SOME RECENT DEVELOPMENTS IN JUDICIAL REVIEW OF EXECUTIVE POWER

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[*The scope for judicial review of executive discretionary powers has long been uncertain. The author reviews a series of recent English decisions in which the appellate courts have been prepared to look behind ministerial decisions to ensure that they were exercised according to the law. Despite some real limitations upon the effectiveness of judicial review in this area, he welcomes the intervention of the courts into the realm of the political and administrative branches of government since, not only does it provide a forum for those aggrieved by the indiscriminate actions of executive government but also allows public scrutiny of executive action; this being, to the author's mind, a most effective deterrent to abuse of discretionary power vested in the executive.*]

A. INTRODUCTION

For almost a decade, *Padfield v. Minister of Agriculture, Fisheries and Food*[1] has stood as a conspicuous, yet lonely, example of the extent to which the courts will insist that executive discretionary powers be exercised according to law. The *Padfield* decision provoked discussion of the controversial issue of the legitimate role of the courts in reviewing administrative action,[2] an issue which has now been dramatically revived by several recent decisions of the English appellate courts.[3] *Congreve,* for example, has been described as epitomising 'the dangers of allowing the courts more scope to impose their values in this area of the law'.[4] Professor J. A. G. Griffith, discussing the *Tameside* decision, remarked that: 'I can see no justification for this judicial intervention and it sets a dangerous precedent for the future.'[5] The *Gouriet* litigation has been particularly controversial. The proceedings in the Court of Appeal inspired the comment from the leader of the House of Commons that the Attorney-General 'has been fully engaged in the last day or two defending the

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[1] [1968] A.C. 997 (H.L.).

[2] Compare, for example, notes on *Padfield* in (1968) 84 *Law Quarterly Review* 166 and (1968) 31 *Modern Law Review* 446 with Farmer and Evans, 'Two Criticisms of *Padfield v. Minister of Agriculture*', [1970] *New Zealand Law Journal* 184.

[3] *Congreve v. Home Office* [1976] 2 W.L.R. 291; *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1976] 3 W.L.R. 641; *Laker Airways Ltd v. Department of Trade* [1977] 2 W.L.R. 234; *Gouriet v. Union of Post Office Workers* [1977] 2 W.L.R. 310 (C.A.), reversed in [1977] 3 W.L.R. 300 (H.L.).

[4] [1976] *Public Law* 14, 15.

[5] *The Sunday Times* (London), 8 August 1976. Professor Griffith's views on these recent decisions and, more generally, on the role of the courts in English government, are discussed more fully in his controversial and provocative book, *The Politics of the Judiciary* (1977).

honour, reputation, and rights of this House'.[6] Another Member of Parliament appealed to the House 'to debate the matter and decide if judges should be in a position to influence the whole democratic proceedings in this way'.[7] Indeed, one political commentator was moved to comment that: 'Tameside, TV licences, the Laker skytrain, the telephone workers' political strike — all confirm, in some Labour eyes, the anti-Labour perfidy of judges . . .'[8]

The decisions have enjoyed a more favourable reception in other quarters. Typical of that response is one evaluation of the *Tameside* decision: '. . . there is a robustness about all the appeal judges' approach to the case, a willingness to examine grounds for challenge, and a desire to give full weight to statutory limitations placed on ministerial discretion. All that is heartening evidence that the long retreat of the judiciary before the aggrandisement of the executive has been halted.'[9] However, not unexpectedly, those who applauded the decisions reaffirming the spirit of judicial activism which emerged from *Padfield,* have been disappointed by the reversal in the House of Lords of the Court of Appeal's decision in *Gouriet.* One comment on the case refers to 'the uniformly reactionary opinions handed down by the House of Lords in *Gouriet*'.[10]

The recent decisions are a timely reminder of the continuing validity of Professor de Smith's observation in the preface to the third edition of his monumental work, *Judicial Review of Administrative Action,* that it is an 'unusual but indisputable fact that over the past few years the most creative developments in the judicial sector of administrative law have been taking place in [England]'.[11] Despite important legislative developments in Australia — particularly at the Commonwealth level[12] — the decisions are clearly relevant to the scope of judicial review of executive power in Australian jurisdictions as well as in England. It is now proposed to analyse those decisions in their chronological order.

B. TELEVISION LICENCES

The implementation of Parliament's decision[13] to increase by six pounds from April 1, 1975 the cost of annual colour television licences was

[6] *The Times* (London), 21 January 1977.
[7] *Ibid.* 28 January 1977.
[8] *The Sunday Times* (London), 22 May 1977.
[9] *The Times* (London), 22 October 1976. See also *ibid.* 5 August 1975, 22 and 28 January 1977; *The Sunday Times* (London), 30 January 1977.
[10] [1977] *New Law Journal* 750, 751. See also [1977] *The Solicitors' Journal,* 550.
[11] P. v.
[12] See especially, Administrative Decisions (Judicial Review) Act 1977 (Cth), discussed in Griffiths, 'Legislative Reform of Judicial Review of Commonwealth Administrative Action' (1978) 9 *Federal Law Review.* All Australian jurisdictions except Tasmania have enacted Ombudsman legislation, and the Commonwealth has gone further than any of the States in establishing a general Administrative Appeals Tribunal to hear appeals on the merits from certain Commonwealth decisions: see Administrative Appeals Tribunal Act 1975 (Cth) and Administrative Appeals Tribunal Amendment Act 1977 (Cth).
[13] S.I. 1975, no. 212.

eventually to lead to complaints of maladministration to the Parliamentary Commissioner of Administration as well as to legal proceedings on the grounds of abuse of executive power. The nub of the problem was Parliament's failure expressly to prohibit overlapping licences from being acquired before April 1 at the old rate of twelve pounds per annum. The Home Secretary had issued an instruction to Post Office employees to refuse applications received before April 1 for new licences where the applicant's existing licence had not expired, but the temptation to save six pounds proved irresistible to 24,500 television licensees who, undoubtedly inspired by the media publicity given to the 'loophole', were able through administrative oversight to obtain overlapping licences before the increases came into effect.

Although no overt indication had been given of the Home Office's attitude to this consumer ingenuity, when the Home Secretary did respond by threatening to revoke the new licences unless the balance of six pounds was paid, many licensees were sufficiently intimidated to yield. But others remained steadfast, and some of the more pertinacious ones sought the assistance of the Parliamentary Commissioner of Administration to investigate their complaints of maladministration, whilst those who considered themselves to have been legally aggrieved sought declarations that the Home Secretary's threats of revocation were unlawful and invalid.

The Parliamentary Commissioner's special report on the matter vindicated in no uncertain terms the allegations of maladministration which had been levelled against the Home Office's handling of the episode and, in particular, trenchant criticism was directed at the Department's failure to publicise at the earliest opportunity their attitude to the taking out of overlapping licences.[14]

The legal battle to establish that the Home Office had acted not only imprudently and unfairly in an administrative sense, but unlawfully, suffered an initial setback when Phillips J. refused the relief sought.[15] The plaintiff's submission that the Home Secretary had abused his discretionary power to revoke television licences[16] was rejected by his Lordship on the ground that Parliament's intention, that annual licences required after April 1 be obtained at a cost of eighteen pounds, justified the Home Secretary in refusing to issue overlapping licences or in cancelling any financial advantage by revoking such licences after the expiration of eight months. Phillips J. concluded that the evidence did not support the plaintiff's contention that the revocation was vitiated by the demand for an additional six pounds, since, in his Lordship's view, the Home Office

[14] United Kingdom, *Seventh Report of the Parliamentary Commissioner for Administration* (Session 1974-75) no. 680.

[15] *Congreve v. Home Office* [1976] 2 W.L.R. 291.

[16] Wireless Telegraphy Act 1949 (U.K.), s. 1(4) provides: 'A wireless telegraphy licence may be revoked, or the terms, provisions or limitations thereof varied, by a notice in writing . . .'

had not simply demanded payment of the additional amount as the cost of not revoking the plaintiff's licence, but had afforded him several options which included the opportunity to advance the additional six pounds in return for an annual licence. The plaintiff could also have sought a licence at the new rate after eight months, or otherwise, in Phillips J.'s view, have ceased watching TV from that date.

The Court of Appeal was unimpressed with Phillips J.'s approach.[17] The court accepted his Lordship's view that, although expressed in subjective language, the Minister's power of revocation was reviewable by the courts to ensure that it had been exercised in accordance with the principles enunciated in *Wednesbury Corporation v. Minister of Housing and Local Government*;[18] however, the Court of Appeal held that Phillips J.'s conclusion on the issue whether the effect of the Home Office's correspondence was to demand payment of an unauthorised sum, ignored the important point that none of the options he proposed would enable the licensee to enjoy his licence for a full twelve months without having to pay an additional amount. The Court of Appeal saw the fundamental question as being whether the licence, which had been validly acquired, was revoked for good cause. Accordingly, the court examined the Home Secretary's reasons for exercising his discretionary power of revocation in this instance. It was held that the Minister's revocation amounted to an abuse of discretionary power as not having been exercised for good cause, since the so-called policy of preventing premature renewals did not have Parliament's authorisation, but was merely an administrative decision lacking any legislative mandate either express or implied.

Furthermore, not only was the policy against issuing overlapping licences unauthorised by Parliament, but the demand for payment of six pounds was also held to lack Parliamentary authorisation and therefore, was contrary to the Bill of Rights 1689 and invalid, following *Attorney-General v. Wilts United Dairies Ltd.*[19]

The second reason advanced by the Home Office to justify revocation of overlapping licences that to allow some licensees to take advantage of the loophole discriminated against other licensees, was given short shrift by Lord Denning M.R., who pointed out that it was simply their own misfortune not to have taken advantage of the opportunity since there was no legal impediment to their so doing.[20]

The *Congreve* decision is significant in several respects. First, it reveals that the jurisdiction of the Parliamentary Commissioner and the courts will inevitably overlap in some circumstances, notwithstanding that section 5(2) of the Parliamentary Commissioner Act 1967 (Eng.) purports

[17] [1976] 2 W.L.R. 302 (Lord Denning M.R., Roskill and Geoffrey Lane L.JJ.).
[18] [1965] 1 W.L.R. 261.
[19] (1921) 37 T.L.R. 884.
[20] [1976] 2 W.L.R. 302, 308.

to avoid such a situation occurring. Even more importantly, *Congreve* stands as testimony to the continuing important role of judicial review in controlling executive powers in spite of the recent appearance of an alternative remedy in the form of the Parliamentary Commissioner's office and, indeed, despite threats that the court's powers will be called into question, as had apparently been threatened here by counsel for the Home Office.[21]

Secondly, although the Court of Appeal was keen to point out that the court's concern was with the legality of the Home Office's action rather than with the issue of its administrative merits, it is unquestionable that the court's decision was influenced in no small measure by the unfairness of the Home Office's conduct. While the courts will stop short of appraising the individual merits of administrative action, it is apparent from *Congreve* that they will insist that administrative action conform to fundamental principles of fairness, subject, of course, to a compelling Parliamentary intention to the contrary. This approach manifests itself most clearly in *Congreve* when the Court of Appeal insisted that, in the absence of a Parliamentary mandate, the Home Secretary's power of revocation could be exercised for good cause alone. This requirement can be seen as an integral aspect of the long-established principle that the courts will ensure that discretionary powers be exercised properly,[22] as expounded in cases such as *Wednesbury* and *Padfield*.

C. EDUCATION

Underlying the legal issues in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*[23] was a highly controversial political dispute relating to the choice between systems of either comprehensive or selective education. The Labour Government supported the concept of comprehensive education which, in contrast with the traditional grammar school system, allocated positions to applicants regardless of ability or aptitude.

The Education Act 1944 (Eng.) distributes responsibility for administering education policy among four partners: the Minister for Education (now the Secretary of State), local education authorities, parents, and the heads of individual schools. Importantly, the Act does not authorise the Secretary of State to impose a particular system of education on local education authorities; however, it is provided by section 13 of the Act that his approval is required for any proposal by a local authority significantly to alter the character of a county school.

In November, 1975 the Secretary of State approved a plan submitted by the Labour-dominated Tameside council to introduce comprehensive

[21] *Ibid.*
[22] See, for example, *Rooke's Case* (1598) 5 Co. Rep. 99b.
[23] [1976] 3 W.L.R. 641.

education in the region. That issue figured prominently in subsequent council elections during which the Conservative Opposition campaigned against comprehensive education and included among its platform planks a proposal not to implement the approved plan. Following the Conservative Party's victory in the election on May 6, 1976 the new council considered that it had received a mandate to depart from its predecessor's proposals and, although much of the approved plan was in fact adopted by the newly elected council, it was resolved to postpone the transfer of five grammar schools to the comprehensive principle on the ground that the changeover had proceeded too hastily with disruptive effects upon the education of many pupils.

Section 68 of the Education Act 1944 (Eng.) provides: 'If the Secretary of State is satisfied . . . that any local education authority . . . [has] acted or [is] proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may . . . give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.' Purporting to act under this provision, on June 11, 1976 the Secretary of State directed the Tameside council to implement the approved plan in its entirety. The Secretary of State was of the view that the new council was acting unreasonably, since allocation of pupils to comprehensive schools had already been finalised. The proposed modifications would, in the Secretary of State's opinion, have presented parents with a dilemma in having to decide whether to adhere to those placements, or submit their children 'to an improvised selection procedure . . . carried out in circumstances and under a timetable which raise substantial doubts about its educational validity'.[23a] Moreover, he asserted, preparations to accommodate the approved plan were well advanced and modification at this late juncture would cause unwarranted disruption to building, curriculum and staffing arrangements.

The Secretary of State's application for an order of mandamus to enforce his direction was granted by the Queen's Bench Divisional Court in spite of the fact that the court ruled that the Secretary of State's allegations of disruption to building, staffing and coursing arrangements lacked substance. However, the court conceded that the Secretary of State's misgivings concerning the capacity of the proposed selection procedures to fill the limited number of vacancies were justified in view of the short time available before commencement of the new school year (September 1), and the threats by some teachers' unions to refuse to cooperate with the selection procedures. On appeal, however, the Tameside council's contention that the Secretary of State had not lawfully exercised his power under section 68 was upheld unanimously by the Court of Appeal and the House of Lords.

[23a] *Ibid.* 646.

It is significant that at no time did the Secretary of State rely on the introductory words of section 68 — 'If the Secretary of State is satisfied' — to argue that the subjective language protected his decision from judicial review. Though such language may achieve that result with regard to regulations of a war-time character[24] or indeed, if the matter upon which the Minister is to be satisfied is one of opinion rather than an objective state of fact,[25] Lord Denning M.R. in the Court of Appeal reiterated the basic proposition which had emerged from *Padfield,* that the courts will not be prevented so indirectly from enforcing Parliament's presumed intention that executive statutory powers be exercised according to law.[26] Counsel for the Secretary of State acknowledged the role of the courts in this respect when he conceded that the court could declare the direction unlawful if it were shown that the Secretary of State had acted in bad faith; took into account irrelevant considerations or omitted to consider relevant matters; or took a view which on the material and information available to him no reasonable person could have taken.[27]

The concept of 'unreasonableness' which, as Lord Diplock in the House of Lords indicated,[28] has become a term of legal art in its context as a ground for judicial review, was also relevant in the statutory context of section 68 pertaining to administrative review by the Secretary of State of the action of the local education authority. As a ground of judicial review, the narrow meaning imputed to 'unreasonableness' facilitates judicial restraint by releasing the courts from a judicial evaluation of the political merits of particular administrative action. Both appellate courts in *Tameside* held that a similarly narrow meaning of 'unreasonableness' in section 68 was required in light of the statutory scheme which divided responsibility for education policy and denied the Secretary of State the power to dictate policy to local education authorities. It was held, therefore, that in determining whether the Tameside council had acted unreasonably, the Secretary of State was not entitled merely to rely on the fact that he disagreed with the authority's policy or regarded their action as erroneous, but he had to be satisfied that the local education authority, in modifying the approved plan, had acted as no reasonable authority would have acted in similar circumstances.

In approaching this critical issue, the Court of Appeal and the House of Lords laid heavy emphasis upon the importance of the new council's electoral mandate and the implicit acceptance by a majority of parents of the fact that modification of the approved plan would unavoidably entail some degree of disruption and inconvenience. Since both appellate

[24] See *Liversidge v. Anderson* [1942] A.C. 206 and *Robinson v. Minister of Town and Country Planning* [1947] K.B. 702.
[25] [1976] 3 W.L.R. 641, at 651 *per* Lord Denning M.R.
[26] *Ibid.* 651-2.
[27] *Ibid.* 656.
[28] *Ibid.* 681.

courts adopted the Divisional Court's rejection of the substance of the other reasons advanced by the Secretary of State to justify his appraisal that the modification would be unduly disruptive, the ultimate question was seen to concern the Secretary of State's opinion at the time he issued the direction that the Tameside council's selection procedure was not viable. Affidavit evidence from education experts, adduced by the council, established that the proposed merit selection procedures had been successfully employed in other areas and, relying on this information, the courts deduced that the Secretary of State must have been misinformed to conclude that the Tameside council's selection procedure was an impracticable proposition at the material date. Moreover, in the courts' opinion, the new council was not acting unreasonably in the relevant sense to proceed with its modification proposals despite threatened union boycotts, since it was held that the council would have been justified in taking the view that it was improbable that cooperation would have been withheld if the Secretary of State had not interfered.

In the result, the Court of Appeal and the House of Lords concluded that the Tameside council's decision to modify the approved plan was *not* one which *no* reasonable authority could have arrived at in similar circumstances and, consequently, it was held that the Secretary of State had not lawfully exercised his power under section 68, either because: (i) in deciding upon the basis of his belief that the council was acting erroneously, he had misdirected himself on the correct meaning of 'unreasonableness'; or (ii) if he had applied the correct meaning and asked the right question whether the council had acted unreasonably in the relevant sense, there were no grounds upon which he could properly have been satisfied that the council was acting unreasonably.

This aspect of the relationship between asking the wrong question and 'no evidence', which also appeared in *Maradana Mosque Trustees v. Mahmud,*[29] is of special interest to the position of judicial review of administrative action in Australia where, hitherto, the courts have been very reluctant to recognise 'no evidence' as an independent ground of judicial review for jurisdictional error.[30] Even if the Australian courts do not adopt the emerging English view that judicial review will lie upon the ground that there is no evidence supporting a finding of fact,[31] it would appear that such relief may be absorbed under the rubric of the more familiar heads of judicial review for abuse of statutory powers such as unreasonableness; improper purpose;[32] and in particular, misdirection,

[29] [1967] 1 A.C. 13 (P.C.).

[30] See Benjafield D. G., and Whitmore H., *Principles of Australian Administrative Law* (4th ed. 1971), 180. But see now Administrative Decisions (Judicial Review) Act 1977 (Cth), s. 5(1)(h) and 5(3), discussed in Griffiths, *supra,* n. 12.

[31] See Wade H. W. R., *Administrative Law* (3rd ed. 1971), 98 ff.; de Smith S. A., *Judicial Review of Administrative Action* (3rd ed. 1973), 115.

[32] See *R. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co. Pty Ltd* (1953) 88 C.L.R. 100, 121-2 *per* Dixon C.J., Williams, Webb and Fullagar JJ.

misconception or asking the wrong question with respect to statutory duties.[33]

And it is apparent that it is not only with respect to the issue of 'no evidence' that the English courts are appearing more adventurous than their Australian counterparts in expanding the ambit of judicial review,[34] for several of the judgments in *Tameside* evince the emergence of a further novel ground upon which the exercise of statutory powers may be reviewed by the courts. Scarman L.J., in the Court of Appeal, remarked that judicial review of the Secretary of State's decision was available on the ground that there had been a 'misunderstanding or ignorance of an established and relevant fact'.[35] In the House of Lords, Lord Wilberforce commented that the courts could intervene 'on such grounds as that the minister has acted right outside his powers or outside the purposes of the Act, or unfairly, or *upon an incorrect basis of fact*'.[36] In a similar vein, Lord Diplock expressed the view that the court's task was to inquire 'did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly'.[37] The court found that evidence was readily available to the Secretary of State at the relevant date to the effect that selection schemes similar to that proposed by the Tameside council had been widely and successfully used in similar circumstances. Lord Salmon asserted: 'It seems incredible to me that these facts were unknown to the Department of Education and not available to the minister on June 11, 1976'.[38] By failing to apprise himself of this crucial information, the Secretary of State's determination that the council was acting unreasonably was vitiated.

The appearance of this additional weapon in the judicial armoury will undoubtedly cause concern in that it takes judicial review into the realm of the administrator.[39] Difficult questions of degree are indeed raised by the distinction between permissible errors of fact and misconceptions or misdirections of facts which will invalidate the decision. And there is no denying that judges do approach facts in a different light from executive and administrative officials. However, the Court of Appeal and the House of Lords in *Tameside* were well aware of the need for judicial caution. Lord Denning M.R. admitted that: 'Much depends on the matter about which the Secretary of State has to be satisfied'.[40] Scarman L.J. referred

[33] See *Sinclair v. Mining Warden* (1975) 132 C.L.R. 473, and see generally Tracey R. R. S., 'Absence or Insufficiency of Evidence and Jurisdictional Error' (1976) 50 *Australian Law Journal* 568.

[34] The relevant Australian principles are discussed in Benjafield D. G. and Whitmore H., *op. cit.* 161 ff.

[35] [1976] 3 W.L.R. 641, 656.

[36] *Ibid.* 665 (emphasis added).

[37] *Ibid.* 681.

[38] *Ibid.* 687.

[39] See Lord Devlin's comments on *Tameside* in *The Times* (London), 27 October 1976.

[40] [1976] 3 W.L.R. 641, 651.

to the misunderstanding of 'an *established* and *relevant* fact'.[41] Lord Wilberforce added that the courts' interest was only in the existence, not the evaluation of those facts.[42] Furthermore, the plaintiff carries the burden of proof in this matter, an onus which fluctuates according to the subject matter and the particular statutory context. The critical importance of this factor in judicial review for abuse of discretion is revealed by contrasting the significance attached to Parliament's division of responsibilities for education policy in *Tameside,* with the emergency industrial powers bestowed upon the Employment Secretary in *Secretary of State for Employment v. Associated Society of Locomotive Engineers and Firemen (No. 2),*[43] where the Court of Appeal held that the plaintiff union had failed to discharge the burden of proof of establishing that the minister's opinion was not a 'reasonable' one in all the circumstances.[44]

It is also apparent from *A.S.L.E.F. (No. 2)* that the courts will not always go to the lengths that they did in *Congreve* and *Tameside* to examine the adequacy of the reasons advanced as supporting administrative decisions. It was held in *A.S.L.E.F. (No. 2)* that the important principle established in *Padfield,* that the courts are entitled to deduce from administrative silence that there are no reasons sound in law to justify a particular decision, was by no means absolute but depended upon all the circumstances of the particular case. In this respect, regard would be had to the subject matter and statutory context as well as to the important question whether the material decision imperilled individual liberty, livelihood, or property.[45]

D. SKYTRAIN

As Mocatta J. observed,[46] the *Laker* decision gave rise to the greatest interest, not only in its legal significance, but in the public interest which accompanied it due, no doubt, to the prospect of the substantial savings to be enjoyed by air travellers if the project to introduce a novel type of trans-Atlantic air service was realised. Mr Frederick A. Laker, described by Lord Denning M.R. as 'a man of enterprise',[47] devised a scheme known as 'Skytrain' to operate between Stansted (near London) and New York. By offering a very basic service more akin to that provided by railway companies and devoid of many of the extravagances and frills offered by established airlines, Skytrain fares promised to be significantly lower than those of the established airlines.

[41] *Ibid.* 656 (emphasis added); and see *ibid.,* 692 *per* Lord Russell of Killowen.
[42] *Ibid.* 665.
[43] [1972] 2 W.L.R. 1370 (hereinafter referred to as *A.S.L.E.F. (No. 2).*
[44] *Ibid.* 1390-1 *per* Lord Denning M.R., 1407 *per* Roskill L.J.
[45] *Ibid.*
[46] *Laker Airways Ltd v. Department of Trade* [1976] 3 W.L.R. 537 (Queen's Bench Division).
[47] *Laker Airways Ltd v. Department of Trade* [1977] 2 W.L.R. 234, 242 (Court of Appeal).

According to an international treaty, known as the Bermuda Agreement of 1946, in order lawfully to operate the scheme it was necessary that Skytrain be declared a 'designated air carrier' by the United Kingdom Government, in which event the United States Government would, in effect, be obliged to grant the designated air carrier an operating permit to fly in American territory. Moreover, in order to operate an air service within the jurisdiction of the United Kingdom, it was required by the Civil Aviation Act 1971 that Skytrain obtain a licence from the Civil Aviation Authority. In fact, Skytrain had satisfied both these requirements, having been declared a designated air carrier by the United Kingdom Government in February 1973 (though at the time of litigation the formalities attending designation had not been carried out by the United States' authorities); and having been issued with a decennary licence by the Civil Aviation Authority in October 1972 to conduct the Skytrain operation within the United Kingdom. Separate appeals had been taken by rival airlines to the Secretary of State and the Civil Aviation Authority raising objections to the issue of the Skytrain licence, however, neither was successful and the licence was reaffirmed in December 1972 and February 1975 respectively.

Meanwhile, preparations for the Skytrain project were well advanced and over seven million pounds had been expended purchasing aeroplanes and equipment when the critical blow was struck on July 29, 1975. In a statement to the House of Commons, the Secretary of State of the newly elected Labour administration announced a reversal in government policy in declaring that no longer would licences be issued to permit competition between United Kingdom airlines on long-haul scheduled services and that the Skytrain service would not be allowed to commence. Rather than introduce legislation to give effect to this policy reversal as had initially been thought necessary, the Secretary of State decided to issue a policy 'guidance' under section 3(2) of the Civil Aviation Act 1971 (Eng.) in which it was announced that the Government intended to withdraw Skytrain's designation, and instructing the Civil Aviation Authority to deal with Skytrain's licence in accordance with the Government's new policy, which could only mean revocation.[48] Consequently, Laker Airways brought an action *quia timet* against the Department of Trade for declarations that the policy guidance to the Civil Aviation Authority was *ultra vires* the 1971 Act, and that the Department was not entitled to dedesignate Skytrain.

In holding that the policy guidance was indeed *ultra vires,* both Mocatta J. and the Court of Appeal (Lord Denning M.R., Roskill and Lawton L.JJ.), approached that issue as one of statutory construction to determine the scope of the Secretary of State's powers under the Civil Aviation Act, highlighting the point which had appeared so clearly in

[48] United Kingdom, *Future Civil Aviation Policy* (1976) Cmnd 6400.

cases like *Padfield* and *Tameside,* that the particular statutory context is critical in these cases. It was provided by section 3(1) of the Act that in performing its functions, including the granting of licences, the Civil Aviation Authority was obliged to have regard to four expressed criteria, which included the objective to encourage competition with the state-owned airline by at least one major private airline. Section 3(2) provided that, subject to prior Parliamentary approval, the Secretary of State was empowered to give 'guidance' with respect to how the Authority should perform its functions, and the Authority was obliged to execute its functions in such a manner as it considered would be in accordance with the current guidance. In times of war or other great national emergency, however, it was provided by section 4 that the Secretary of State could give 'directions' to the Authority in the interests of national security or international relations and, importantly, such 'directions' were not subject to Parliamentary approval; and where they conflicted with the requirements imposed upon the Authority by the Civil Aviation Act, those requirements were to be disregarded.

It was held that the Secretary of State was not empowered to effect a reversal of government policy by issuing a policy guidance under section 3(2) of the Act which was inconsistent with one of the express criteria of section 3(1), since 'guidance' could be used to explain or amplify those criteria but not so as to contradict them. To support this construction, reference was made in all the judgements to Parliament's deliberate choice of 'guidance' and 'direction' and the contrasting meanings which these words generally convey, with particular reference to the greater control suggested by 'direction'. This interpretation was reinforced by the fact that, in the exceptional circumstances delineated in section 4, the Secretary of State's power to issue directions to the Authority expressly overrode the requirements of the Act. By contrast, there was no similar express provision in section 3 to permit the Secretary of State, through his guidance power, to override the Authority's primary statutory duty to comply with the objectives set out in section 3(1). Moreover, it was revealed that this view, that 'guidance' denoted lesser control than 'direction', had in fact been adopted in the first policy guidance issued by a Secretary of State in February 1972, where it was stated that, in issuing guidance, the Secretary of State's task was to 'amplify and supplement these four objectives in more detail'.[49]

The Secretary of State's submission that the requirement of Parliamentary approval under section 3(3) of the Act inferred that his guidance power could be used to contradict the criteria in section 3(1) was rejected by the Court of Appeal on the ground that, following *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry,*[50]

[49] United Kingdom, *Civil Aviation Policy Guidance* (1972) Cmnd 4899.
[50] [1975] A.C. 295 (H.L.).

Parliamentary approval was distinguishable from an Act of Parliament, and the Authority's statutory duty to perform its functions consistently with the express criteria could be avoided only with statutory authorisation: for example, if Parliament enacted appropriate amending legislation or, if the circumstances defined in section 4 arose.

The Secretary of State had submitted to the Court of Appeal an interpretation of section 3 which, if accepted, would have overcome the court's objection to the lack of Parliamentary authorisation. The submission turned upon the introductory words of section 3(1) which provided that: 'It shall be the duty of the authority to perform the functions *conferred on it otherwise than by this section* in the manner which it considers is best calculated' to secure the expressed objectives.[51] It was contended that, since 'function' was defined in section 64(1) to include powers and duties, there was no obligation upon the Authority to comply with the relevant objectives in relation to the functions imposed by section 3. Since the duty to comply with guidelines issued by the Secretary of State under section 3(2) was a function imposed by section 3, it was argued that the guidance must prevail over the objectives.

Lord Denning M.R. was singularly unimpressed with this construction, dismissing it summarily by describing the relevant phrases as '. . . the words of a purist intent upon literal accuracy. But to my mind they contribute nothing but confusion. The best way of understanding the provisions is to omit those words altogether'.[52]

Roskill L.J., with whom Lawton L.J. concurred on this issue, adopted a more conventional approach in rejecting the Secretary of State's construction on the grounds that, not only was it a highly convoluted way of achieving a dispensing power which had been expressly achieved in section 4, but to empower the Secretary of State to require the Authority to withhold or revoke licences would fetter the Authority's statutory duty to afford a full and independent hearing to both licence applicants, and licensees defending their licences on appeal.[53] Roskill L.J. was able to give effect to these 'infamously obscure phrases' by reasoning that, since the Authority was obliged by section 3(2) to implement guidelines issued under that subsection (assuming that the guidelines had been lawfully given), the phrases were intended to free the Authority in that situation from applying the expressed objectives to the guidelines, since the guidelines themselves explained and amplified the objectives.

In opposing Laker Airways' application for a further declaration with respect to the Department's threatened dedesignation of the Skytrain service, the Secretary of State had contended that his discretionary power in this matter arose from an international agreement which had not been

[51] Emphasis added. A similar phrase occurred in section 3(2).
[52] [1977] 2 W.L.R. 234, 244.
[53] *Ibid.* 259-61.

incorporated into municipal law and, being a prerogative power, it was argued that its exercise was immune from judicial review. The orthodox view of the scope of judicial review of prerogative powers was stated concisely by Mocatta J.: '. . . whilst the courts are empowered to determine the existence, scope and form of a prerogative power, that power is absolute, in the sense that the courts have disclaimed jurisdiction to review the propriety or adequacy of the grounds on which it has been exercised'.[54] This principle was adopted by Roskill and Lawton L.JJ. in the Court of Appeal, who further agreed with Mocatta J. that, in determining the ambit of a prerogative power according to the principles enunciated in *Attorney-General v. De Keyser's Royal Hotel Ltd,*[55] the prerogative to dedesignate had, by necessary implication, been fettered by the Civil Aviation Act 1971.

In examining the process by which this conclusion was arrived at, one cannot fail to perceive the presence of an underlying concept of fairness which influenced the court's decision as, indeed, had been the case in *Congreve.* Reference was made to the existence of the elaborate licensing scheme established by the Act, from which Laker Airways had lawfully acquired a valuable commercial asset in the form of a licence granted by the Civil Aviation Authority after full inquiry; an asset which would be rendered worthless if the Secretary of State was permitted to withdraw Skytrain's designation. Furthermore, it was pointed out that the Act itself provided several means by which Skytrain's licence could lawfully be revoked after full inquiry and it is not without significance that Lawton L.J. commented: 'This would be a fair procedure'.[56] By contrast, to permit the Secretary of State to dedesignate Skytrain as an exercise of the prerogative power, would not only have deprived Laker Airways of these statutory protections, but would have effectively rendered the decision immune from judicial review in light of the orthodox view.

That orthodox view did not commend itself to Lord Denning M.R. who asserted that, since the prerogative power was a discretionary power exercisable by the executive government for the public good and was essentially indistinguishable from executive statutory powers, then, like all such powers, the prerogative power was reviewable by the courts to ensure that it had not been exercised improperly or mistakenly.[57] Relying on the same factors which had been adduced by Roskill and Lawton L.JJ. in applying the principle in *De Keyser's Royal Hotel,* and undoubtedly influenced by the intrinsically unfair consequences if the Secretary of State was able to abort the Skytrain service by this method, the Master

[54] [1976] 3 W.L.R. 537, 567; see generally de Smith, *op. cit.* 253-5, and de Smith S. A., *Constitutional and Administrative Law* (2nd ed. 1973), 114-6.
[55] [1920] A.C. 508 (H.L.).
[56] [1977] 2 W.L.R. 234, 270.
[57] *Ibid.* 249-51. This view has commanded support in academic and judicial circles: see Comment by Williams D. G. T. (1971) 29 *Cambridge Law Journal* 178; and Markesinis, 'The Royal Prerogative Re-visited' (1973) 32 *Cambridge Law Journal* 287.

of the Rolls was able to conclude that the Secretary of State had misdirected himself as to his powers and, as a consequence, had improperly exercised his discretion.

Brief mention should be made of the fact that the Court of Appeal rejected Mocatta J.'s holding that the Department was estopped from withdrawing Skytrain's designation.[58] Since Mocatta J. and the Court of Appeal were prepared to grant declarations on the two other grounds raised by Laker Airways, the estoppel issue was unnecessary to any of the judgements. However, Roskill and Lawton L.JJ. expressed the view that, without denying that in some circumstances estoppel might operate against the Crown, the doctrine should not be permitted to hinder the formation of government policy, particularly where a general election had returned a new administration as occurred in this instance.[59] Lord Denning M.R. was also disinclined to rely on estoppel, holding that, while the Crown may be estopped in circumstances where it was exercising its powers improperly, estoppel would not have operated here if the Secretary of State had had a prerogative power to dedesignate Skytrain and had exercised that power properly.[60]

The moral of *Laker* is readily discernible: Laker Airways had lawfully obtained both designation and a licence to conduct the trans-Atlantic Skytrain service and in legitimate expectation of operating that service had outlaid considerable capital. In these circumstances, the courts would not acquiesce in the executive branch derogating from Laker Airways' acquired rights on the basis of a convoluted interpretation of the relevant legislation or a nebulous power derived from the Royal Prerogative, either of which would circumvent and render nonsensical a comprehensive legislative scheme devised by Parliament to provide airline operators with a legislative framework within which they could lawfully conduct airline services subject to the express qualifications authorised by Parliament.

The decision does not render the Skytrain service absolutely unimpeachable for, leaving section 4 aside, it is open to Parliament to enact legislation expressly to give the Secretary of State a mandate to prevent Skytrain operating. Indeed, the Court of Appeal's rejection of Mocatta J.'s views on estoppel evinces a judicial awareness of the need for the courts not to erect insurmountable barriers to the democratic functioning of the Parliamentary process.

[58] [1976] 3 W.L.R. 537, 567-8. The extent to which estoppel may apply to fetter this exercise of administrative discretion remains an unsettled issue, despite recent decisions such as *Lever Finance Ltd v. Westminster (City) London Borough Council* [1971] 1 Q.B. 222; *Dowty Boulton Paul Ltd v. Wolverhampton Corporation* [1971] 1 W.L.R. 204; *Reg. v. Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association* [1972] 2 All E.R. 589; *Norfolk County Council v. Secretary of State for the Environment* [1973] 3 All E.R. 673; *H.T.V. Ltd v. Price Commission* [1976] I.C.R. 170. And see generally (1973) 36 *Modern Law Review* 93; de Smith, *op. cit.* 88-91; Wade, *op. cit.* 68-9.

[59] [1977] 2 W.L.R. 234, 253-4, 271.

[60] *Ibid.* 251-2.

E. PUBLIC RIGHTS AND RELATOR ACTIONS[61]

On Thursday, January 13, 1977 it was publicly announced that in response to a call from the International Confederation of Free Trade Unions to protest against South Africa's apartheid policy, the executive council of the Union of Post Office Workers (U.P.W.) had resolved to direct its members not to handle mail to that country during the week commencing Sunday, January 16. On Friday 14, the plaintiff sought the Attorney-General's consent to act as plaintiff in relator proceedings for an injunction to restrain the U.P.W. from soliciting or endeavouring to procure any person wilfully to detain or delay any postal packet in the course of transmission between England or Wales and South Africa, contrary to section 68 of the Post Office Act 1953 (U.K.). The Attorney-General replied that 'having considered all the circumstances including the public interest" he was of the opinion that consent should be refused. At this juncture, Gouriet might easily have admitted defeat. The law was reasonably clear that, apart from relator proceedings, the courts lacked jurisdiction to award equitable remedies unless the plaintiff could show that either some private right of his was affected by the subject action, or that he had incurred special injury in the event that a public right was affected.[62] Gouriet could establish neither, nevertheless, he preceded to issue a writ of summons in his own name, and he applied to the judge in chambers for an interim injunction against the U.P.W. To establish his standing, the plaintiff relied simply on his right as a member of the public to use the facilities of the Post Office, a right which he claimed would be interfered with by the proposed union boycott.

After a brief hearing on the Friday, Stocker J. refused the relief sought on the predictable ground that he lacked jurisdiction to allow the plaintiff's application in these circumstances in the absence of the Attorney-General's consent to relator proceedings. The plaintiff's interlocutory appeal from this decision was heard the following day by a specially convened Court of Appeal which lent a more sympathetic ear to the plaintiff's application and an interim injunction in the terms sought was granted to run until the following Tuesday when the Attorney-General was expected to attend and assist the court on the question whether the refusal to grant his fiat deprived the court of jurisdiction to intervene on the plaintiff's application to prevent the U.P.W. from violating the law. Leave was also granted to join the Attorney-General and the Post Office

[61] See generally, de Smith, *op. cit.* 385-8, 400-1, 527-9; Wade, *op. cit.* 124-7; and Edwards J. Ll, J., *The Law Officers of the Crown* (1964) 288-95.

[62] de Smith, *op. cit.* 401-2; Benjafield and Whitmore, *op. cit.* 224-6. However, in *Attorney-General, ex rel. McWhirter v. Independent Broadcasting Authority* [1973] 2 W.L.R. 344, the Court of Appeal had raised the possibility of the courts intervening at the instance of a private individual where the Attorney-General had improperly refused his consent to relator proceedings. See *ibid.* 355-6 *per* Lord Denning M.R.; 363 *per* Lawton L.J.: and 361 *per* Cairns L.J. *McWhirter's* case was applied in *Benjamin v. Downs* [1976] 2 N.S.W.L.R. 199, 210-11 *per* Helsham J.

Engineering Union as defendants, and an interim injunction was awarded to the plaintiff to restrain that union from counselling or procuring its members to delay to transmit or deliver any message to South Africa contrary to section 45 of the Telegraph Act 1863.

Preceding the Attorney-General's appearance on the appointed day, the plaintiff made the first of several amendments to his pleadings, thereby contributing to a situation which was later to provoke the critical comment from Lord Wilberforce that 'the proceedings involved a high degree of improvisation, even of fiction'.[63] The plaintiff amended his pleadings to claim a declaration that the Attorney-General had acted improperly and had unlawfully exercised his discretion in refusing his consent.

At the resumed hearing the Attorney-General attended to assist the court on what he described as 'a vital constitutional issue'. He refused to adduce the reasons for his decision to withhold consent to the relator action on the ground that his discretion in that matter, being a prerogative power, was absolute, hence the courts were precluded from reviewing the propriety or adequacy of the grounds of its exercise. The Attorney-General submitted that if he had refused his consent improperly then he was accountable to Parliament alone. He drew attention to the independent nature of his office and his special functions which, he contended, distinguished his powers from those of other ministers who act within the principle of collective responsibility and whose decisions had been judicially reviewed in cases such as *Padfield, Congreve, Tameside* and *Laker*.

Apart from this 'vital constitutional issue', the Attorney-General submitted, along with counsel for the two unions, that in the absence of the Attorney-General's consent to a relator action, the court lacked jurisdiction to grant either injunctive or declaratory relief since the plaintiff failed to establish that his interests were more adversely affected by the unions' action than those of the public generally. At the end of the hearing, the declaration sought against the Attorney-General was provisionally amended following the plaintiff's concession that he was not entitled to a declaration that the Attorney-General had acted improperly and unlawfully. Instead, the plaintiff now claimed that he was entitled to proceed with his claim for final injunctions against the two unions in spite of the Attorney-General's refusal to grant his fiat.

With respect to the 'vital constitutional issue' which had occupied the bulk of the Attorney-General's submissions, Lawton and Ormrod L.JJ. expressly adopted the Attorney's primary contention that the exercise of his prerogative power to consent to relator proceedings was absolute and unreviewable by the courts.[64] By contrast, Lord Denning M.R. held that,

[63] [1977] 3 W.L.R. 300, 307.
[64] [1977] 2 W.L.R. 310, 337.

following *London County Council v. Attorney-General*,[65] the Attorney's discretion was unfettered where he had exercised it by granting his consent; but where consent was *refused* the courts could, in the Master of the Rolls' view, review the exercise of the discretion to ensure that it had been exercised according to law.[66] In this regard, his Lordship's judgment reflects his view stated previously in *Laker* that, as far as judicial review is concerned, no meaningful distinction exists between statutory and prerogative powers *per se*; the fundamental question in either case being whether the particular power is justiciable. However, Lord Denning M.R. did maintain that judicial review of the negative aspect of the Attorney's prerogative from power was in one significant respect different from review of any other justiciable power. In the event that the Attorney-General had exercised his discretion in a manner inconsistent with the appropriate legal principles, the application for his consent to relator proceedings would not be returned for him to reconsider it according to law, but, in his Lordship's view, the court itself would hear the plaintiff's complaint.[67]

Despite this ostensible division in the Court of Appeal concerning the issue of the court's power to review the Attorney's decision, the court was in unanimous agreement that the Attorney-General was not the final arbiter on the question whether the criminal law should be enforced. Each of their Lordships made reference to the intolerable situation if the effect of the Attorney-General's refusal was to deny the plaintiff access to the courts and the concomitant protection of the law.[68] The Court of Appeal agreed that, in the event that the Attorney refused his consent to a relator action, the plaintiff could avail himself of the court's own jurisdiction to grant equitable remedies to enforce the law. The court was prepared to grant Gouriet standing on the basis that his right as a member of the public to use the facilities of the Post Office would be injuriously affected by the unions' violation of the law. Notwithstanding that the plaintiff had sought declaratory relief against the Attorney-General alone, the court held that he was entitled to declarations against all three defendants, and that pending determination of the plaintiff's anticipated application for such relief, he was entitled to interim injunctive relief against both unions in the terms sought.[69]

Meanwhile, the threatened boycotts had been cancelled in obedience to the Court of Appeal's initial interim injunctions against both unions, and the court's final judgment merely confirmed the plaintiff's victory as

[65] [1902] A.C. 165 (H.L.).
[66] [1977] 2 W.L.R. 310, 328-9.
[67] *Ibid.* 328.
[68] *Ibid.* 330-1 *per* Lord Denning M.R., 339 *per* Lawton L.J.: 344-5 *per* Ormrod L.J.
[69] The Master of the Rolls was prepared to go one step further and award the plaintiff permanent injunctive relief, but the majority took the view that the relevant statutory provision, Supreme Court of Judicature (Consolidation) Act 1925 (U.K.), empowering the court to grant injunctive relief wherever it appeared to be 'just and convenient', was limited to interim injunctive relief.

well as adding a bonus in the form of the declaratory relief. *Gouriet* had won the battle, but was about to lose the war.

On appeal to the House of Lords, the decision of the Court of Appeal was unanimously reversed.[70] It was held that, in the absence of the Attorney-General's fiat or evidence of special damage, the plaintiff was without standing to prevent the perpetration of a public wrong, and that the court lacked jurisdiction to award him any relief in these circumstances. The 'vital constitutional issue' concerning the power of the court to review the exercise of the Attorney-General's prerogative was, strictly speaking, moot, since the plaintiff had withdrawn his claim that the Attorney had acted improperly in refusing his consent. However, in common with the Court of Appeal, the issue was taken up at some length by the House of Lords, either because it was mistakenly believed that the plaintiff was still asserting that claim,[71] or because it was tacitly perceived that that issue was effectively inseparable from what was described as the primary question whether the effect of the Attorney-General's refusal was to deprive the court of its jurisdiction to grant relief. After all, it does seem somewhat illogical that Lawton and Ormrod L.JJ. should have asserted that, on the one hand, the Attorney's prerogative was absolutely unreviewable by the courts while avowing that, on the other hand, the reasons for the Attorney's refusal might well be relevant to the court's decision whether to grant the plaintiff equitable remedies. Lord Edmund-Davies appreciated as much when, in discussing the Court of Appeal's majority judgments, he remarked that '. . . yet lip service was paid to the proposition that the Attorney-General's exercise of his discretion cannot be reviewed by the courts'.[72] At the same time, however, it should not be overlooked that it was open to the House of Lords to apply the classical doctrine[73] that, without reviewing the exercise of the Attorney-General's prerogative power, it was permissible for the court to ascertain the scope of that prerogative and, in particular, to determine whether it was so extensive as to deprive the court of any jurisdiction to enforce the criminal law. Instead, despite the novelty of the immediate circumstances, the House of Lords was content to rely on various dicta as unequivocally establishing that the Attorney-General's prerogative was absolutely unreviewable by the courts in either its negative or positive aspects.[74]

In any event, the House of Lords was adamant that the court lacked any jurisdiction to grant equitable remedies where the plaintiff sought to protect public rights without himself having suffered special injury. Indeed, the court insisted that there was no public right enforceable at law to use

[70] [1977] 3 W.L.R. 300.
[71] *Ibid.* 320 *per* Viscount Dilhorne, but see 308 *per* Lord Wilberforce.
[72] *Ibid.* 342; and see 315 *per* Lord Wilberforce, and 348 *per* Lord Fraser of Tullybelton.
[73] *Supra.*
[74] [1977] 3 W.L.R. 300, 315 *per* Lord Wilberforce, 326 *per* Viscount Dilhorne, 336-7 *per* Lord Edmund-Davies, 348 *per* Lord Fraser of Tullybelton.

the facilities of the Post Office, since that institution enjoyed an extensive statutory immunity from legal action;[75] and, more generally, it was held that any public right or interest in having the criminal law enforced was of no avail to the plaintiff since the assertion and protection of such a public right vested exclusively in the Attorney-General representing the Crown as *parens patriae*. Lord Wilberforce claimed that: 'It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public.'[76] However, it is respectfully submitted that this statement cannot be accepted literally. As far as the criminal law is concerned, the Attorney-General is not the exclusive representative of the public interest since an individual is entitled to bring a private prosecution to enforce the criminal law after a crime has been committed. The plaintiff had argued that this interest should suffice to support an individual's right to prevent the commission of a criminal offence by way of injunction, just as the Attorney-General was entitled to seek an injunction in the civil courts to prevent a breach of the law. In addition, it was contended that the Attorney's role in relator proceedings was largely fictional since, realistically, it was the relator who vindicated the public interest in such proceedings and any restraining function performed by the Attorney-General could be undertaken by the courts power to prevent frivolous and vexatious actions. But the House of Lords was unconvinced that the Attorney-General should not enjoy the exclusive right to represent the public interest in the enforcement of the criminal law. It was held that the Attorney-General did retain ultimate control of relator actions as, indeed, he did over private prosecutions through his power to abort any prosecution on indictment by entering a *nolle prosequi* or, otherwise, by directing the Director of Public Prosecutions to take over the conduct of any criminal proceedings and either offer no evidence or invite an acquittal. The court maintained that it was not always in the public interest that every offence be prosecuted and that the Attorney-General was in the best position to evaluate the diverse and potentially controversial factors which bear upon the decision whether to prosecute, a decision which the court regarded as 'outside the range of discretionary problems which the courts can resolve'[77] and 'not appropriate for decision in the courts'.[78]

The analogy between the Attorney-General's right to invoke the aid of the civil courts to prevent a violation of the law and the plaintiff's position in this case clearly invited a broader analysis of the topic of preventive

[75] Post Office Act 1969 (U.K.), ss. 9, 29. See [1977] 3 W.L.R. 300, 309 *per* Lord Wilberforce, 329 *per* Lord Diplock, 337 *per* Lord Edmund-Davies, 348 *per* Lord Fraser of Tullybelton.

[76] *Ibid.* 310. See also 326 *per* Viscount Dilhorne, 331 *per* Lord Diplock, 341-2 *per* Lord Edmund-Davies, 353 *per* Lord Fraser of Tullybelton.

[77] *Ibid.* 314-5 *per* Lord Wilberforce.

[78] *Ibid.* 353 *per* Lord Fraser of Tullybelton.

justice, but the House of Lords was wary of committing itself unnecessarily on the troublesome aspects of this subject.[79] The court sought to explain the Attorney's power to prevent the commission of an offence by way of injunction as being derived from the public interest in seeing that the law was respected and it was suggested that the Attorney's power was an illustration of the general principle that he was the exclusive guardian of the public interest.[80] What is more significant is that, having established as much, the House of Lords then proceeded to express some misgivings concerning the Attorney-General's power. It was emphasised that his power to enlist the aid of the civil courts was 'exceptional',[81] and 'one of great delicacy . . . to be used with caution'[82] and 'extreme care'.[83] Apart from Viscount Dilhorne,[84] the court was inclined to view the Attorney-General's power as limited to two situations: where there were repeated floutings of the law in the face of inadequate penalties, or in cases of emergency.[85] And even under those conditions it was suggested that the Attorney's power was 'not without its difficulties and these may call for consideration in the future'.[86] The full impact of these comments can be appreciated when they are read in conjunction with the principle that the courts enjoy an ultimate discretion whether to grant equitable remedies, even at the instance of the Attorney-General. While the Attorney-General's decision whether it is in the public interest to commence proceedings in the civil courts (either *ex proprio motu* or *ex relatione*) to prevent the commission of an offence remains his absolute prerogative, his determination is limited to the extent that the courts retain a discretion to decide whether it is in the public interest that injunctive relief be granted.[87] Though the courts are reluctant to disagree with the Attorney's view of the public interest, injunctive relief to prevent the commission of an offence has been denied to the Attorney-General acting as guardian of the public interest. In one such case in the Supreme Court of New South Wales, Myers J. declared that: 'I do not think that the public interest calls for an injunction and . . . it would be unjust and oppressive to do so.'[88] Apparently, in this respect, the courts do regard themselves as

[79] For an excellent analysis of these problems see the dissenting judgment of Bray C.J. in *Attorney-General v. Huber, Sandy & Wickman Investments Pty Ltd* [1971] 2 S.A.S.R. 142. See generally, de Smith, *op. cit.* 405-7.

[80] [1977] 3 W.L.R. 300, 314 *per* Lord Wilberforce, 331 *per* Lord Diplock, 341 *per* Lord Edmund-Davies, 348-9 *per* Lord Fraser of Tullybelton.

[81] *Ibid.* 313 *per* Lord Wilberforce, 323 *per* Viscount Dilhorne, 329 *per* Lord Diplock.

[82] *Ibid.* 314 *per* Lord Wilberforce.

[83] *Ibid.* 340 *per* Lord Edmund-Davies.

[84] *Ibid.* 323.

[85] *Ibid.* 313 *per* Lord Wilberforce, 331-2 *per* Lord Diplock, 340 *per* Lord Edmund-Davies, 348-9 *per* Lord Fraser of Tullybelton.

[86] *Ibid.* 313 *per* Lord Wilberforce.

[87] See generally, de Smith, *op. cit.* 390-5, 406-7.

[88] *Attorney-General v. J.N. Perry Contractors Pty Ltd* [1961] N.S.W.R. 422, 430. See also *Attorney-General v. Harris* [1961] 1 Q.B. 74, 87; *Attorney-General v. Greenfield* (1962) 62 S.R. (N.S.W.) 393; *Attorney-General v. B.P. (Aust.) Ltd* [1964-65] N.S.W.R. 2055.

competent to decide the difficult issues pertaining to the public interest. Yet, in *Gouriet,* Lord Wilberforce concluded that: 'The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve.'[89] The strength of this argument of nonjusticiability must be judged not only in light of the fact that the question of the public interest is decided by the courts in considering whether to grant injunctive relief, but also in view of the fact that the courts have evinced a welcome willingness to engage in a not dissimilar exercise of residually determining the public interest regarding claims for non-disclosure of documents or information on the grounds of 'Crown privilege'.[90] Judicial decisions pertaining to claims of 'Crown privilege' are no less likely to attract political criticism and controversy than decisions concerning the public interest in any other context. It should also be borne in mind that, in assessing the appropriateness of the courts to decide issues such as the public interest, the Court of Appeal below was not suggesting that the decision whether it was in the public interest to grant relief to Gouriet was a decision to be arrived at in a judicial vacuum. As Lord Edmund-Davies acknowledged in the House of Lords, 'it would always be open to the Attorney-General himself to intervene and make representations in civil proceedings brought by a private individual if he considered that the public interest required him to do so'.[91]

Only Lord Diplock addressed himself (and then somewhat cursorily)[92] to another aspect of the topic of preventive justice dealing with the power of criminal courts (especially magistrates' courts) to bind over.[93] It is highly regrettable that further consideration was not given to this issue since it is indeed ironical that, while civil courts at any level are powerless to prevent the commission of a crime at the instance of a private individual who cannot show special injury, a magistrates' court, acting on an information or complaint, may require a person formally to agree to be of good behaviour and keep the peace for a specified period with the sanction of imprisonment for up to six months if the recognisance is

[89] [1977] 3 W.L.R. 300, 314-5.

[90] See, for example, *Conway v. Rimmer* [1968] 1 All E.R. 874; *Australian National Airways Commission v. Commonwealth of Australia and Canadian Pacific Airlines Ltd* (1975) 6 A.L.R. 433; *Attorney-General v. Jonathon Cape Pty Ltd* [1975] 3 W.L.R. 606. See generally, Pearce, 'The Courts and Government Information' (1976) 50 *Australian Law Journal* 513.

[91] [1977] 3 W.L.R. 300, 340; but see 315 *per* Lord Wilberforce. It is submitted that Lord Wilberforce's objections are overcome if it is seen that the court is determining the ambit of the prerogative power rather than reviewing its exercise. See *supra.*

[92] [1977] 3 W.L.R. 300, 329.

[93] See generally, Glanville Williams, 'Preventive Justice and the Rule of Law' (1953) 16 *Modern Law Review* 417; Williams D. G. T., *Keeping the Peace* (1967) 87-113; Grunis, 'Binding Over Orders to Keep the Peace and Be of Good Behaviour in England and Canada' [1976] *Public Law* 16.

breached.[94] The power of magistrates to bind over, the origins of which are uncertain but appear to go back as far as the Justices of the Peace Act 1361,[95] is a considerable weapon of preventive justice since the power is not restricted to cases where a specific crime is proved, or even anticipated. And where it is apprehended that a particular act contrary to law will be committed, a magistrate may bind over despite the fact that the anticipated offence is beyond his jurisdiction.[96] Consequently, a person may be bound over after summary proceedings in a magistrates' court notwithstanding that his anticipated action would constitute an indictable offence which would entitle him to trial by jury in either the magistrates' court, or in a higher court if the offence is outside the jurisdiction of the magistrates' court. Several members of the House of Lords relied on the ramifications for the right to a fair jury trial in denying Gouriet the right to obtain injunctive relief in a civil court to prevent a violation of the law,[97] yet it is apparent that this consideration is equally applicable to binding over orders, as it is also to cases of public nuisance.[98]

Other aspects of the judgments of the House of Lords in *Gouriet* are also questionable. It has already been suggested that in view of a private individual's right to bring a private prosecution, Lord Wilberforce's sweeping observation that it is 'a fundamental principle of English law that . . . public rights can only be asserted by the Attorney-General' is an overstatement in so far as the criminal law is concerned.[99] Nor can that statement of principle accurately be applied to the civil law. In the first place, an individual has standing to assert public rights without the Attorney-General's fiat where he has suffered special damage as a consequence of interference with those public rights.[1] Secondly, Lord Wilberforce's statement ignores the fact that in certain circumstances the courts have recognised the right of a body or authority appointed to protect specific public interests to commence litigation to assert public rights without the Attorney-General's fiat.[2] This principle has been reduced to statutory form in the local government sphere.[3] Thirdly, and most importantly, the statement fails to take account of an individual's right to seek prerogative remedies even where no private legal right of his has been affected by the matter in dispute. Although the law concerning standing is notoriously uncertain it is apparent that, in theory at any rate, the prerogative remedies of prohibition and certiorari are available to a

[94] Courts Act 1952 (U.K.), s. 19. See generally, Harris B., *The Criminal Jurisdiction of Magistrates* (1974) chapter 23.
[95] See Grunis *supra* 18.
[96] *Ibid.* 27.
[97] [1977] 3 W.L.R. 300, 313-4 *per* Lord Wilberforce, 322 *per* Viscount Dilhorne, 330 *per* Lord Diplock, 350-1 *per* Lord Fraser of Tullybelton.
[98] *Ibid.* 340 *per* Lord Edmund-Davies.
[99] *Supra.*
[1] See *Boyce v. Paddington Borough Council* [1903] 1 Ch. 109, 114.
[2] See Zamir I., *The Declaratory Judgment* (1962) 267-8; and de Smith, *op. cit.* 409.
[3] Local Government Act 1972 (U.K.), s. 222.

stranger as of right where there is want of jurisdiction on the face of proceedings.[4] Apart from patent jurisdictional errors, several recent decisions have established that in some circumstances applicants for prerogative remedies are required to show no more than that they have a 'sufficient interest' in the matter in dispute. In *Reg. v. Greater London Council, ex parte Blackburn,*[5] prohibition was awarded to the plaintiff applicants to prohibit a public authority from acting unlawfully in licensing premises in accordance with a condition that was too narrow to prohibit the exhibiting of films which were 'indecent' at common law. In response to a challenge to the plaintiffs' standing, Lord Denning M.R. retorted: 'Who then can bring proceedings when a public authority is guilty of a misuse of power? Mr Blackburn is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has.'[6] Even though the issue of locus standi was not taken, it appears that the Court of Appeal in *Reg. v. Metropolitan Police Commissioner, ex parte Blackburn* [*No. 3*] did not doubt the plaintiffs' standing to apply for mandamus against the Metropolitan Police Commissioner to compel proper enforcement of the Obscene Publications Act 1959.[7] The plaintiffs showed no special interest other than a general concern in the welfare of their children. The judicial trend to liberalise the requirements of standing for the prerogative remedies manifests a judicial awareness of the desirability in the public interest to remedy illegal actions by public authorities where political and administrative controls prove to be inadequate. This development is a tentative step towards recognising public actions in English administrative law.[8]

Even though in general terms it may be more accurate to describe the Attorney-General as the primary, rather than the exclusive, guardian of public legal rights, the effect of the House of Lords' decision in *Gouriet* is to establish that, in some circumstances, only the Attorney-General has standing to assert public rights. The *Gouriet* case dramatically underlines the critical importance of the Attorney's powers concerning law enforcement, but scant attention was given to the question of the Attorney-General's accountability for the exercise of those powers. Lord Wilberforce's faith in the right of an individual to bring a private prosecution as 'a valuable constitutional safeguard against inertia or partiality on the part of authority'[9] is not shared by all. Trenchant criticism was levelled at that procedure in *Reg. v. Metropolitan Police Commissioner, ex parte Blackburn* [*No. 1*] where Salmon L.J. (as he then was) described

[4] See de Smith, *op. cit.* 368-72.
[5] [1976] 1 W.L.R. 550.
[6] *Ibid.* 558-9. The decision cannot satisfactorily be explained simply on the basis of the fiduciary duty owed to ratepayers: see (1976) 39 *Modern Law Review* 74.
[7] [1973] 2 W.L.R. 43, 52 *per* Lord Denning M.R., 55 *per* Phillimore L.J.
[8] On public actions, see generally, Jaffe, L. L., *Judicial Control of Administrative Action* (1965) 459-500.
[9] [1977] 3 W.L.R. 300, 310.

as 'fantastically unrealistic' the argument that the undertaking of a private prosecution was an equally effective remedy as mandamus when it came to reviewing policy decisions of the police relating to law enforcement.[10] Edmund-Davies L.J. (as he then was) volunteered 'the simple observation that only the most sardonic could regard the launching of a private prosecution . . . as being equally convenient, beneficial and appropriate as the procedure in fact adopted by this appellant'.[11] Moreover, private prosecutions are irrelevant where it is sought to prevent the commission of crimes, as in *Gouriet*.

As a minister of the Crown, the Attorney-General is accountable to Parliament for the manner of exercising his discretionary powers. Lord Fraser of Tullybelton claimed that: 'If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field.'[12] But, with respect, it is surely naive to expect that the Attorney-General will in fact be answerable in Parliament for the exercise of his prerogative powers. Responsibility to Parliament means, in practice, responsibility to the government of which the Attorney is a member, and in the nature of politics it is highly improbable that his own political party will act as an effective safeguard for fear of creating a politically embarrassing situation.[13] It is regrettable that the House of Lords did not heed the spirit of Farwell L.J.'s candid remark in *Dyson v. Attorney-General*: 'If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.'[14] Many of the Attorney-General's powers are semi-judicial in nature, but as he himself acknowledged, he is a political animal'.[14a] Putting aside whether the Attorney-General's decision in *Gouriet* was motivated by considerations of party political advantage, the possibility of this occurring in other circumstances cannot be denied. The unavoidable implication of the House of Lords' decision in *Gouriet* that the Attorney-General enjoys an absolute and unfettered discretion whether to activate the legal process to prevent the commission of a crime is a matter for grave concern.[15]

[10] [1968] 2 Q.B. 118, 145.

[11] *Ibid.* 149. See generally Williams D. G. T., 'Prosecution, Discretion and the Accountability of the Police', in *Crime, Criminology and Public Policy* (1974) 161, 166-9; Edwards, *op. cit.* 397; Dickens, 'Control of Prosecutions in the United Kingdom' (1973) 22 *International Comparative Law Quarterly* 1, 2-3.

[12] [1977] 3 W.L.R. 300, 353. See Edwards, *op. cit.* 224-5, 243-4, 253-4.

[13] See generally, Dickens, 'The Prosecuting Roles of the Attorney-General and Director of Public Prosecutions' [1974] *Public Law* 50, 66-73.

[14] [1911] 1 K.B. 410, 424. See generally, Northey J. F., 'Ministerial Responsibility in Modern Parliamentary Government', *Record of the Third Commonwealth and Empire Law Conference* (1966) 11.

[14a] See [1977] 2 W.L.R. 310, 327.

[15] See letter by Lord Hartley Shawcross in *The Times*, August 3 1977; and see *The Daily Telegraph*, July 28 1977 and *The Times*, July 28 1977.

F. CONCLUSION

Underlying every decision dealing with judicial review of executive power is the fundamental and controversial issue of the democratic acceptability of judicial review. The legitimate role of the courts in a modern democracy is an issue which has engaged constitutional lawyers and political scientists in the United States for decades,[16] but the issue has received scant attention in the context of Commonwealth administrative law. The doctrine of Parliamentary sovereignty dictates, of course, that judicial review of executive power is a residual power. Furthermore, judicial review is confined to a residual or restraining role not only by the shortcomings of the judicial process such as difficulties of access, delays, limited remedies, and haphazard treatment of cases as they are brought before the court; but by the doctrine of jurisdiction which provides the constitutional justification for judicial review of executive power. Apart from the ground of error of law on the face of the record (the importance of which has been drastically reduced by *Anisminic Ltd v. Foreign Compensation Commission*[17]), the only ground on which the courts are entitled to review the exercise of statutory powers is for *ultra vires* or lack of jurisdiction. In order constitutionally to justify judicial review of executive statutory powers the courts are driven to postulate that Parliament impliedly intended those powers to be exercised in good faith, for their proper purpose, fairly, without regard to irrelevant considerations, and so on. In the absence of Parliamentary authorisation, the courts are without constitutional warrant to review the merits of executive decisions and policies. This fundamental jurisdictional limitation was repeatedly emphasised in *Congreve, Tameside* and *Laker* dealing with statutory powers, and the same notion was implicit in the House of Lords' decision in *Gouriet*. But judicial decisions which call into question the exercise of executive powers cannot fail to arouse complaints and criticisms of undemocratic judicial intervention in the political and administrative branches and the recent English decisions have proved unexceptional in this regard. Contrariwise, while the decision of the House of Lords in *Gouriet* has silenced those who saw the Court of Appeal's judgments as direct challenges to Parliamentary sovereignty, the decision attracts the criticism that the House of Lords failed to respond to the reality of the limited extent to which Parliament can effectively control the manner of exercise of prerogative powers.

The criteria for judicial review of the exercise of discretionary powers are familiar, but are capable of definition only in very general terms. They include improper purpose, irrelevant considerations and failure to take account of relevant considerations, no evidence, bad faith, ulterior motive, unreasonableness, in fairness, and misconception or misdirection

[16] See, for example, Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 193; and Cox, A., *The Role of the Supreme Court in American Government* (1976).

[17] [1969] 2 A.C. 147 (H.L.).

of statutory duty. However, *Congreve, Tameside, Laker* and *Gouriet* demonstrate that it is in the application of these principles to particular circumstances that intractable problems arise. The explanation of those cases, along with many other decisions involving judicial review of executive power, does not lie within technical classifications or the doctrine of precedent since statutory contexts vary so extensively. In any event the innate limitations of language preclude statutory contexts — where relevant — from providing easy solutions. What does emerge is that complete rationalisation of these decisions can only be achieved in terms of the nebulous and seldom articulated factors which influence judicial attitudes and approaches. Whether in the context of statutory or prerogative powers, delicate questions of justiciability, fairness, and the availability of adequate and alternative political and administrative remedies have a critical bearing on the chameleonic moods of judicial activism and restraint. These questions manifest themselves in the positions taken by the courts regarding such issues as the vacillating burden of proof carried by the plaintiff, the degree to which administrative silence ought to be permitted to fetter judicial review, and the continuing relevance to the scope of judicial review of classical principles like ministerial responsibility or the principle that the courts are powerless to review the exercise of a prerogative power as distinct from defining its ambit.

It is submitted that *Congreve, Tameside* and *Laker* convincingly demonstrate the democratically important role which the courts can play in ensuring that executive powers are exercised according to law by providing aggrieved individuals with a valuable forum to redress executive action which impinges upon private rights without Parliamentary authorisation. In addition, the publicity which has surrounded these decisions illustrates that the judicial process operates in a manner which enables public attention to be focussed on particular executive decisions and public opinion remains the most effective deterrent to abuse of executive power. It is less certain whether the judgments of the House of Lords in *Gouriet* are equally convincing in refusing to involve the courts in the circumstances that were presented in that case.