Constitutional Jurisdiction in the United Kingdom

Geoffrey Marshall *) *D. C. M. Yardley* **)

In what sense is there constitutional jurisdiction?

It is well known that no formal constitutional instrument exists in the United Kingdom. It follows, therefore, that questions about constitutional jurisdiction can only be formulated in the following way: By what rules, legal and non-legal, are the most important principles of constitutional behaviour defined, and by what agencies, juridical and political, are those rules applied and interpreted? Since no fundamental rules of law restrict the competence of the legislature and no legal organ has the power of judicial review over legislative acts, constitutional jurisdiction in its most familiar sense might be said simply not to exist. However some legal rules which now exist might be called "fundamental" in that they are not in practice likely to be altered, and there are a number of non-legal rules (the "conventions" of constitutional behaviour) which might be called "fundamental" in the sense that the most important of them are regarded as morally binding by both people and government. Judicial review and constitutional jurisdiction of course exists in the sense that the ordinary courts of law will ensure that the actions of all officials and subordinate agencies comply with the terms of Acts of Parliament and are not *ultra vires*.

The rules which define constitutional rights might be classified as follows:

1. *Legal rules deriving from both common law and statute which govern the manner in which legislative authority is exercised*

The major principles are that a statute must be made by the concurrent action of Crown, Lords and Commons, and that a statute passed in the

*) Fellow of the Queen's College, Oxford.
**) Fellow of St. Edmund Hall, Oxford.

proper manner and form may repeal any existing provision of law. However, it is provided by the Parliament Acts 1911 and 1949 that in certain defined circumstances financial legislation may be passed without the assent of the House of Lords and other legislation may be passed by the Commons and Crown without the Lords after an effective delay of one year. The Act of 1911 fixes the maximum duration of each Parliament at five years and this period may not be extended without the assent of the Lords.

2. *Substantive common law and statutory rules which define the structure and powers of the executive machinery of government and the rights and duties of individuals*

Here complete enumeration would be lengthy. Examples are the Acts of Union and statutes providing for the government of Northern Ireland, the Judicature Acts, Crown Proceedings Act, Statutory Instruments Act, Life Peerages Act, legislation setting up government departments, nationalised industries and providing for the conduct of elections and delimitation of constituency boundaries.

Much of this legislation deals with rights of citizens as well as with the structure of government (for example the Representation of the People Acts and the Tribunals and Inquiries Act). Other legislation directly affecting rights and duties can be found in the Bill of Rights of 1689, the Habeas Corpus Act, Official Secrets Acts, Public Order Act, British Nationality Acts and Administration of Justice Acts. Rules as to police powers, breach of the peace, public meeting, treason and sedition are laid down both in statute and decisions at common law.

3. *Non-legal rules practices and convention*

The most important of these regulate the relations between the Cabinet and Parliament, Government and Opposition and between the Prime Minister and the Crown. They are also important in the field of Commonwealth relations.

These then are the principle classes of rules. What are the agencies by which they are applied interpreted and enforced? The following could well be described as exercising in this sense a constitutional jurisdiction:

1. The Courts of Law
2. The House of Commons (and in a lesser degree the House of Lords)
3. Government Departments and Special Tribunals
4. The organs of public opinion.

The Agencies which apply and interpret constitutional rules

1. *The Courts*

The courts are bound by all statutory provisions which have not yet been repealed by later statutes, and also by all valid subordinate legislation. This means that it is never open to a court to declare an Act of Parliament unconstitutional or in any other way invalid. Admittedly no court will hold itself bound by the provisions of any document purporting to be a statute unless it appears on its face to have been passed by both Houses of Parliament and to have received the Royal Assent [1]), but it is very unlikely, to say the least, in British constitutional practice that Parliament, or any part of Parliament, should attempt to declare a mere resolution of, say, one of the Houses to be an Act of the whole Parliament [2]). An Act of Parliament passed in the proper manner and form may repeal any existing statute, and it may even implicitly repeal any provision in an earlier statute which is inconsistent with it [3]). Parliament may, by statute, delegate its powers to public officials, Government Departments or local authorities. There is no theoretical limitation on the ambit of the power which can be delegated in this way, and when the public authority concerned exercises any of the powers delegated to it it is said to be creating delegated or subordinate legislation [4]). Provided that the public authority keeps within the limits of the powers conferred by the enabling statute,

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[1]) See *Edinburgh and Dalkeith Ry.* v. *Wauchope* (1842), 8 Cl. & F. 710, *per* Lord Campbell. The provisions of the Parliament Acts, 1911 and 1949, however, allow certain types of public Acts to be passed without the consent of the House of Lords, and these Acts are also binding upon the courts. The procedure under the Parliament Acts has only rarely been invoked.

[2]) For an example of a resolution of the House of Commons held by the Court of Queen's Bench to be incapable of changing the law, see *Stockdale* v. *Hansard* (1839), 9 A. & E. 1.

[3]) As was held in *Vauxhall Estates Ltd.* v. *Liverpool Corporation,* [1932] 1 K. B. 733, followed in *Ellen Street Estates Ltd.* v. *Minister of Health,* [1934] 1 K. B. 590. It is an unsettled question whether the three elements of Parliament acting by the present process of a simple majority in each House may fetter future legislative action by providing for certain purposes a manner and form of legislation other than the simple majority process in each House. On this topic, see e. g.: Marshall, Parliamentary Sovereignty and the Commonwealth (1957); Dicey, Introduction to the Study of the Law of the Constitution (10th ed. by Wade 1959), Chapter I; Keir and Lawson, Cases in Constitutional Law (4th ed., revised 1954), Part VII; Jennings, The Law and the Constitution (5th ed. 1959), Chapter IV; Heuston, Essays in Constitutional Law (1961), Chapter 1; Yardley, Introduction to British Constitutional Law (1960), p. 25–29; Wade, The Basis of Legal Sovereignty, [1955] C. L. J. 172.

[4]) As to the necessity of delegated legislation in modern times, see Report of the Committee on Ministers' Powers (Cmd. 4060, 1932).

no court may question the actual exercise of discretion in the creation of delegated legislation. On the other hand it is always open to a court to question whether the exercise of legislative powers by a subordinate authority has been *ultra vires* [5]), and it may set aside any delegated legislation found to be bad for this reason.

Apart from statutory law, the courts have the power to develop the common law in appropriate cases [6]); and even where statute law is applicable the courts not only have the power, but may be faced with the duty to interpret statutory provisions or the provisions of a piece of delegated legislation. Where a civil action or a prosecution turns upon the terms of a statute or of delegated legislation, the court must decide what the wording of the statute means. In performing his function the courts usually seek the literal or grammatical interpretation of the words in question, though they often modify this approach by rejecting manifest absurdities [7]). *Attorney-General* v. *Prince Ernest Augustus of Hanover* [8]) might be cited as an example of the working of this principle. An Act of the reign of Queen Anne, passed in 1705, provided that, to the end that the lineal descendants of Princess Sophia (who was the mother of King George I of England and Scotland) might "be encouraged to become acquainted with the laws and constitution of this realm", they were deemed to be natural-born subjects. Prince Ernest Augustus claimed British Nationality under the terms of this statute [9]) of which the preamble stated that "It is just and highly reasonable that they, in your Majesty's lifetime . . . should be naturalized". Vaisey, J., in the Chancery Division, held that it was clear that the legislature must have intended that the provision should only apply within the lifetime of Queen Anne. But the House of Lords, on appeal [10]), held that the effect of the Act was not limited to persons born in the Queen's lifetime, and that there was no absurdity in granting that the Prince was a British subject [11]).

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[5]) See *R.* v. *Minister of Health, ex. p. Yaffe,* [1930] 2 K. B. 98, [1931] A. C. 494 *(sub. nom. Minister of Health* v. *The King on the prosecution of Yaffe);* cf. *Institute of Patent Agents* v. *Lockwood,* [1894] A. C. 347.

[6]) In the hierarchy of courts, all courts are bound by previous decisions of superior courts or of courts of the same standing. There are certain exceptions to this general principle which need not concern us in this paper. See Rupert Cross, Precedent in English Law (1961).

[7]) On this whole subject see Allen, Law in the Making (6th ed. 1958), p. 466–516.

[8]) [1957] A. C. 436.

[9]) [1955] 2 W. L. R. 613.

[10]) The House of Lords is the ultimate court of appeal in the United Kingdom.

[11]) The Act of Queen Anne was in fact repealed by the British Nationality Act, 1948, but without affecting the status of persons who were British subjects at that date. The

One further principle of statutory interpretation should be mentioned here, namely the rule that it is open to the court to consider what mischief the particular statute was designed to remedy [12]). This principle implies an investigation by the court as to the state of the law on the particular point in question before the statute was passed; and it would seem to imply, logically, that the court may consider what are sometimes termed the *travaux préparatoires* of the statute. In most Continental countries recourse is had freely to *travaux préparatoires* in the interpretation of statutes. In the United States of America the practice is not entirely settled, but references to the Congressional history of statutes, and especially to the reports of committees, are now fairly frequent. Certainly in the interpretation of the United States Constitution recourse has always been taken to the debates in the Convention which drew up the Constitution. But in England it is not permissible for any court [13]) to consider the Parliamentary history of an Act of Parliament as an aid to interpretating the words of the finished product. There are many English critics of this strict rule, but the justification always given for it is that the speech of any single member of either House, even of the Minister who introduces the Bill in the first place, cannot be considered to give anything but a misleading impression of that indefinable and intangible thing, the will of Parliament as a whole. The nearest that English courts ever get to the Continental practice is in admitting in evidence reports of various committees set up to recommend law reform; but even then the reports are only admitted in so far as they set out what the law was at the time, and they are never admitted to show what the suggested reform may have been. Thus the courts are permitted to use extrinsic aids to discover the mischief that may have been in the old law, but not to discover the reform which was designed to remedy the situation.

As a final example of the operation of statutory interpretation, the case of *Liversidge* v. *Anderson* [14]) might be quoted. The Emergency Powers (Defence) Act, 1939, s. 1(1), provided that His Majesty by Order in

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decision of the House of Lords means that several hundred foreign descendants of Princess Sophia are British subjects, many of whom must have fought against the country during one or other of the World Wars, and would therefore have committed treason. But treason may only be prosecuted within three years of the offence; and Roman Catholics and those married to Roman Catholics and one or two other groups of persons are excluded from the effect of the old Act.

[12]) This is sometimes known as the rule in *Heydon's Case* (1584), 3 Rep. 7 a.

[13]) Other than the Judicial Committee of the Privy Council hearing appeals from courts of Commonwealth countries, where the practice is slightly modified.

[14]) [1942] A. C. 206. See Heuston, *op. cit.*, p. 160–167, for a useful account of this case.

Council "may ... make such regulations ... as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged". Without prejudice to the generality of these powers, s. 1 (2) provided that regulations might be made, *inter alia*, "for the detention of persons whose detention appears to the Secretary of State to be expedient in the interest of the public safety or the defence of the Realm". Regulation 18 B of the Defence (General) Regulations issued under this Act provided that: "(1) If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations ... and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained". A detention order was made by the Home Secretary in 1940 against Liversidge on the ground that he had reasonable cause to believe that Liversidge was a person of hostile associations, and that by reason thereof it was necessary to exercise control over him. Liversidge was accordingly detained in prison, but shortly afterwards he issued a writ against the Home Secretary, claiming a declaration that his detention was unlawful, and damages for false imprisonment. For justification of his action the Home Secretary merely produced the order purporting to be made under Regulation 18 B (1), and the House of Lords held, by a majority of four to one, that the matter was one for executive discretion. Lord Maugham, L. C., held that the words "has reasonable cause to believe" did no more than draw the attention of the Home Secretary to the fact that he should personally consider the matter himself, and that he must act in good faith; the whole question was one of statutory interpretation, and the fact that the person to exercise the power was a Secretary of State indicated that Parliament may have been content to leave the matter to his otherwise unfettered discretion [15]). As Lord Maugham said, "we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention". This decision was followed in other cases [16]), but more recent cases have made it clear that the House of Lords was not laying down an inflexible and binding way of interpretating the words "has reasonable cause to believe". Thus, in

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[15]) But see the spirited dissenting judgment of Lord Atkin [1942] A. C., at p. 225.

[16]) See *Green* v. *Home Secretary*, [1942] A. C. 284; *R.* v. *Home Secretary, ex p. Lees*, [1941] 1 K. B. 72; *Budd* v. *Anderson*, [1943] K. B. 642. For a parallel case from the First World War, see *R.* v. *Halliday, ex p. Zadig*, [1917] A. C. 260.

Nakkuda Ali v. *Jayaratne* [17]), the Judicial Committee of the Privy Council emphasised that no general rule for the construction of the expression had been laid down, and held that the use of the phrase in a regulation authorising a controller of textiles in Ceylon to withdraw the licence of a cotton dealer suspected of misconduct implied that there must in fact exist grounds for such a withdrawal [18]). It can be seen, therefore, that methods of statutory interpretation are employed by the courts to uphold the rights of individuals as well as to justify executive action.

2. *The House of Commons*

The House of Commons exercises a very important rôle within the framework of the Constitution. Apart from those aspects of the House considered in the first part of this article, the House of Commons plays its most important part by enforcing its privileges [19]). The House claims quite a large number of different privileges, but most of them are obsolete or of no practical importance today. Nevertheless there are probably four privileges which are still of great importance, namely the privilege of freedom of speech in debate, the right of the House to regulate its own composition, the right to take exclusive cognisance of matters arising within the House, and the right to punish members and strangers for breach of privilege and contempt [20]). It is not necessary here to consider these four

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[17]) [1951] A. C. 66. See also *Ross-Clunis* v. *Papadopoullos,* [1958] 1 W. L. R. 546, an appeal to the Privy Council from Cyprus dealing with the imposition of a communal fine which a Commissioner was entitled to impose if he had "satisfied himself" of certain circumstances. It was held that if it could be shown that there were no grounds upon which the Commissioner could be so satisfied, then a court might infer either that he did not honestly form that view, or that in forming it he could not have applied his mind to the relevant facts.

[18]) This part of the Privy Council decision may, however, be *obiter,* since the controller's function was in fact held to be executive and therefore not subject to review in the courts; as to which see below. It is also possible that the distinction made by the Privy Council between this case and *Liversidge* v. *Anderson* may turn on the difference between powers granted to a senior Minister of the Crown and those granted to a comparatively junior official. In *Commissioners of Excise* v. *Cure and Deeley,* [1961] 3 W. L. R. 798 a regulation was held to be *ultra vires* though the empowering statute provided that the Department might make regulations "providing for any matter for which provision appears to them to be necessary for the purpose of giving effect to the provisions of this part of the Act".

[19]) The House of Lords also has its privileges, but they are rarely called into question, probably because the House does not consist of elected representatives, and its members therefore do not feel obliged to act as champions of the people.

[20]) On the whole subject, see e. g. Hood Phillips, The Constitutional Law of Great Britain and the Commonwealth (2nd ed., 1957), Chapter 11; Heuston, *op. cit.,* Chapter 4; Yardley, *op. cit.,* p. 20–24.

privileges in detail, but their extent should be appreciated. Thus freedom of speech in debate is probably the one vital privilege which must be enjoyed by any legislature in a free country. No member of the House would be able to carry out his constitutional functions properly without the protection from prosecution and civil action which it affords. The House of Commons is the forum of the elected representatives of the people, and without the privilege of freedom of speech these representatives would be unable to play their full parts in the deliberations of the House [21]). The right of the House to regulate its own composition covers the problems of membership of the House. It is therefore within the jurisdiction of the House alone to deal with the filling of casual vacancies on the initiative of the government by issuing a writ for the holding of a by-election when, for example, a member has died. Again, the House retains the right to determine of its own motion whether a person, who has otherwise been properly elected, is legally disqualified from sitting [22]), and it may also expel any member who, while not subject to any legal disability, is in its opinion unfit to serve as a member [23]). The right to determine questions of disputed election returns is still nominally retained by the House, except that statute now lays down a procedure whereby Election Courts sit to make decisions upon the merits of such cases, the decisions then being given practical effect by the House [24]). The right to take exclusive cognisance of matters arising within the House implies that the House may regulate its own proceedings as it thinks fit. Thus, the everyday procedure of the House, including even the methods of passing Bills, which will ultimately become Acts of Parliament, is the concern of no other body than the House itself, and it cannot be questioned in any court [25]). The power to punish members and strangers for breach of privilege and contempt has sometimes been criticised in modern times as being unnecessary. Certainly the power to punish for contempt may be too wide,

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[21]) For certains extensions of the privilege to cover written communications etc., see e. g. Hood Phillips, *loc. cit.*

[22]) As where the House determined that the Rev. J. G. MacManaway, a clergyman of the Church of Ireland, was disqualified from sitting in 1950, after seeking the advice of the Privy Council: see n. 30.

[23]) This is commonly done when a court notifies the Speaker of the House that a member has been convicted of an indictable misdemeanour. See also *Report of the Committee of Privileges in the Case of Mr. Allighan* H. C. 1946–7 (138).

[24]) The Acts at present in force are the Representation of the People Act, 1949, and the Parliamentary Elections Act, 1868. For a recent case following this procedure, see *Re Parliamentary Election for Bristol South East,* [1961] 3 W. L. R. 577, where it was decided that Mr. Anthony Wedgood Benn was disqualified from sitting.

[25]) See *Edinburgh and Dalkeith Ry.* v. *Wauchope,* and n. 3 *supra.*

for the House would alone be the judge of what constituted a contempt [26]), but clearly some sanction for a breach of privilege must be provided, even if the power to punish were to be surrendered by the House to the ordinary courts, which would be an unlikely development.

In any case where a member claims that one of his privileges has been infringed, the House may dispose of the complaint forthwith. But if there appears to the Speaker to be a *prima facie* case of such infringement being made out, the complaint is referred to the Committee of Privileges [27]). This is a select committee [28]) appointed by the House at the beginning of each session, and it usually consists of ten members, including the Leader of the House, the Leader of the Opposition and one of the Law Officers of the Crown [29]). This committee may send for any papers it considers to be relevant, and it may also require persons to attend before it. It then makes a report in which it recommends that the House should decide either that there has or that there has not been a breach of privilege (or contempt), and if it recommends that there has been such a breach, it also recommends the course of action that it considers the House should take. In rare cases it may also recommend that the House should seek the advice upon a point of law of the Judicial Committee of the Privy Council [30]). In any event the House is not bound to follow the advice of the Committee of Privileges [31]), but it will usually do so.

In relation to its Parliamentary privileges it is clear, therefore, that the House, together with its Committee of Privileges, is exercising a constitutional jurisdiction which may well affect the rights and liberties of individuals. Of course the present scope of the power of the House in this sphere is always subject to alteration by the passage of an Act of Parliament, which implies the participation of the House of Lords in its enactment, but it is impossible for any such statute to be enacted without the

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[26]) See Hood Phillips, *op. cit.*, p. 156.

[27]) The system of committees is widely employed in the House for a variety of purposes.

[28]) A select committee is any committee of the House composed of a certain number of members specially named, as distinguished from one which consists of all the members of the House, and which does not normally deal with legislative business. The composition of the committee is in relation to the political party ratio in the House.

[29]) At present the Attorney-General.

[30]) There have been two instances of this since the last war: *Re MacManaway, Re House of Commons (Clergy Disqualification) Act, 1801,* [1951] A. C. 161, and *Re Parliamentary Privilege Act, 1770,* [1958] A. C. 331.

[31]) See e. g. the rejection by a small majority of the recommendation of the Committee of Privileges in 1958 that the London Electricity Board had been guilty of a breach of privilege in threatening to issue a writ for libel against Mr. George Strauss, M. P.: 591 H. C. Deb. 208.

active support of the Commons [32]). An example of an area of the privileges of the Commons which, with the support of the Commons itself, is now covered by statute law would be the law govering the conduct of elections and the delimitation of constituency boundaries [33]), where it is desirable that the people generally should be aware of the legal position, and that electoral officers should be sure of the scope of their duties. In one other respect it may be that the jurisdiction of the House of Commons is subject to outside control, this time by the courts. The House has always maintained not only that it possesses certain privileges, but also that it has full power to determine the exact scope of these privileges. Yet the courts have never admitted this claim. The leading case on the subject is *Stockdale* v. *Hansard* [34]). Stockdale sued Messrs. Hansard, the Parliamentary printers, for a libel contained in a report of prison commissioners which had been printed by order of the Commons, and not only laid before the House but also put on sale to the public. The Commons instructed Messrs. Hansard to plead that the report had been ordered by the Commons to be printed and published, and was therefore covered by Parliamentary privilege. The Court of Queen's Bench gave judgment for Stockdale, holding that the courts had jurisdiction to determine whether an alleged privilege existed, although if a privilege did exist, the House was the sole judge as to how it should be exercised. It held that Parliamentary privilege (the privilege of freedom of speech in debate) was legitimately extended to papers circulated among members by order of the House, but not to documents published outside the House; and that no resolution to the contrary by the House could alter the law of the land. The subsequent history of this conflict between the courts and the House need not concern us here [35]), but it suffices to note that the dispute between the two organs as to jurisdiction in this part of the field of Parliamentary privilege has never yet been resolved, though good sense has prevailed in recent times to prevent any unseemly collision [36]).

One other committee of the House of Commons may be said to exercise

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[32]) The Parliament Acts, 1911 and 1949, which give statutory force to the previous constitutional convention that only the House of Commons should concern itself with financial legislation, were passed against the wishes of the House of Lords.

[33]) See the Representation of the People Act, 1949, and the House of Commons (Redistribution of Seats) Acts, 1949 and 1958, which provide for Permanent Boundary Commissions. Cf. *Harper* v. *Secretary of State for the Home Department* [1955] Ch. 238.

[34]) (1839), 9 Ad. & E. 1. Heuston (*op. cit.*, at p. 82–88) gives a full account of this litigation. Cf. *Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271.

[35]) See *Case of the Sheriff of Middlesex* (1840), 11 Ad. & E. 273, and the Parliamentary Papers Act, 1840.

[36]) As in the Strauss affair, *supra*, n. 31.

a constitutional jurisdiction – the Select Committee on Statutory Instruments, commonly called the Scrutiny Committee. Reference has already been made to delegated legislation, and the most important type of delegated legislation is the statutory instrument. Statutory instruments may be defined as orders or regulations made by the Queen in Council [37]) or by one of her Ministers, acting under the terms of an Act of Parliament, and either having the force of law, or else acquiring such force on being approved by either or both Houses of Parliament [38]). All the most important delegated legislation is made by Ministers or by the Queen in Council, which is in fact only a more solemn method of doing the same thing. The Scrutiny Committee came into being partly as a delayed result of the recommendations of the Committee on Ministers' Powers, which reported in 1932 [39]), and it now performs the valuable service of considering all statutory instruments which, by virtue of the provisions of the enabling Acts concerned, must be laid or laid in draft before the House, and which either must be approved by resolution of the House (or of both Houses) before they acquire the force of law or are annulled if either House passes a prayer (resolution) to that effect. The committee may not consider or report on the merits or policy of any instrument, for this would otherwise give rise to the possibility of questioning the exercise of a discretion purposely vested by legislation in the Minister concerned. But the committee does have the duty to consider such problems as whether the powers granted have been exercised in any unusual or unexpected way, whether the instrument purports to have retrospective effect, whether it

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[37]) The Privy Council dates from Anglo-Saxon times, and was an early body of advisers of the Monarch. The present Cabinet has now usurped that ancient position, but the Privy Council still meets in committees for various purposes. One such committee is the Judicial Committee of the Privy Council, hearing appeals from courts in certain Commonwealth countries. Its most important function, however, is in the making of Orders in Council (and occasionally Proclamations), when a small committee consisting mainly of Cabinet Ministres meets to approve in solemn form the policy already decided upon by the Government, and to issue it as delegated legislation.

[38]) Again, as with Parliamentary privilege, the power of the House of Lords in this sphere is not so important in practice. Its own committee, the Special Orders Committee, has less wide powers than its counterpart in the Commons. On the definition of statutory instruments, and the process of laying before Parliament etc., see the Statutory Instruments Act, 1946. On the whole subject generally, see Allen, Law and Orders (1946); Kersell, Parliamentary Supervision of Delegated Legislation (1960).

[39]) Cmd. 4060. The delay was twelve years, and would probably have been longer had not a Minister discovered in 1944 that he had neglected to lay before the House a number of National Fire Service Regulations, which were required to be laid by the enabling Act. It was then thought that the House should introduce its own method of control by the Scrutiny Committee, which was at first called the Select Committee on Statutory Rules and Orders.

involves the expenditure of public money, or whether its purport or form appears to require elucidation; and it may draw the attention of the House to any of these matters it thinks fit in relation to any instrument or draft instrument. Such is the high standard of integrity and care with which statutory instruments are drafted that very few are commented upon by the committee. From 1944 to 1952, the committee considered 6,900 instruments, and only drew the attention of the House to 93 [40]); and among more recent figures, in July 1961 the committee considered 84 instruments, but resolved that it was unnecessary to draw the special attention of the House to any of them, though it did request that the President of the Board of Trade should furnish it with a memorandum explaining one draft order [41]). Nevertheless the existence of the Scrutiny Committee represents a powerful safeguard to the rights of the citizen [42]).

3. *Government Departments and Special Tribunals*

In this section we are concerned particularly with the structure and working of the machinery of government and the rights and duties of the individual in relation to it. Administrative authorities of all sorts have been set up by statute and by delegated legislation. Thus, there are local authorities with power to make bye-laws, and nationalised industries have been created in the form of public corporations which also possess, *inter alia,* the power to make bye-laws. There is provision for the formation of special tribunals, sometimes called administrative tribunals, and for the holding of public inquiries. Most powerful of all are the Ministers as heads of the various Government Departments [43]). It would be tedious to examine these different administrative authorities at great and individual length, and it is sufficient to note here that all possess powers, duties and discretions conferred by statute or by delegated legislation. In the remainder of this section it is intended to deal only with Ministers and Govern-

[40]) Hood Phillips, *op. cit.*, p. 375.

[41]) H. C. 5–XVIII, 5–XIX, 5–XX, 5–XXI, 5–XXII of 1960–1961; and see H. C. 5–VI (1961).

[42]) For other aspects of Parliamentary jurisdiction in the constitutional field, as affecting the rights of the individual, see e. g. the Act of Union with Scotland, 1707; the Union with Ireland Act, 1800; and the Life Peerages Act, 1958, the latter making the first step, perhaps, towards some form of representative element in the House of Lords.

[43]) On Ministers' powers generally, see Marshall and Moodie, Some Problems of the Constitution (1959), Chapter VI. In a more detailed discussion of powers of expropriation in the United Kingdom, together with safeguards, restrictions and limitations of various kinds, see Street and Wortley, State and Private Property in English Law, a contribution to the Symposium on "Staat und Privateigentum" (Beiträge zum ausländ. öffentl. Recht und Völkerrecht 34, p. 131).

ment Departments on the one hand, and special tribunals on the other. It may be convenient to cite two brief examples of these authorities and their activities.

The Ministry of Housing and Local Government is particularly concerned with planning problems. A typical example of how this arises would be where a local authority decides to denote some definite area as a clearance area. As a result of this resolution, the authority will make a clearance order or a compulsory purchase order, either of which require the consent of the Minister of Housing and Local Government to become effective. If there is opposition to the order, which must be made available for inspection, then a public inquiry must be held, presided over by one of the Ministry inspectors, before the Minister may decide whether to approve the order or not, and the inspector must make a report to the Minister [44]). As an example of a special tribunal we may take the Lands Tribunal, created by the Lands Tribunal Act, 1949. This tribunal is independent of any Minister (though some few tribunals are designed to carry out Ministerial policy), and it decides disputes concerning the compensation to be paid on compulsory acquisition of land, and certain other matters, such as disputes concerning the rateable value of land. This tribunal exercises judicial rather than administrative functions, but these functions are mixed with the administrative problems of compulsory acquisition. Perhaps more typical of the local tribunal field are the National Insurance and the National Insurance (Industrial Injuries) tribunals, which deal with disputed claims arising under insurance, pensions and compensation legislation [45]).

All Government Departments and special tribunals are bound by the ordinary law of the land, in the same way as all other persons and agencies. This law is the common law, unless and until altered or superseded by statute, and the common law itself afforded special privileges of immunity from civil or criminal suit to the Crown and all its various agencies [46]). These privileges have now been removed by statute [47]) (though

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[44]) For a fuller account of the procedure and of the statutes in force in this area of the law, see Wade, Administrative Law (1961), p. 167–170. On statutory inquiries generally, see Wade, *op. cit.*, Chapter VI. On special tribunals, see Wade, *op. cit.*, Chapter VII.

[45]) For a short account of the work of special tribunals, see Allen, "Administrative Jurisdiction", [1956] P. L. 13, at p. 20–23. For actual decisions of the Commissioners, see the Current Survey section of any number of the journal Public Law.

[46]) This was an extension of the old Royal Prerogative maxims to the effect that the King can do no wrong, and that the King cannot be impleaded in his own courts.

[47]) Crown Proceedings Act, 1947.

some exceptions remain) [48]), but the common law has also conferred special privileges upon the police in relations to powers of arrest, search and prevention of disorder [49]). On the whole, however, the position at common law represents equality for all, and a lack of special privilege or jurisdiction as far as Government Departments and special tribunals are concerned [50]). Yet statutes have not infrequently conferred immunity or unfettered executive power upon these authorities, and in this respect they may be said to possess, by virtue of statute, a constitutional jurisdiction of importance, for where such unfettered power has been granted no court is competent to interfere with its exercise by way of judicial review. It also remains true that documents in the possession of the Crown are privileged from production in a court of law on the affidavit of a Minister [51]).

It is in this area of English law that it becomes important to separate from each other those powers which have been called judicial, quasi-judicial and administrative. To quote from a celebrated attempt to define these powers [52]):

> "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:
>
> (1) the presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on

[48]) These exceptions include the retention of the personal immunity of the Monarch from litigation: Crown Proceedings Act, 1947, ss. 38 (3) and 40 (1), and certain exceptions from liability relating to the Post Office and Armed Forces (ss. 9 & 10).

[49]) For fuller discussions of these powers, see Hood Phillips, *op. cit.*, Chapters 28 and 30; Yardley, *op. cit.*, Chapter 8. On powers of search and entry, see especially *Elias* v. *Pasmore*, [1934] 2 K. B. 164, and *Thomas* v. *Sawkins*, [1935] 2 K. B. 249. On powers of arrest and prevention of disorder, see especially *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308, and *Duncan* v. *Jones*, [1936] 1 K. B. 218. Certain of these powers have been extended by the Public Order Act, 1936, and the Official Secrets Acts, 1911–1939. It should, however, be noted that the police are not servants of the Crown or the executive and do not obey the orders of the executive in the discharge of their functions. Their position, which is not clear in English law, appears to be that of public, but independent, officers of the peace: see *Fisher* v. *Oldham Corporation*, [1930] 2 K. B. 364, and cf. Marshall, Police Responsibility (Public Administration Vol. 38, 1960, p. 213). For other examples of special offences created by the common law, see seditious libel (*R.* v. *Burns* (1887), 16 Cox C. C. 355) and treason (codified by the Treason Act, 1351, and added to by later statutes, mainly in the eighteenth century). For statutory protection of citizens' rights, see e. g. Magna Carta, 1215, and the Bill of Rights, 1689.

[50]) See e. g. the recommendation of the Report of the Committee on Administrative Tribunals and Enquiries (Cmnd. 218, July 1957), that all procedures involving a tribunal, an inquiry or a hearing should be open, fair and impartial: *ibid.*, para. 402.

[51]) *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] AC. 624; cf. 197 House of Lords Debates C. 741–7.

[52]) Report of the Committee on Ministers' Powers, Cmd. 4060, 1932, p. 73 f.

the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice."

Thus, in the example of a planning procedure briefly stated above, the judicial element would enter into the public inquiry held by the Ministry inspector, but the actual decision of the Minister as to whether or not to consent to the clearance order or the compulsory purchase order would be administrative and within his own discretion [53]). This procedure is, therefore, quasi-judicial, and it is possible for a court to review the procedure, and even to set the eventual decision aside, if there has been some irregularity at the public inquiry [54]). The grounds upon which the court will interfere are usually either that the authority or tribunal concerned has acted *ultra vires* or that there has been a breach of one of the rules of natural justice [55]), these rules being two in number: that no man or body shall be a judge in his or its own cause (the rule against bias or special interest), and that the parties to the proceedings should be given an adequate opportunity to be heard (the rule often stated as *audi alteram partem*). If the authority or tribunal was under a duty to act judicially, the court may always interfere when either of these grounds for review is appropriate, but if a statute has conferred complete discretion upon the authority, and the authority has acted within the area of that discretion, then no court may interfere [56]). If the duty of the authority is quasi-judicial, the court may interfere if the irregularity alleged concerns the judicial part of the proceedings, but not otherwise.

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[53]) Certain extra safeguards are now provided by the Tribunals and Inquiries Act, 1958. See e. g. s. 12, which provides that reasons must be given for decisions. Selected decisions of the Minister in previous cases are now also made available for perusal beforehand. See also the Council on Tribunals, set up by section 1 of the Act, and its First and Second Annual Reports for the years 1959 and 1960, published by H.M.S.O.

[54]) Compare *Franklin* v. *Minister of Town and Country Planning*, [1948] A. C. 87, *subter*.

[55]) For a full account of this subject, see de Smith, Judicial Review of Administrative Action (1959), Part Two. For a shorter account, see Wade, Administrative Law (1961), Chapters III and V.

[56]) The desirability of certain ways of reviewing even the exercise of this type of discretion have recently been suggested by the Justice Report on The Citizen and the Administration (1961).

The methods which any complainant may employ to achieve the result of judicial review are several, and need only be briefly noted here. The ancient remedies supplied by the common law are the prerogative writs of certiorari, prohibition, mandamus and habeas corpus, all except the last of which have now been converted, for procedural purpose, into prerogative orders [57]). By certiorari the court may set aside the proceeding of an authority or tribunal; by prohibition it may prevent such a proceeding continuing if it is not yet completed; and by mandamus it may order the authority to carry out its public duty. The writ of habeas corpus, which is often regarded as the final safeguard of the liberty of the individual in England, is used where someone has been illegally detained or imprisoned, and by the writ the court may order his release [58]). In other cases it may be appropriate to seek an injunction to prevent something taking place, a declaration of the position at law, or damages in tort or for breach of contract [59]); or else there may be the possibility of direct appeal. The latter remedy is only possible where an Act has provided that such appeal may lie, but the modern trend is to provide for appeals in a great number of cases where tribunals have made decisions [60]).

It may be pertinent here to give one example of the power exercised by, in this case, a Minister, the example of the case of *Franklin* v. *Minister of Town and Country Planning* in 1948 [61]). The New Towns Act, 1946, empowers the Minister to make an order designating an area as the site of a "new town" to be developed by a Corporation, if he is satisfied, after consultation with the local authorities concerned, that it is expedient in the national interest to do so. The Act lays down that a notice must be published that the draft order is available for inspection, and that objections may be made within a specified time. If any objection is made, the Minister before making the order final must hold a public inquiry and consider the report of the inspector who conducts the inquiry. Subject to these provisions, the Minister may make the order with or without modifications, and the right to challenge the validity of the order is restricted by statute. Franklin and other landowners applied to have the order designating Stevenage as the site of a new town quashed on the ground that, before considering objections, the Minister had stated that he would make the

[57]) Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7. For a full account of the remedies, see de Smith, *op. cit.* Part Three. For a shorter account, see Wade, *op. cit.*, Chapter IV.

[58]) This procedure has even been facilitated by the Administration of Justice Act, 1960.

[59]) Particularly against a Minister, as provided by the Crown Proceedings Act, 1947.

[60]) See e. g. the Tribunals and Inquiries Act, 1958, s. 9.

[61]) [1948] A. C. 87.

order, and that he was therefore biased in any consideration of the objections. In fact the Minister had spoken at a public meeting in Stevenage Town Hall when the Bill that became the New Towns Act, 1946, was before Parliament, and had expressed his intension that Stevenage would be the first "new town" to be designated under the Act. The House of Lords gave judgment for the Minister on the ground that his function in making an order under the Act was purely administrative, and that the question of bias is only relevant in the exercise of a judicial or quasi-judicial function. The Minister had complied with the statutory procedure, and there was no evidence that he had not genuinely considered the objections. The procedure in this type of case may be said to be quasi-judicial in that an inquiry may have to be held, and any bias or breach of the *audi alteram partem* rule at the inquiry itself would give rise to the possibility of setting aside the whole procedure. But if there is no such defect in the inquiry, the quasi-judicial part of the procedure, there is no way in which the actual exercise of the administrative function of the Minister in deciding whether or not to make the order final can be questioned. Thus, as the House of Lords decided, the object of the inquiry was to inform the mind of the Minister; any consideration of possible conflicts of interest or opinion between the Minister and the objectors was a matter for the Minister alone to decide thereafter.

In the area of pure administrative decisions, therefore, there cannot, under the present state of the law [62]), be any possibility of judicial review, for Parliament has by statute conferred complete discretionary power, and the sovereignty of Parliament in this field is undoubted [63]). The only remedy for an individual would be to persuade Parliament to alter the state of the law upon the particular matter of grievance. It may be concluded that a substantial area of constitutional jurisdiction is occupied by the activities and powers of Government Departments and special tribunals.

4. *The organs of public opinion*

Some of the most important questions of constitutional behaviour which arise in great Britain are settled outside the law by the following of infor-

[62]) But see the suggested proposal for a "Parliamentary Commissioner" by the Justice Report on the Citizen and the Administration (1961), which based its suggestions on the Scandinavian "Ombudsman".

[63]) See the Report of the Committee on Ministers' Powers, Cmd. 4060, 1932, p. 81: "In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion".

mal practices which have grown up in the past or by agreements reached between the political parties or between the government and Opposition. These rules, practices and agreements greatly modify the formal legal powers both of the Crown and the legislature. It is a fundamental conventional rule that the omnicompetence of Parliament should not be used to enact legislation which is oppressive or violates commonly held standards of equity. The enforcement of this principle rests simply on the belief that public opinion as expressed at free elections would not support a government which did not respect it. Since any government and Parliament could legally extend or perpetuate its own existence the conventions that legislation should not extend the life of a Parliament and that no major alteration in the electoral system should take place without consultation and agreement between the political parties are particularly important. (After agreements of this kind the duration of Parliament was extended during both World Wars.) A. V. Dicey described this situation by saying that the legal sovereignty of Parliament was modified and controlled by the political sovereignty of the people. One may however break down the operation of the political sovereign into its major elements. Today one might say that all of the following help to enforce and create constitutional conventions:

a) Organised pressure groups and interests both within and outside the political parties (Constitutional or administrative reform has often followed studies published by or campaigns promoted by nongovernmental bodies).
b) The Press, and to an increasing degree radio and television[64]) comment.
c) Opposition members of Parliament, particularly through the operation of Question Time in the House of Commons. (Opinion amongst members supporting the government, is also influential, though less directly expressed.)

Many of the most important rules which govern the behaviour of Ministers have been settled through such informal means rather than in courts of law or statutory enactment, although some conventions may later be converted into statutory provisions (as in the case of the Parliament Acts and the Statute of Westminster, 1931). It is nowhere for example formally

[64]) The rules which regulate the use of radio and television broadcasts at election times and for political broadcasting have been agreed between the B.B.C. and the political parties. These rules of practice together with the convention that the government does not interfere with the independent judgment of the B.B.C. (though it has power to do so) may obviously be considered as being of constitutional importance. See also the Reports of the Broadcasting Committee, 1935 (Cmd. 5091) and 1949 (Cmd. 8117).

laid down that the government will provide time for a vote of censure tabled by the Opposition or that the cabinet will resign if defeated in such a vote on an important issue of policy. Other sets of rules which have developed through practice and precedent are those governing the behaviour, attitude and selection of the Speaker who presides in the House of Commons and those which determine the actions of the Crown in relation to the Prime Minister and Cabinet. In general the Crown will act only on the advice of the Prime Minister. In appointing a new Prime Minister after a resignation, an election or a retirement the Crown will discover and respect the verdict of the electorate and the choice of leader made by the Parliamentary parties. Any bill sponsored by ministers and passed by Parliament must receive the royal assent. None of these basic principles could be enforced by legal process, but without them the system of government would be unworkable.

Though such principles as these have been accepted for many years fresh situations arise and questions of interpretation may need to be settled. Here the press and discussion within the parties may be decisive. There may, for example, be a discussion in the correspondence columns of The Times of a disputed question (such for example as the use made by the House of Commons of its contempt powers, or the right of the Prime Minister to demand a dissolution of the Parliament). Correspondence in the newspapers and to members of Parliament also plays a central part in enforcing the principle that every minister is responsible to the House of Commons for every official action large or small which is undertaken by his department. Many of these letters lead to questions in the House of Commons or further letters of inquiry from members of Parliament to ministers. Question time is rightly regarded as the traditional method by which administrative misbehaviour is checked. It provides, in the words of a well known American commentator 'a method of dragging before the House any acts or omissions by the departments of state and of turning a searchlight upon every corner of the public service . . . it is a great safeguard against neglect or arbitary conduct, or the growth of bureaucratic arrogance' [65]). In the 1959–60 session 13,471 questions were answered by ministers, some orally and others in writing. Very often in the past a letter or question has led to a parliamentary debate, a departmental investigation or a royal commission of inquiry into such matters as alleged misbehaviour by the police, delay or unfairness in a government department, or the

[65]) A. L. Lowell, The Government of England (1919) Vol. 2, p. 332. For a comprehensive account of the growth of question time in the twentieth century see Chester and Bowring, Questions in Parliament (1962).

tapping of telephones [66]). Since in many important areas where the rights and privileges of citizens are affected, Parliament has given wide discretionary powers to ministers and their civil servants (particularly in fields such as planning, use of land and control of immigration) the constitutional control which is exercised by the organs of public opinion must be given equal weight to that which is imposed by Her Majesty's judges. It is, in fact, only the continued vigour of these organs which prevents government by cabinet from becoming oligarchy, bureaucracy, or something worse.

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[66]) See for example the reports of the Royal Commission on Police Powers & Procedure, 1929 (Cmd. 3297), of the public inquiry into the disposal of land at Crichel Down (1954) Cmd. 9176, and of the Committee of Privy Councillors appointed to inquire into the interception of communications (1957) Cmnd. 283.

The important practice by which it is necessary for the police to obtain a warrant from the Secretary of State before intercepting letters or telephone calls is, it may be noted, only a convention and not a statutory requirement.