan interpretation of the prerogative. Indeed, the judgment of Lord Scarman emphasised that it is now the subject-matter rather than the source of the power that counts in determining whether the courts can intervene. However, we have also noted that academic authorities, such as H.W.R. Wade, have argued for a more Blackstonian position. In the case of *ex p Northumbria Police Authority* we saw that there appeared to be a generalised prerogative power in existence that the court was prepared to acknowledge, despite the fact that this apparently qualified the principles set out in *De Keyser*.

In *GCHQ*, Lord Roskill provided a list of prerogatives that were not reviewable (at p. 488), and these appear to have been largely accepted in subsequent decisions. The list included: the right to make treaties, the defence of the realm, the prerogative of mercy (but see *ex p Bentley* above, 17.5.5.5), the granting of honours, appointment of ministers, etc. It is worthwhile considering what, if any, justification there is for specifically these areas of executive decision-making being placed beyond the ambit of judicial scrutiny. There was a recognition of a policy element and the lack of judicial expertise, but one might well ask whether there is any remaining reason why other types of executive activity ought not to be accountable to the judicial branch. We have already seen in the court's attitude in *ex p Bentley*, that, even in traditionally ring-fenced areas such as the prerogative of mercy, the policy element is often minimal, especially if judicial intervention is merely to rectify a mistake in the criminal process. In fact, it can be suggested that opening up more of these areas to review would improve the quality of ministerial decision-making, as officials would be concerned by the possibility of actions being taken through the courts. It might be argued that judicial review in these circumstances would result in the courts repeating an existing function, because one appeals procedure being exhausted would only be followed by another duplicating procedure. The point being that the importance of judicial review lies in it being, at any stage, concerned with the nature and quality of the decision-making process itself.

The developing law of judicial review in this area appears to indicate a movement from source to subject-matter. If this is the case, it raises several other important issues related to judicial activism. We have observed that the prerogative, where it remains, is nearly always exercised as part of executive discretion, and it has been pointed out, that there is a danger of this discretion being used by government to evade, or at least attempt to evade, existing democratic constitutional safeguards (see Lord Denning in *Laker Airways Ltd v Department of Trade* [1977] QB 643). However, it would seem to follow that the obvious means of control here is through Parliament and not the courts. For instance, in the USA, as we have already observed, committees of Congress have formidable powers in comparison to their under-resourced British counterparts. But any recommendation of greater parliamentary control needs to be qualified by recognising that certain prerogatives include the kind of executive discretion that is nearly always reserved for executive action, e.g., the making of war and peace, in almost any state in the world one cares to mention.

Lastly, the central issue is whether the potential implied in *GCHQ* has been realised. The case has been presented as a focus of analysis, as it apparently voices with most authority a developing judicial attitude. However, it is worth considering to what extent this is really so. It is clear that the change from source to subject-matter that appeared such a radical departure has not left the courts arbitrating whenever ministers have acted under the prerogative. Rather, the subsequent case law indicates that judges have continued to move with a degree of circumspection, and sometimes even in reaction against such developments, as in the case of *ex p Northumbria Police Authority*. In *GCHQ*, you will have noticed that, despite the comments of Lords Scarman, Diplock, and Roskill, the court sided with the government on the familiar ground of national security. The same might be said of *ex p Smith*. The exercise of ministerial discretion under the prerogative involves predominantly areas which are susceptible to claims of non-justiciability, and it sometimes appears that the courts exercise their discretion to intervene almost at will. Perhaps the *obiter* comments of Simon Brown LJ in *ex p Smith* (in the Divisional Court) are as good a guide as any to the judiciary's developing attitude in this area: 'There could be no hesitation in finding the challenge justiciable. Only the rarest cases would today be ruled strictly beyond the court's purview: that is only those involving national security where the court lacked the experience or materials to form a judgment on the issues'. This is a remarkable contrast to the position only a few decades ago.

17.6 Implied limits on judicial review: (II) public interest immunity

17.6.1 What is public interest immunity?

In order to appreciate fully the significance of public interest immunity (PII), a doctrine of the law of evidence (formerly known as Crown privilege), it is first necessary to recognise the function of discovery of documents as part of the trial process. In civil litigation this procedure enables the parties to the action to examine information and documents from the other side. Normally, the court will order the disclosure of documents that are not voluntarily produced and this exchange of documents serves to speed up the trial process by allowing a person to know the nature of the case that is to be presented against him or her. This also permits a case to be prepared thoroughly in advance, and tends to reduce the possibility of either side being surprised or ambushed by the production of unexpected evidence. In criminal cases, there is an even stronger right to be notified in advance of the prosecution's case because of the desire to acquit the innocent.

In private civil actions, the counterpart to discovery in public law arises when evidence is protected by qualified privilege, preventing certain sources from being revealed. Accordingly, if a party refuses to disclose documents, a dispute can take place on recognised grounds and the judge may order the production of the documents. However, it had long been recognised that the Crown occupied a special position and, latterly, that this now extends to certain other public bodies. Such

bodies are able to invoke PII if it is considered contrary to the public interest for the document(s) to be released on specified grounds, e.g., doing harm to national security or revealing the name of a police informer. It is these grounds and others that will be the main concern of this chapter.

It should be noted that one feature of the Crown Proceedings Act 1947 is that s 28 provides that the courts can make an order for the discovery of documents against the Crown. But s 28 is subject to the major qualification that it does not affect the rule that evidence can still be withheld if the wider public interest so demands. As we shall soon see, the courts are, in effect, called upon to strike a balance between defining this public interest on the one hand and, on the other hand, ensuring that the power to withold information is not abused by public authorities to shield them against legitimate claims from aggrieved members of the public or defendants.

17.6.2 Why is it important?

For our purposes PII must be considered in the context of the general accountability (or lack of it) of government and public bodies. In the absence of a written constitution (although we do now have a Bill of Rights in the form of the ECHR incorporated by the Human Rights Act 1998; and a Freedom of Information Act 2000) we shall see that defining the extent of immunity touches on some fundamental questions. For example, how far ought official bodies be allowed to cloak their activities in a veil of secrecy by preventing the release of information when matters are being disputed in open court? Should high-level government and cabinet documents be regarded differently to the mundane communications of official bodies? Perhaps more specifically, should mundane communications by official bodies, including government departments, be afforded any immunity at all? Should the rules for disclosure be different for civil and criminal matters?

It will become apparent that it is frequently the judges who are called upon to decide which matters can remain outside the consideration of the courts, despite the suggestion by some that judges are not well suited or even sufficiently independent of the state to perform this function. Whatever the merits of these arguments, it is important to stress, before we proceed, that there are potentially far-reaching implications if certain types of document are kept out of the public domain. This is, in part, because the government or public officials may be assuming (sometimes inadvertently, but at other times knowingly) considerable licence to make up their own rules in secret. In part, because decisions about immunity, once reached, can mean that an aggrieved citizen or a defendant in a criminal trial is then confronted with what appears to be an impenetrable barrier of secrecy. Most disturbing of all is the realisation that as a result of such secrecy a person may be denied a remedy, and consequently may be denied justice. Indeed, towards the end of this discussion, it will become clear why there was such general concern following the collapse of the Matrix Churchill trial in November 1992. The result of the signing of immunity certificates by ministers, withholding information from the court that the defendants were acting in collusion with the security services, might have resulted in their imprisonment. Public concern about this matter led to the Scott Inquiry being set up, and the subsequent report will be discussed in more detail later.

17.6.3 The development of the modern law

17.6.3.1 *Duncan v Cammell Laird*

The judicial benchmark on this subject was set by the House of Lords in *Duncan v Cammell Laird and Co Ltd* [1942] AC 624. The House reached a decision which indicated that the courts were prepared to allow the Crown and public bodies general immunity from disclosing documents, whenever the protection of the public interest was raised by them. The case came in the aftermath of the sinking of the submarine *Thetis* in Liverpool bay, while on sea trials, with the loss of all hands in 1939. The widow of one of the victims wanted to sue Cammell Laird, the shipyard that had built the submarine, for negligence and alleged that the design itself had been defective. To prove this, the plans of the submarine would have to be produced in open court. It should be remembered that the litigation arising from the tragedy took place during the course of the Second World War, and the First Lord of the Admiralty swore an affidavit claiming that it was in the public interest not to disclose the plans. Bearing this in mind, the House of Lords refused to allow discovery and accepted that the documents were protected by Crown privilege.

The outcome of the case in wartime conditions was perhaps inevitable. It was accepted that these plans might well have given valuable information to the skilled eye of the agent of a foreign power, and that the plans should therefore clearly be protected. However, the House of Lords considered that, more generally, there were two alternative grounds for claiming Crown privilege (as it was then known):

(a) That the content of particular documents would harm the public interest. This became known as a *contents* claim (in *Duncan v Cammell Laird and Co Ltd* the plans of the submarine fell into this category).

(b) That the document belonged to a class that was injurious to 'the proper functioning of the public service'. This became known as a *class* claim. More significantly, class claims recognised a much broader category into which a large proportion of the routine communications of public bodies could, in principle, fit. (See below.)

Although their Lordships considered that it was for the judge to make the decision ruling out documents being made available, they also held that a properly executed affidavit from the minister claiming non-disclosure for any category of public documents was to be regarded as final and conclusive. (It should be remembered that *Duncan v Cammell Laird and Co Ltd* was concerned with civil proceedings and that Viscount Simon LC indicated that the position might be different in a criminal trial (see 17.6.7).)

17.6.3.2 *The aftermath of Duncan v Cammell Laird*

The case was interpreted for 25 years as meaning that any ministerial certificate was to be taken at face value, unquestioned by the courts, with the result that the public interest was firmly identified as being in the suppression of government information. This approach is illustrated very well by the decision in *Ellis v Home Office* [1953] 2 QB 135. In this case, a prisoner sought to take action against the Home Office, maintaining that injuries to him were caused because another mentally disturbed prisoner, who was known to be dangerous and violent, had

been inadequately supervised. However, his claim for negligence failed because the documents that might have demonstrated lack of care on the part of the Home Office were accepted by the court as being protected by public interest immunity. This was on the ground that it would be detrimental to the proper functioning of the prison service to have released them. The rule in *Duncan v Cammell Laird and Co Ltd* [1942] AC 624 was strictly applied. Wade and Forsyth (2004, p. 844) comment: 'It is not surprising that the Crown having been given a blank cheque, yielded to the temptation to overdraw.' The decision was heavily criticised on the ground that far too little attention was paid to achieving justice for the victim in such situations. Meanwhile, the Scottish courts were already showing signs of moving away from this overly restrictive interpretation (see *Glasgow Corporation v Central Land Board* 1956 SC 1). However, the most significant concession to the criticism levelled at such a wide exclusionary rule came from the Lord Chancellor, Viscount Kilmuir, in 1956. Acting on behalf of the government, he announced that a number of categories of information would no longer be protected by Crown privilege, including documents required by the defence in criminal cases (see 17.6.7 on PII in criminal cases).

17.6.3.3 *Conway v Rimmer*

In one of the crucial judgments marking a shift to greater judicial activism, *Conway v Rimmer* [1968] AC 910, the House of Lords departed from their earlier position in *Duncan v Cammell Laird and Co Ltd* [1942] AC 624. The case arose after a probationary police constable had been acquitted of theft. Subsequently, he sought to bring an action for malicious prosecution against the superintendent who had been responsible for bringing the charges against him in the first place. He sought discovery of four reports made during the probationary period, and of a report made by the superintendent to the Chief Constable on the subject of the investigation into the offence. The first four reports fell into a category of documents which comprised confidential reports by police officers to chief police officers relating to the competence, efficiency, and fitness for employment of individual police officers under their command. The other report fell within a class of documents comprising reports by police officers to their superiors concerning investigations into the commission of crime. Both parties were in favour of disclosure of these documents, but the Home Office objected because it maintained that the documents would be injurious to the public interest. To justify suppression the argument advanced was the desirability of candour. It was suggested that the likelihood of documents being revealed at a later stage would influence the degree of candour with which reports were prepared, and that this, in turn, would influence the quality of serious investigations of this type to the detriment of the public interest. (It will soon be obvious to the reader that this argument has been employed repeatedly over the years to justify non-disclosure of information.)

Breaking with earlier precedents, their Lordships in *Conway v Rimmer* were unwilling to accept the unqualified use of the candour argument, and held that the court had the power to inspect the disputed documents. After so doing in private, they declared that the documents should be made available to the plaintiff. In reaching this conclusion, Lord Reid found that it was necessary to balance the interests of the government in secrecy against the demands of the public interest in disclosure. Although he acknowledged that greater weight must be placed behind

a minister's claims for immunity, His Lordship departed from Lord Simon's judgment in *Duncan v Cammell Laird and Co Ltd* and made a clear distinction between routine reports and matters that were truly prejudicial to national security. A wide-ranging exception to Crown privilege that had already been established was documents that were relevant to the defence in criminal proceedings. This was accepted following Viscount Kilmuir's statement in 1956. In the instant case, however, it was being argued that suppression was nevertheless justified in subsequent civil proceedings. But according to Lord Reid the test to be applied was to ask whether it was really 'necessary for the proper functioning of the public service'. Ministers should be required to clarify their reasons for non-disclosure. If in doubt, the judge should also perform an important role by inspecting the documents in the absence of the parties to ascertain, first, whether the documents are required; and secondly, to assess the impact of disclosure on the public interest. In order for judges to inspect the documents, however, it was necessary to establish a relevance threshold for those documents. And even if disclosure was ordered by the judge, the minister should have a right of appeal. Lord Reid believed that there were some important exceptions to the much more general rule allowing for judicial inspection and possible disclosure. For instance, some classes of documents should not be disclosed, including Cabinet minutes. The upshot was that it was no longer to be thought of in terms of Crown immunity but whether the public interest overrode the ordinary rights of litigants.

17.6.3.4 *The impact of Conway v Rimmer*

In *Rogers v Home Secretary* [1973] AC 388, the House of Lords broadly followed the approach taken in *Conway v Rimmer*. Significantly, Lord Reid shifted the terminology away from Crown privilege, on the ground that it was misleading, to the use of the term 'public interest immunity'. The scope of this immunity was extended from governmental to non governmental bodies in *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171. In particular, the principle that certain sources needed to be protected (to uphold the system of criminal justice) was widened by the House of Lords to include an authorised body (rather than an organ of the government) recognised under the Children and Young Persons Act 1969. On this occasion a person who had been wrongly accused of child abuse was not permitted access to documents in order to sue the NSPCC. It was held that the wider public interest would be served by the identity of informants remaining anonymous so that the Society could expect full cooperation when investigating future complaints of alleged child abuse. A more recent example of the application of this principle is found in *Roylance v General Medical Council (No 1)* (1999) *The Times*, 27 January, where it was held that the deliberations of the professional conduct committee of the General Medical Council attracted PII in the absence of any overriding interest in disclosure. If such information found its way into the public domain this would seriously inhibit discussion.

We have so far observed that the decision in *Conway v Rimmer* qualified the principle of PII and expressed the claims of justice by no longer accepting the wholesale exclusion of a class of documents. This was because circumstances were recognised where a wider public interest might be served by disclosure than would be served by suppression. Nevertheless, further important questions remained to be answered. First, could high-level government documents, such as Cabinet papers,

be produced at a trial? Lord Reid had indicated earlier in *Conway v Rimmer* that they would be protected except in the most exceptional circumstances. Secondly, what was to be the mechanism for determining whether such documents are released? These questions were considered in *Burmah Oil v Bank of England* [1980] AC 1090. Burmah Oil had been faced with severe financial difficulties and it had agreed, as part of the rescue package, to the sale of most its holding in British Petroleum (BP). The company subsequently sued the Bank of England for having undervalued almost 78 million ordinary shares in BP when the stock was sold for £179 million. It alleged that the transaction was 'unconscionable, inequitable and unreasonable'. In order to pursue the action, Burmah Oil submitted a list of some 62 documents it wished to obtain. The bank was instructed by the Crown not to produce these documents because, it was stated in the certificate issued by the minister, they would be injurious to the public interest. Two sets of documents were involved. Group A included communications between ministers, and between ministers and senior departmental officials, and related to the formulation of government policy at the highest level. Another set of documents, Group B, concerned advice given by businessmen to the Bank of England. By a majority the House of Lords held that it was necessary to inspect the documents, if there was a reasonable probability that they would be helpful to the applicant's case. This inspection was to take place before a final decision was taken on whether the failure to disclose was in the public interest. In *Burmah Oil* inspection took place but there was no disclosure, because ultimately the objections to disclosure were stronger than any value as evidence the papers were said to have. It is also notable that Lord Keith expressed strong disapproval of the candour argument, stating that 'the notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is in my opinion grotesque . . . '. (See also Lord Wilberforce's dissenting judgment on the argument for candour.)

Although the decision did go further than *Conway v Rimmer* in discussing the procedures to follow when immunity is claimed, there is an obvious difficulty for an applicant who wishes to demonstrate that a document will in fact be beneficial to his case. It is a classic 'Catch 22' dilemma: if the material is not first examined because it is protected, how can a litigant be sure that it is necessary? Yet at the same time, the danger of relaxing the rules was to introduce the possibility of speculative fishing for documents. Their Lordships held that a relevance threshold must be reached; but should this be 'reasonable probability', as a majority in the case found? Or was even this too strong, as the minority argued, requiring a 'strong positive belief' before disclosure of the documents?

In *Air Canada v Secretary of State for Trade* [1983] 1 All ER 910, there was further consideration of the difficulties presented when classes of documents, including ministerial minutes and Cabinet documents, are subject to public interest immunity certificates. The British Airports Authority (BAA), the statutory body that owns and manages Heathrow Airport, wished to develop the airport, but the Secretary of State refused to allow any money to be raised by borrowing for this purpose, and he gave a direction under the Airports Act 1975 that the funding was to come from revenues that the BAA itself was to raise. Accordingly, substantial increases of 35 per cent in landing charges were imposed. However, a group of 18 airlines sought to challenge the new charges as being *ultra vires* the Airports Act 1975. It was argued

that the dominant motive behind the exercise of the power was to reduce the public sector borrowing requirement. In pursuit of their action, the airlines successfully obtained discovery of one group of documents that had passed between the Secretary of State and the BAA. However, they also sought to obtain another group of documents relating to discussions between ministers at cabinet level. Public interest immunity was claimed in respect of the ministerial documents.

It was held in the House of Lords that a case for inspection of these documents by the courts had not been established. Lord Fraser stated that even Cabinet minutes were not completely immune from disclosure—for instance, in a case involving serious misconduct by a cabinet minister—however, in general, documents of this type are entitled to a high degree of protection. It was not enough to establish that the documents were relevant to the matters at issue and necessary for disposing fairly with the case. Because PII had been claimed there was an onus on the plaintiffs to show why the documents ought to be produced for inspection by the court in private. It needed to be established how they would help their own case, the test being:

> …in order to persuade the court even to inspect the documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he 'might be deprived of the means of… proper presentation' of his case.

It was further suggested that inspection should not take place unless the court was *likely* to order production. Equally, although Lord Wilberforce placed considerable emphasis on the court doing, and being seen to do, justice as between the parties in the instant case, he also stressed that *likely*, in relation to any benefit to the plaintiff's case, must mean more than a mere 'fishing' expedition. (Note also the divergence in the approaches of Lords Scarman and Templeman, who favoured private inspection of the documents by the court.)

17.6.4 What is the public interest? The candour argument

There have been a number of notable decisions which have required the courts to consider whether it is truly 'necessary for the proper functioning of the public service' for a class of documents containing confidential information to continue to be protected. In essence, it is a question of deciding whether the public interest is being served by preserving the anonymity of the source of information. As we have seen, the candour argument in support of non-disclosure is founded on the assumption that important information that official bodies, such as the police, rely on will not be forthcoming if those volunteering information face the prospect of having their identity unmasked. In *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 a company believed that its assessment for purchase tax was too high. In reaching its assessment, the Customs and Excise Commissioners had obtained information from the company's customers and other sources regarding the value of its machines. The company required this information to contest its assessment for tax before the arbitrator. After weighing the considerations, it was held in the House of Lords that disclosure would be harmful to the efficient working of the Act of Parliament. Unless they remained

anonymous, such sources would be less willing to come forward and cooperate with the Commissioners of Customs and Excise, leading to a less effective discharge of the Commissioners' duties.

Williams v Home Office (No 2) [1981] 1 All ER 1151 allows us to compare another important decision in which, after the judge had examined the relevant documents, the candour argument was overridden and the public interest was considered to be best served by disclosure. It concerned a long-term prisoner who wanted to bring an action against the Home Office, after he had spent time in an experimental control unit at Wakefield prison. A large stack of documents was produced, but the Home Office objected, in particular, to the production of 23 documents which involved communications to and from ministers, and between ministers and officials. These documents were in a class that involved the formulation of policy, and it was claimed that immunity here was required for the proper functioning of the public service. Nevertheless, it was held that it appeared that the rights of the applicant may have been interfered with and that there was a reasonable probability that these documents contained relevant material, which was essential to prove that such a policy existed. McNeill J examined the documents and then ordered six of them to be disclosed at the trial. In this case, it is clear that the needs of the prisoner outweighed the possibility that the Home Office might be subjected to ill-judged and unfair comment.

17.6.5 Public interest immunity and the police

Since *Conway v Rimmer*, a significant number of PII cases have concerned the police. It can be readily acknowledged that the police occupy a special position by being charged with the responsibility of conducting investigations into serious crime and, in general, a strong case can be made for their operations and tactics being kept strictly confidential. But there have been occasions when the courts may have been too ready to grant immunity. For example, *Gill and Goodwin v Chief Constable of Lancashire* (1992) *The Times*, 3 November was a civil action for negligence by police officers against their local force. They had sustained injuries during a riot training course by being burnt when a pool of petrol was ignited by an instructor. In order to prove their case they sought disclosure of the Public Order Manual used by the police, but the Chief Constable objected to this being revealed on the ground of PII. The trial judge had ordered disclosure, but this decision was overruled by the Court of Appeal because the manual belonged to a class of documents protected by PII. The confidentiality of police strategies in dealing with demonstrations and public order was considered to be of the highest importance, even though it appeared that much of the information in the manual was already widely available. In contrast, *Peach v Commissioner of Police of the Metropolis* [1986] QB 1064 was a civil case in which it was alleged that police action had been responsible for unlawfully killing a demonstrator. On this occasion the Court of Appeal decided that documents relating to the incident ought to be released. This was on the grounds that the public interest in determining the cause of death at a public inquiry outweighed the need for the maintenance of confidentiality.

However, while confidentiality has been widely recognised as an established ground for claiming immunity in actions involving the police, we can see that problems have arisen in a number of other situations where there have been claims

of immunity for a class of documents. For example, where there have been complaints against the police; where civil claims have been taken against the police following complaints; and when police officers have sought to challenge decisions relating to disciplinary or discriminatory matters concerning their employment.

This position was significantly modified by the decision of the House of Lords in *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274. But we must first briefly consider a number of earlier cases. In *Neilson v Laugharne* [1981] QB 736, it was held by the Court of Appeal that statements made as part of an investigation which had taken place under the Police Act 1964, s 49, could not be used in subsequent civil proceedings. (This was after the plaintiff had his house searched for drugs while on holiday, and was then arrested on his return before being released without charge.) The protection of this information was justified not simply by the need to maintain confidentiality, but by resort to the 'candour' argument (see 17.6.4). It was accepted by the court that the use of this type of evidence would deter witnesses from frank cooperation in inquiries if they were aware of the future use that this evidence might be put to.

In *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617, the Court of Appeal, in allowing an appeal by the Police Commissioner, adopted the same reasoning as in *Neilson v Laugharne* (accepting the candour argument), but the circumstances were somewhat different. The plaintiff had instituted civil proceedings against the police following an investigation under the Police Act 1964, s 49. Nevertheless, on this occasion, she sought discovery of her own statements that had been made as part of the investigation, and also a transcript of her own evidence from subsequent disciplinary proceedings. Bingham LJ stated (in a judgment later referred to critically in the Scott Report) that the Commissioner was under a duty to claim immunity: 'Public interest immunity is not a trump card vouchsafed to certain privileged players to play when and as they wish. It is an exclusionary rule, imposed on parties in certain circumstances, even when it is to their disadvantage in the litigation.' Thus Bingham LJ regarded PII not as a privilege that can be waived by the Crown or by any party. In another case, *Halford v Sharples* [1992] 1 WLR 736, an Assistant Chief Constable, taking proceedings against the police for sex discrimination, unsuccessfully applied for the disclosure of complaints and disciplinary files which she had previously had in her own charge. These files contained information directly relevant to her complaints of discrimination. Such blanket protection meant that members of the police service were seriously encumbered when seeking to make a complaint of sexual or racial discrimination. There must surely be a broad contravening public interest in just complaints of this kind being pursued.

17.6.6 A significant retreat from the candour argument

In *R v Chief Constable of West Midlands Police, ex p Wiley* [1995] 1 AC 274, the House of Lords overruled *Neilson v Laugharne* [1981] QB 736 and the other cases based upon the previous authorities (including *Makanjuola v Commissioner of Police of the Metropolis* [1992] 3 All ER 617). Their Lordships held that documents coming into existence during police complaints proceedings do not fit into a class covered by PII. Indeed, a surprising feature of the appeal was that the Chief Constables themselves contended that PII did not attach to this class of documents. In his

judgment, Lord Woolf dismisses any contention that the balance of public interest has altered and maintains that a class claim should be rejected because such a claim was never justified, indicating that the reasoning of previous cases was fundamentally flawed (although a contents claim could still be made with regard to police disciplinary investigations). Another point discussed by Lord Woolf was the assumption of 'a level playing field' in cases where a claim for PII has been made. That is, if documents were unavailable to one side, they would be equally unavailable to the other side.

However, this trend towards disclosure in *ex p Wiley* was qualified in *Taylor v Anderton* [1995] 1 WLR 447. The Court of Appeal held that reports prepared by investigating officers in the conduct of police disciplinary proceedings were entitled to the protection of PII. This was to enable investigators to feel free to report on professional colleagues, in the interests of candour. Accordingly, such reports fell into a class protected by public interest immunity and would be disclosed only where the public interest in disclosure outweighed that in preserving their confidentiality. Sir Thomas Bingham MR acknowledged a strong current flowing in favour of openness and disclosure, emphasising the role of the trial judge in weighing the considerations for and against disclosure in any particular case. In *Powell v Chief Constable of North Wales Constabulary* (2000) *The Times*, 11 February, it was held by the Court of Appeal that PII attached to the identity of a police informer because the evidence would be only slightly helpful to the claimant and the public interest in preserving immunity was 'infinitely stronger' here.

We have recognised that there is a clear public interest in the operations of the police and the security services remaining confidential; but, notwithstanding this important consideration, it appears that the courts have sometimes been too willing to accept the candour arguments in such cases. The result has been the exclusion of material without properly balancing the overall public interest in relation to the particular considerations of individual cases. The decision in *ex p Wiley* goes some way to redressing the balance in favour of disclosure.

17.6.7 Public interest immunity in criminal cases

In *Duncan v Cammell Laird and Co Ltd* [1942] AC 624, Viscount Simon LC stated that 'the judgment of the House in the present case is limited to civil actions and the practice as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same'. The rules discussed so far have developed in and been limited to civil proceedings. In criminal proceedings the question can be put very simply: can a situation ever be envisaged where the public interest in non-disclosure of documents outweighs the public interest in ensuring that in a criminal trial, justice is both done and seen to be done? It is not all that unusual for criminal cases to involve documents to which a PII claim might attach. For example, evidence might arise which the state, in the form of the police or security services, might wish to suppress in particular where an informer has been used and the individual's identity might be revealed. As Lord Taylor CJ put it in *R v Keane* (1994) 99 Cr App R 1 at p. 6. 'If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.' In circumstances where the public interest requires that disclosure should be withheld, the result may be that the prosecution cannot

proceed. This is because of the prospect of a miscarriage of justice if the evidence is not disclosed. In such cases, the judge will normally have a role in examining the documents to ascertain their sensitivity and relevance. If they are examined and found crucial to establishing the innocence of the defendant, the prosecution will be faced with a choice—they can either decide to release the document, or they can drop the prosecution (see *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269 below where the House of Lords have recently addressed this issue). However, an additional dimension will be present when the immunity is claimed on the grounds of national security. The telling example of Matrix Churchill, a criminal prosecution, vividly bought to the public attention many of the dangers that can arise from claims of PII in a criminal trial. It is worth examining the case, and the issues arising from it, in greater detail.

17.6.7.1 *The Matrix Churchill case*

Matrix Churchill concerned the trial of the directors of a machine tool company which had been responsible for exporting to Iraq tools and components that had possible military uses. Trading in such materials was in flagrant breach of the export guidelines published by the government. After certain parts (for a 'super gun') had been seized by customs officers, three directors of Matrix Churchill were prosecuted by HM Customs and Excise for being involved with these illegal exports. Even greater prominence was given to the matter as it surfaced almost coincidentally with the outbreak of the Gulf War in 1990. However, the defence case was founded on the contention that the government and the intelligence services had known about the sales to Iraq from the outset. The trial threatened to, and in the event did, unmask a tangled web of conflicting engagements between government departments. The Foreign Office was assuming an appearance of impartiality. The Department of Trade was promoting British business, manufacturing and exports vigorously. The Ministry of Defence was considering the strategic and intelligence situation. The political sensitivity of the trial was pronounced because the defence case would reveal that certain ministers at the Department of Trade had been flouting the government's own policy guidelines. Behind the scenes, companies supplying defence equipment had not only been encouraged to trade with Iraq, but the business executives involved were at the same time being useful by feeding vital information to the intelligence services. The extent of this collusion would be revealed if the relevant documents entered the public domain. Category A documents constituted a couple of pieces of paper from a confidential informant. Category B were ministerial and departmental documents, and were covered by a certificate signed by a junior minister, on behalf of the Foreign Secretary. This certificate claimed they were concerned with high level policy formulation and included the advice given to ministers. It was strongly maintained that it would be against the public interest to release this information, as being prejudicial to the giving of honest and candid advice. Category C documents were to do with security and secret intelligence matters, signed by three ministers because it was asserted that these documents would identify members of the intelligence services and their deployment.

There was surprisingly little direct authority on PII in criminal cases. Judge Smedley, presiding over the *Matrix Churchill* trial, turned to *R v Governor of Brixton Prison, ex p Osman (No 1)* [1991] 1 WLR 281, and was of the opinion that class

immunity had been rightly claimed by ministers. After the certification of documents, the judge believed the protection for the accused lay with the appropriate judicial scrutiny. Mann LJ had stated in *ex p Osman* that it is the judge who must weigh the competing interests in the administration of justice and determine if the documents can be used. He further stated that 'Where the interests of justice arise in a criminal case touching and concerning liberty…the weight to be attached to the interests of justice is plainly very great indeed'. It inevitably follows from this *dictum* that in a criminal case a class claim is only rarely likely to survive the judicial balancing of interests. Simon-Brown LJ in *R v Horseferry Road Magistrates' Court, ex p Bennett (No 2)* [1994] 1 All ER 289 makes the same point: 'In short, to say of a class of documents that it attracts public interest immunity is something of an oversimplification. What the documents in a class attract is no more than prima facie immunity from disclosure, an immunity dependent upon there being no weightier public interest requiring their disclosure.' Judge Smedley's robust approach to disclosure, at least on one view of the proceedings, resulted in the collapse of the *Matrix Churchill* trial.

Subsequently, it became a matter of great controversy whether a class of documents must be automatically certified because of a duty resting on ministers. Certain Conservative ex-ministers maintained in public that their reason for signing PII certificates was, despite clear misgivings, entirely the result of following (what turned out to be erroneous) advice of the Attorney General to the effect that ministers were under a duty to sign PII certificates falling within a protected class without questioning their contents. They were told by the Attorney General they had no choice in the matter.

If this position is accepted, it is still essential to ask how it is decided by a minister when this duty arises. The fact that there is no mechanism dealing with this question, suggests that there is a wide discretion in defining the grounds on which immunity can actually be claimed. Bearing this in mind, it is not at all surprising that charges of abuse of process gained momentum. For example, how could ministers possibly reconcile their willingness to suppress information with regard to the *Matrix Churchill* trial on the basis that they were slavishly following the Attorney General's advice, when in July 1993 the same government authorised the disclosure of letters written by the Attorney General (whose advice is always strictly confidential) with regard to the questionable conduct of Michael Mates MP in his dealings with businessman Asil Nadir? Presumably, disclosure was deemed to be expedient, so that the apparently strict rule that a class claim should always be asserted was conveniently overlooked. (The fact that ministers exercise discretion on whether to sign certificates was acknowledged by Kenneth Clarke MP in his evidence to the Scott Inquiry.) Furthermore, we should remember Lord Kilmuir's statement, in 1956, that the government would not invoke PII in criminal trials. Had this escaped the notice of the Attorney General when he proffered his advice? In his findings Sir Richard Scott attached great importance to providing a fair trial. The court had a role in protecting the fundamental rights of the accused which would include insistence on disclosure of prosecution evidence that might be favourable to the defence. This was regarded as a basic safeguard necessary to uphold the rule of law but the Scott Report itself failed to recommend any legislative steps that might lead to root and branch reform to codify this principle.

In fact, in relation to PII claims in criminal cases it is doubtful whether 'the efficient functioning of the public service' (the test set out in *Conway v Rimmer*: see 17.6.3.3) can ever provide a satisfactory justification for refusing to release documents necessary for the defence. If we accept that the considerations of justice are likely to be viewed by the trial judge as overwhelming in criminal cases, it seems pointless for such claims to be asserted by ministers in the first place.

After the collapse of the *Matrix Churchill* trial, the Court of Appeal in *R v Ward* [1993] 1 WLR 619 confirmed that the prosecution in a criminal case has a duty generally to disclose all the evidence which it has gathered. This involves giving notice to the defence of the categories of material that are held and allowing the defence to make representations to the court. It was for the court to make the ultimate decision about disclosure to avoid the prosecution being the judge in its own cause. However, Lord Taylor CJ in *R v Davis* [1993] 1 WLR 613 and *R v Keane* (1994) 99 Cr App Rep 1 chose to qualify these guidelines and referred to situations where even disclosing the existence of a category of material might be going too far.

17.6.8 Disclosure of evidence and human rights

Even before the Human Rights Act 1998 (HRA) came into force on 2 October 2000, the European Court of Human Rights in an important decision unanimously found that there had been a violation of Art. 6(1) of the ECHR in *Rowe and Davis v United Kingdom* [2000] Crim LR 584. In this case the prosecution, without informing either the defence or the trial judge, had withheld evidence of the relationship between a police informer and the police and that there had been a reward involved. The Court of Appeal had upheld the non-disclosure in *Davis, Johnson and Rowe* [1993] 1 WLR 613, but without hearing from witnesses concerned. The European Court held that the requirements of a fair trial imposed a duty of disclosure of evidence on the prosecution. Although this right was not absolute (e.g., evidence might be withheld if this threatened the safety of a witness), any limitation must be strictly necessary. It was made clear that holding back evidence without informing the judge amounted to an unfair procedure. On the other hand, in *Jasper v United Kingdom*; *Fitt v United Kingdom* [2000] Crim LR 586, it was held by a narrow majority, 9 votes to 8, that there had not been a violation of Art. 6(1). In this case the trial judge had taken the decision whether or not to disclose the material, and the defence had been fully informed of the situation. These decisions indicate that withholding evidence without informing the court will clearly be in breach of Art. 6(1), but the procedure that must be followed to decide whether the evidence will be allowed has yet to be fully determined.

In *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269 the House of Lords clarified the position where the prosecution claims PII in a criminal trial, while also taking account of the requirements of Art. 6 of the ECHR and the Strasbourg jurisprudence. In the instant case the defendants had been charged with conspiracy to supply heroin. In order to establish a defence based on the planting of evidence and the falsification of observations by the police, the defendants made far-reaching requests for disclosure, including of material relating to covert human intelligence sources relating to the investigation. Without first fully considering the evidence the trial judge sought to appoint special counsel to consider this evidence. The House of Lords rejected the general contention that, 'it was [now] incompatible

with Article 6 for a judge to rule on a claim to PII in the absence of adversarial argument on behalf of the accused where the material which the prosecution is seeking to withhold is, or may be, relevant to a disputed issue of fact....' (see *Edwards and Lewis v United Kingdom* 22 July 2003, unreported, Application Nos 39647/98 and 40461/98). Rather their Lordships recognised that there were circumstances where some derogation from the golden rule of full disclosure may be justified and, adopting the language of proportionality, they stated that any 'such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial'. (It was also acknowledged that very occasionally the evidence in question might be so sensitive that even its existence could not be disclosed.) A series of related questions were set out (para 36) to assist the court in determining the risk of serious prejudice likely to be caused to the defence where PII was claimed by the prosecution. In cases of exceptional difficulty where there would be a risk of serious prejudice to the defence and where the court also identified a public interest to be protected, their Lordships recognised the need to appoint a special counsel to represent the interests of the defence without disclosing the disputed evidence. In addition to upholding applications for Public Interest Immunity on grounds of national security the Court of Appeal has recently upheld an application by the Home Secretary in *R v Wang Yam* [2008] EWCA Crim 269 for part of a murder trial to be held in camera despite claims of incompatibility with Arts. 6 and 10 of the ECHR. This action was justified under s 8(4) of the Official Secrets Act 1920 which grants the courts power to exclude the public from legal proceedings if their presence would be prejudicial to national security.

17.6.9 Further developments since the Scott Report

(1) In line with the recommendations of the Scott Report the distinction between class and contents claims was abolished in respect of central government in England and Wales in December 1996 (see Hansard HL Deb, vol. 576, col. 1507 and HC Deb, vol. 287, col. 949, 18 December 1996). In consequence, blanket immunity is removed and ministers can claim PII only when they consider that the disclosure of a specific document (or documents) will cause 'real damage or harm' to the public interest. Although no definition of 'real damage to the public interest' is provided, this includes, e.g., preventing harm to individuals (informants); or damaging the regulatory process, international relations, or economic interests. The new guidelines mean that at the very least, 'Ministers...have to be a good deal more open about their reasons for not being open' (Tomkins 1997).

(2) The Criminal Procedure and Investigations Act 1996 (and revised codes of Practice) changed the procedure for disclosure in criminal trials. For example, under s 3(1)(a) the prosecutor is under a duty to disclose to the accused any prosecution material which, in the prosecutor's opinion, *might undermine* the case against the accused. This formulation can be criticised as allowing considerable scope for deciding against disclosure, arguably leaving too much discretion with the prosecution. Given that some of the most celebrated miscarriages of justice have turned on this very issue (e.g., *R v*

Ward [1993] 1 WLR 619 above) it is not surprising that such an approach was regarded as potentially prejudicial to the interests of the accused. However, the procedure has been modified to conform with the requirements of the Human Rights Act 1998 and see *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269 above in regard to PII in criminal cases.

(3) SIAC and Terrorism Threat—The Special Immigration Appeals Commission (SIAC) is a judicial oversight body originally created by the Special Immigration Appeals Commission Act 1997 to hear specific immigration and asylum appeals that could not be brought before the Asylum and Immigration Tribunal for national security or other public interest reasons. SIAC's jurisdiction has increased with the government's restrictive response to the increased threat of terrorism (e.g., the Terrorism Act 2000 permits pre-charge detention of up to 28 days; Part 4 of the Anti-Terrorism Crime and Security Act 2001, before its repeal, allowed indefinite detention without trial of non-British nationals suspected of terrorism; the Prevention of Terrorism Act 2005 allows the imposition of control orders for terror suspects). If an appeal before SIAC contains evidence that cannot be made public due to national security considerations, closed sessions are held and the appellant is represented by special advocate. Following the introduction of control orders under the Prevention of Terrorism Act 2005 SIAC must produce a written determination giving reasons for its decision, to the extent that it is possible to do so without disclosing information contrary to the public interest (Special Immigration Appeals Commission (Procedure) (Amendment) Rules 2007). Although SIAC's rules have been revised to include improved safeguards, the procedure adopted continues to face criticism from civil liberties groups.

(4) The Freedom of Information Act 2000 (FOI) which came fully into force on 1 January 2005 introduces a 'general right to know'. Despite its limitations, the Act has a far reaching impact on the way official bodies handle information. Public authorities including, the courts, the Crown Prosecution Service and the police are required to supply the citizen with information they hold on demand (not the actual documents but information contained in documents). Although Part II of the FOI sets out numerous excluded categories and imposes many qualifications to this right, this regime makes a substantial difference to the types of official information placed in the public domain. Also, publication schemes have become a routine requirement for public authorities. An Information Commissioner and staff oversee the operation of the Act and ensure compliance with its principal requirements. In this discussion so far we have seen that the rules of disclosure applying to the trial process and the principles of PII were developed against a backdrop of confidentiality in the practice of government at both national and local level which were heavily criticised by Lord Justice Scott. Moreover, in the desire to avoid time wasting the courts have historically expressed resistance to extravagant claims for disclosure, termed 'fishing expeditions' (see e.g., *Air Canada v Secretary of State for Trade* [1983] 1 All ER 910 above). The Freedom of Information Act allows the citizen to request information without any need to state the reasons for wishing to have the material released which is fundamentally at variance with the targeted approach

required under rules of disclosure at trial. The availability of information on a broader basis from public authorities, coupled with this new right to request information, may facilitate litigation against public bodies by allowing parties to obtain documents more widely, in particular, from public bodies not directly involved in private litigation, and also when making a claim of judicial review against a public authority (see Cane 2004, p. 332).

17.6.10 Conclusion on public interest immunity

The clash between the executive and the judiciary which can arise in claims of PII by central government has certain parallels with the Watergate Affair in the 1970's. After the revelations following on from the break-in at Democratic Party headquarters, attention shifted to the President's claim to protect his own position from accusations of wrongdoing by preventing the disclosure of executive documents and tape recordings. *Nixon v United States* 418 US 683 (1974) can still be regarded as an historic decision which may be referred to in support of the view that there is, in the words of Burger CJ, no 'unqualified Presidential privilege of immunity from judicial process under all circumstances'. We should both take heed of these words and demand candour from our politicians and civil servants. The introduction of the Freedom of Information Act 2000 has gone some way to fulfilling these demands. However, it contains a manifest limitation by including a ministerial override which means that even when the Information Commissioner issues a *decision notice* against the executive recommending publication the notice can be overruled by a government minister or by the Attorney General.

In determining questions of PII it has been apparent that judges occupy an exposed position as they are required to decide between the executive organs of the administrative state and the citizen. There have been many situations in the past where the government and other public bodies have exerted pressure on the courts to identify the public interest with maintaining confidentiality in their activities. In what circumstances is this really justified? Clearly, there are times when national security and other such considerations arise, and when the sensitivity of information means that the public interest does lie in ultimately withholding information from a person seeking a remedy in the courts. But even then, what can be the objection to immunity being granted only after the interests have been balanced, the one with the other, by a judge. The candour argument (which suffered its first assault from the House of Lords in *Conway v Rimmer*) has remained a formidable obstacle, surfacing in numerous situations—e.g., in *Taylor v Anderton* [1995] 1 WLR 447. It was held in this case that reports of officers conducting police complaints inquiries were in a class immune from disclosure. As a possible consequence, members of the public, or of the police force, who believed that their rights had been infringed were prevented from taking further action because of the suppression of relevant evidence. It is submitted that a strong case can be made for identifying a broader public interest here, namely, that public confidence in the police force is best served when it is felt that just complaints are sustained and that deserving victims are compensated. Finally, it has been pointed out that in criminal cases there is no public interest that outweighs the public interest in securing a fair trial. Should this not be guaranteed because of the suppression of evidence, the prosecution case should normally be abandoned. The decision by the European

Court of Human Rights in *Rowe and Davis* and *Jasper and Fitt* has made the withholding of evidence by the prosecution in criminal trials much more difficult and the House of Lords in *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269 has recently set out clearer guidelines in balancing the issues in such cases.

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