Principles and Politics and Public Law

John A. G. Griffith
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Abstract
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I. INTRODUCTION

It may seem a little bizarre, even perverse, to speak of principles and politics and public law together. The cynic might say that they do not often meet in the same company, that principles are too grand to mix with politics, or as Emma thought of Frank Churchill: "his indifference to a confusion of rank bordered too much on inelegance of mind." To the worldly wise, principles, at least in politics and probably in morals also, are more a matter for

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the public relations people to talk about and are meant to conceal the reality of power, of passion, and of reality. And law is another kind of camouflage, also political under the harlequin cloth of seeming principle.

By principle I mean to include general propositions usually held out as desirables, even as ideals, but sometimes only as working rules. The constitution of every country, whether it is written or not written, is full of such principles governing such matters as collective and Ministerial responsibility, the relations between Ministers and civil servants, and the role of the judiciary. I am not talking specifically about conventions, an unfortunate Diceyan invention which only confuses students about the nature of reality. Another part of that reality is what we call politics which for my present purposes is meant to include what happens day by day in the running of the Government of a country.

Principles lend themselves to rhetoric more easily than do politics. We see the two operating side by side in international affairs. At one level, ideological principles abound, and the citizens of the NATO (North Atlantic Treaty Organization) countries are encouraged to contrast their ideals and way of life with those of the Soviet Union to the manifest disadvantage of the latter. So also, the citizens of the Soviet Union are similarly encouraged in the opposite proposition. Russian mothers used to frighten their children in the nineteenth century with the threat of the all-conquering Frenchman. Nowadays, if Boney doesn’t get you, Ronnie will.

No doubt, beneath the avalanche of ideological rhetoric lies the hard rock of economic self-interest and national self-advancement. That looks more like politics.

But I am not going to talk about international politics. Let me instead introduce my third character: public law.

II. PUBLIC LAW

Public law is a two-headed creation, like Janus. It is a gate that opens two ways: towards law and towards public affairs, which is also called politics. And public lawyers choose one way or the other through the gate and then distribute themselves along the
road stretching from those who are scarcely distinguishable from political scientists (or even politicians) to those who look like honest, common lawyers seduced by the notion that their specialty has more than wholly private and personal relationships.

To seek to demonstrate my modest thesis that some interest lies in looking at principles through the eyeglasses of politics and of public law, I will concentrate on two kinds of development, one political and one legal, which (it seems to me) touch on this matter of so-called principle, though not to its manifest advantage.

The first is the Westland story with which some of you will undoubtedly be familiar if, being interested in public affairs, you have had time, from following your own politics, to look across the Atlantic to the slowly sinking offshore island and beyond the continent of Europe.

Here then are the bones of the story, by no means yet finished, of political chicanery and skullduggery, of who's in and who's out, of Cabinet Ministers and their private offices, of Parliamentarians and Law Officers, of defence contracts, of leaks deliberately sprung and barely concealed, of threats to send the special branch into 10 Downing Street, and much besides, including constitutional principles and conventions, alive and dead.

III. WESTLAND

In the early 1980s, in Europe and especially in the United Kingdom (hereinafter UK), the civilian market for helicopters collapsed and military orders declined. The future looked bad for the small helicopter-producing company of Westland. It was the only major manufacturer which was not part of a much larger group either in North America or in Europe. Westland hoped for a large order from India, but for 1984-85, Westland faced a pre-tax loss of 95.3 million pounds sterling.

Well over 90 percent of helicopters in service with British forces were made by Westland for the Ministry of Defence (hereinafter MoD). In 1985, the Ministry ordered twenty-two new helicopters from Westland. In January 1986, an order for fifteen Sea Kings was in prospect. Possibly another six might be ordered, but otherwise no orders were expected from MoD before 1990-91.
In these circumstances, Westland was in need of what we would call help, but what the business world calls a "financial reconstruction." Since 1967, there had been a bilateral programme of collaboration between France and the UK over helicopter production. In June 1975, this became an intergovernmental, four nation Helicopter Steering Committee, with manufacturers from the UK, France, Italy, and West Germany. In 1978, the four Defence Ministers signed a Declaration of Principles to work together to maintain a strong helicopter industry within Europe. There was already a substantial involvement of American helicopter manufacture with European producers, including the American Sikorsky with Westland. Nor did the European helicopter industry offer a full range of types, so Governments bought some from the United States.

The Government first heard of Westland's financial problems in 1984. In June 1985, the Government took the view that a public sector rescue was not justified, and that a market solution should be sought. Later in June, the directors of Westland approached the Bank of England on whose introduction Sir John Cuckney became Chair on 26 June. The Government was now informed that the American Sikorsky were interested in "some form of participation" in Westland. There were also discussions with the European companies.

Mr. Leon Brittan became Secretary of State (hereinafter SoS) for Trade and Industry on 2 September 1985, and it appears that, certainly in October 1985, he was taking steps to ensure that the possibilities of a European option, as well as the Sikorsky American option, were fully explored. But Sir John Cuckney favoured the American option and mistrusted the motives of the European companies, all of which were Government-owned, loss-making, and suffering from excess capacity. Mr. Michael Heseltine was SoS for Defence, and he explored the European option with Cabinet support. He became committed to that option. For many weeks, there was no firm European proposal, while the Sikorsky's bid was ready. At this time, Mr. Heseltine pulled a fast one. He arranged for the National Armaments Directors of France, the Federal Republic of Germany, Italy, and the UK to meet on 29 November. Mr. Heseltine attended this meeting which neither Sir
John Cuckney nor Mr. Brittan knew about. The National Directors recommended to their Governments that some of the helicopter needs of their forces should be covered solely in the future by helicopters designed and built in Europe. Mr. Brittan later recorded his opinion that from this date Mr. Heseltine's enthusiasm for a European solution to Westland's problem caused him to take action going beyond what was consistent with the Government's policy in relation to the handling of Westland. That policy was said to be that the final decision was one for the Westland Board of Directors and that the Government should not intervene. The Treasury saw the recommendation of the National Directors as eliminating competition. Sir John Cuckney saw it, if endorsed by Ministers, as an insuperable obstacle to a capital reconstruction involving Sikorsky.

From then on events gathered speed. On 6 December, a majority of Ministers and ad hoc groups headed by the Prime Minister (hereinafter PM) were ready to decide that the Government should not endorse the Directors' recommendation. But because a minority of Ministers, including Mr. Heseltine, felt very strongly about the matter, it was decided, so the PM told the House of Commons, to hold a meeting of the Economic Sub-Committee for which a full paper would be prepared.

This Sub-Committee took place on 9 December. Mr. Heseltine believed that he was given a commission to see whether the Europeans could put together a firm proposal to the Westland board by the following Friday evening, and that the Sub-Committee was to meet on that Friday to receive his report. The PM denied that there had ever been a firm commitment to a further meeting, but only to the possibility of one. In the event, the preliminary arrangements for the meeting were cancelled by the PM. This stymied Heseltine. Ministers did not endorse the recommendation of the National Directors, and the European consortium's proposal was rejected by the Westland Board which adopted the Sikorsky option.

Mr. Heseltine did not give up. He persisted with his promotion of the European option even though the Cabinet had decided to leave the decision to Westland. Now Mr. Brittan sought to thwart Mr. Heseltine's efforts.
Mr. Heseltine now tried to play around his "stymie." On 24 December, the MoD (that is, Mr. Heseltine) wrote to Lloyds Merchant Bank, representing the European consortium, saying that only by joining that consortium would Westland be in a position to take the British share of European helicopter projects. Westland asked the PM for clarification. Consultation took place between the Departments of Trade and Industry, of Defence, the Treasury, and the Solicitor-General. The PM's reply of 1 January 1986 referred to indications from European governments and companies that a number of projects in which Westland were expecting to participate in co-operation with other European companies might be lost to Westland if the Sikorsky proposals were accepted. The letter continued that, whichever option Westland chose, the UK Government would continue to support Westland's wish to participate in these projects and would resist to the best of their ability attempts by others to discriminate against Westland. This letter was deliberately unspecific and did not include the items which might be lost to Westland if they accepted the Sikorsky option. This did not please Mr. Heseltine, so he suggested to those acting for the European Consortium that they might like to ask him for some of those details. They obliged at once in a letter of 3 January, which was immediately replied to on the same day by the MoD and was made public. It itemized the details which had been deliberately omitted from the PM's letter. It had not, of course, been cleared with the PM, other Ministers, or the Law Officers. The effect of this letter on the PM and Mr. Brittan, said the Select Committee subsequently, "can have been nothing short of incendiary."

The next day, Saturday 4 January 1986, the PM suggested to Mr. Brittan that he should ask the Solicitor-General to consider Heseltine's letter and give his opinion on whether it was accurate and consistent with her letter to Westland. The Solicitor-General reported that, on the basis of the evidence available to him, he had formed the provisional opinion that the Defence Secretary's letter contained material inaccuracies which needed to be corrected. Mr. Brittan reported this to the PM who asked the Solicitor-General to

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consider writing to the Defence Secretary to draw that opinion to his attention. We are still on Saturday 4 January. At 10:20 p.m. that night, the Solicitor-General telephoned Mr. Heseltine and outlined his concern. Mr. Heseltine said he had no problem about this as he had the evidence substantiating what he had written. Nevertheless, on Monday morning 6 January, the Solicitor-General wrote expressing concern to Mr. Heseltine and indicating the material inaccuracies to which he had referred. Mr. Heseltine’s Office received this letter about 12 noon. Copies were sent to the PM, the Foreign Office, the Department of Trade and Industry, and the Treasury. Mr. Brittan’s private secretary saw the copy at about 1 p.m. Westland’s Chair, Sir John Cuckney, had been kept in touch with these exciting developments the day before (Sunday) and wanted the matter cleared up before the company’s press conference on the Monday afternoon. Knowing this, Mr. Brittan’s private secretary rang Mr. Brittan who was out for lunch and read the Solicitor-General’s letter to him. The Secretary to the Cabinet, Sir Robert Armstrong, subsequently reported that the SoS (Mr. Brittan) responded that he thought it should go into the public domain, and that it should be done in specific terms, but that the PM’s Office should be consulted. The PM’s version was that Mr. Brittan made it clear that, subject to the agreement of her office, he was giving authority for the disclosure to be made from the Department of Trade and Industry, if it was not made from Downing Street. Mr. Brittan said, "I would particularly stress, it all had to be subject to the agreement of No. 10."2 Mr. Brittan did not express a view about the method of disclosure. Mr. Brittan wanted the disclosure to come from No. 10, but No. 10 would have none of it. But the Trade and Industry officials believed they had No. 10’s approval for the disclosure.

Mrs. Thatcher was present at No. 10 while all this was going on, but apparently was not consulted. The Select Committee on Defence came to the conclusion that the press office at No. 10 (Mr. Bernard Ingham) "undoubtedly realised the implication of what was

2 Ibid. para. 147.
about to take place and wished to distance No. 10 and the Prime Minister from the consequences."

The means of disclosure adopted was for the press officer at Trade and Industry to telephone the Press Association and read excerpts from the Solicitor-General's letter. The need for urgency was said to be the Westland press conference at 4 p.m. that day. Who decided on the means of disclosure is not clear. It is said that Mr. Ingham at No. 10 did not give instructions to the press office at Trade and Industry. But it is known that the press officer at the Department thought the disclosure, or its method, was improper, and that she wished to consult her Permanent Secretary who was not available. The disclosure was, after all, of a classified letter, written by another Minister who had not been asked if he consented. In addition, the letter had been written by one of the Law Officers whose advice has always been treated as especially private and confidential.

The PM justified the disclosure on the ground that Westland needed to know before the press conference on that afternoon. In fact, the Chair of Westland was personally informed by an official early in the afternoon. The use of the Press Association with the consequent publicity seemed unnecessary. The Select Committee on Defence thought that the PM's justification for publication was "flimsy, to say the least."

The Solicitor-General was angry at the disclosure. The PM said that her officials were right to consider that she would have agreed, had she been asked, that the fact that the Solicitor-General thought Mr. Heseltine's letter contained material inaccuracies should be made public as soon as possible. Both she and Mr. Brittan regretted the method adopted to go public. The selection of extracts was made by two officials in Trade and Industry. Mr. Brittan refused to tell the Select Committee whether he had authorized the publication of the document, and refused to identify the person who had selected the extracts that were published. He also refused to say why the Solicitor-General was not told that his

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3 Ibid. para. 155.

4 Ibid. para. 160.
letter was going to be leaked. The Select Committee on Defences said that:

The effect of selectively releasing the Solicitor-General’s letter, was to undermine the credibility of the advice which Mr. Heseltine had given to Lloyds Merchant Bank and of Mr. Heseltine himself. On the evidence before me, Mr. Heseltine’s advice was correct, although in terms of the conventions of Government it was improperly offered.\(^5\)

It is said that the Attorney-General was so angry at the use made of the Law Officers that he threatened to send the police to No. 10 Downing Street to investigate the leak of the Solicitor-General’s letter, unless an inquiry were immediately set up.

On 13 January, the PM agreed that Sir Robert Armstrong should conduct an internal inquiry into the circumstances under which the Solicitor-General’s letter became public knowledge. Some scepticism had been expressed about this, as it would appear that the PM’s press secretary and private office must have known the answers already. The PM told the House of Commons that she did not know about Mr. Brittan’s own role in the matter of the disclosure until the inquiry had reported on 22 January. The Select Committee reported, "[w]e asked Mr. Brittan when he was first involved in discussions about releasing the information. He refused to tell us. We also asked Mr. Brittan when he first spoke to anybody in No. 10 about the publication of the Solicitor-General’s letter. Mr. Brittan again refused to tell us."\(^6\)

At a Cabinet meeting of 9 January 1986, before the inquiry was set up, the PM required all Ministers to refer to the Cabinet Office, for approval, any statements they intended to make about the Westland affair. Mr. Heseltine refused to accept this and immediately resigned.

After the inquiry and debates in the House, Mr. Brittan accepted full responsibility for the disclosure and for the form in which it was made. He expressed profound regret for the manner of the disclosure and resigned.

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Let us look at how constitutional principles emerged from this affair. The PM and perhaps a majority of the Cabinet, having decided not to rescue Westland by the incursion of public money, wanted the Sikorsky option to succeed, but officially said that the matter was one for the Westland Board of Directors to decide. So political activity had to be somewhat subterranean. If the official policy of the Government was not to intervene, then Mr. Heseltine's continuous efforts to set up the European option were flatly contrary to the doctrine of collective responsibility. He was deliberately seeking the support of Parliamentarians, the general public, and the media. On 17 December, the word from the press office at No. 10 Downing Street was that the PM thought Mr. Heseltine's activities were *unorthodox but in order*, but the line soon changed and became that he was breaching the doctrine of collective responsibility. Nevertheless, he was allowed without public rebuke to continue his campaign. The principle had to be bent because, given all the circumstances, including the popularity of an argument that is pro-Europe and anti-American, the PM was not in a strong enough position to rebuke Mr. Heseltine publicly, and certainly in no position to dismiss him. This is of course the way politics is. It is easy to say that the PM can at any time dismiss Ministers and that this gives the PM great power. It is not only easy to say. It is also true. But the power to dismiss, or even to publicly rebuke, can be used only in special circumstances. Too rigorous a use of the power weakens the Government both in the House and in the country. There will always be those who think the Minister is in the right and the PM is in the wrong, and the question is one of relative advantage. Mrs. Thatcher has not suffered from a whole series of dismissals over the years, though she has never dismissed a high ranking member of her Cabinet. Harold Macmillan's famous night of the long knives, when he sacked six of the Cabinet, on the other hand, gave a blow in loss of morale to his administration from which it did not recover. Finally, Mrs. Thatcher was obliged to turn the screw on Mr. Heseltine because he had become an internal threat. I have always thought of Mr. Heseltine as Robert Devereux, the Earl of Essex (played by Errol Flynn), whose personal challenge was also carried too far. All this had everything to do with the pressures of practical politics, and had nothing to do with principle.
The deliberate release to the press of the Solicitor-General’s letter broke all conventions governing the position of Law Officers whose advice is supposed to be totally confidential. This was a remarkable breach of principle because it was a personal affront to the Solicitor-General whose services the PM was using when she asked him to consider possible discrepancies in Heseltine’s letter.

Mr. Brittan’s resignation is even murkier in its reasons. He really did nothing out of line with the courses of action required by his mistress. We know, as near as we can without having the words from the lady’s lips, that the PM wanted the Solicitor-General’s letter leaked to the press, and that she set up the whole exercise. Who decided by what means the leak should take place is not altogether clear, but all the evidence points to orders from the press office at No. 10 Downing Street. We know that the press officer at the Department of Trade and Industry, who actually contacted the Press Association, was reluctant to do so and tried unsuccessfully to contact her superiors in the civil service. The press office at No. 10 directly refused to authorize the leak, still less to contact the Press Association itself, and it is assumed this was done so that the PM would herself be able to avoid direct responsibility. Mr. Brittan was forced to resign because he was left isolated, holding the responsibility of the disclosure. Everyone else had disappeared. Had the Conservative backbenchers supported him, he would have survived because, although he was holding the responsibility, he was not in fact responsible. But PMs do not resign in such circumstances. This was not then a case of the convention of Ministerial responsibility, but rather the end of a game we used to play in the nursery when a parcel had to be passed from hand to hand and the last holder before the lights went up or the music stopped was the fall guy. The Conservative backbenchers could scarcely be expected to stand by Mr. Brittan when to do so would have been to abandon Mrs. Thatcher to the truth.

And what about those well known principles governing the relationship between Ministers and civil servants. For this we must go back a little time to the Ponting affair. In July 1984 Clive Ponting, an Assistant Secretary in the Ministry of Defence sent two documents to Tom Dalyell M.P. who passed them to Sir Anthony Kershaw M.P. the chair of the Select Committee of the House of
Commons on Foreign Affairs. Sir Anthony handed the documents to the Secretary of State for Defence (Mr. Heseltine) who called in the Ministry's police to investigate. Two days after the investigation began Ponting had signed a statement admitting that he had sent the papers to Dalyell. Ponting then resigned from the Civil Service but was later charged under section 2 of the Official Secrets Act 1911 for communicating official information without being authorized to do so. In February 1985 Ponting was acquitted, the jury returning a unanimous verdict. The two documents contained information about the sinking of the cruiser Belgrano in May 1982 during the Falklands conflict. Ponting claimed that his justification for disclosing the documents was that he believed Members of Parliament were being deliberately misled by Ministerial statements about the sinking of the cruiser and that it was his duty to reveal this.\(^7\) On 16 February 1985, the head of the Home Civil Service (Sir Robert Armstrong) issued a note of guidance stating the duties and responsibilities of civil servants to Ministers. The note was issued after consultation with permanent secretaries in charge of Departments, with their agreement, and with the consent of the PM. Having stated the general principles governing the conduct of civil servants and having emphasized that the duty of the individual civil servant was first and foremost to the Minister in charge of the Department, the note continued:

Civil servants should not decline to take, or abstain from taking, an action merely because to do so would conflict with their personal opinions on matters of political choice or judgment between alternative or competing objectives and benefits; they should consider the possibility of declining only if taking or abstaining from the action in question is felt to be directly contrary to deeply held personal conviction on a fundamental issue of conscience.

A civil servant who feels that to act or to abstain from acting in a particular way, or to acquiesce in a particular decision or course of action, would raise for him or her a fundamental issue of conscience, or is so profoundly opposed to a policy as to feel unable conscientiously to administer it in accordance with the standards described in this note, should consult a superior officer, or in the last resort the Permanent Head of the Home Civil Service. If that does not enable the matter to be resolved on a basis which the civil servant concerned is able to accept,

he or she must either carry out his or her instructions or resign from the public
service — though even after resignation he or she will still be bound to keep the
confidences to which he or she has become privy as a civil servant.\(^8\)

This note does not cover the situation in which Mr. Brittan's civil
servants found themselves during the Westland affair when ordered
to disclose to the press the contents of the letter from the Solicitor-
General to the SoS for Defence (Mr. Heseltine).\(^9\) The note does
not make clear whether those civil servants were entitled to refuse
to make the disclosure in this way if they thought it would be
improper (though not illegal) to do so, especially when they did not
have the opportunity to consult superior officers.

Lord Hooson asked some of these questions in a debate in
the House of Lords (hereinafter HL) on 26 February 1986:

What are the duties, if any, of civil servants to Parliament? Do they owe any duty
to Parliament if Ministers lie and a civil servant knows that it is a lie? Do they
owe any duty to Parliament if the Minister refuses to be answerable to Parliament?
In other words, what are the limits of a civil servant's duty to Government?\(^10\)

The answers are not clear.

The Armstrong Memorandum, as it came to be known, led
to much discussion, and the Select Committee on the Treasury and
the Civil Service in 1985 appointed a sub-committee to inquire into
the duties and responsibilities of civil servants and Ministers.\(^11\) The
Committee was critical of the Memorandum and found it remarkable
that it should be considered an appropriate answer to today's
problems. Observing that loyalty should not be a one way street,
the Committee recommended that the PM should, after consultation
with the leaders of the other political parties represented in the
House of Commons, formulate and publish guidelines for Ministers
which would set out their duties to Parliament and responsibilities

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as amended in vol. 84, col. 193 (24 October 1985).

\(^9\) See text at 9-10.


\(^11\) See U.K., H.C., "Civil Servants and Ministers: Duties and Responsibilities" No. 92-
The Committee also recommended that the Head of the Home Civil Service should enter into discussions with the Civil Service Trade Unions with a view to producing an agreed text of a new note of guidance for civil servants. They emphasized that Ministers should be able to play an active role in selecting the key officials who were going to work with them in planning and implementing their policies, and generally encouraged the "infusions, temporary and permanent," of highly motivated people of proven ability into the higher Civil Service. Specifically, on the issue that gave rise to the Memorandum, the Select Committee said that they could not regard as justified any leak by a civil servant which was designed to frustrate the policies or actions of a Minister, and that civil servants who leaked information "should face the sack or internal discipline."

In June 1986, the Association of First Division Civil Servants adopted a Code of Ethics which it proposed should be incorporated in the civil service pay and conditions of service code. The Code of Ethics provided for the recording of advice by the civil servant of any instruction believed by the Department's legal advisors to be likely to be unlawful, in breach of treaty obligations; or where a civil servant was required to act in a way which misled members of the public as to their rights, or in other ways amounted to maladministration. The Code also provided that civil servants with professional responsibilities should refuse to take action which conflicted with their professional code of conduct, or where a professional civil servant was instructed to take action damaging to the public interest (for example, in matters of health and safety). Again, civil servants should record their advice where they considered they were being asked to assist Ministers in misleading or

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13 The Government said Sir Robert Armstrong would discuss this with the civil service unions: ibid. para 16-18.


15 Supra, note 11 at para. 6,10.
lying to Parliament. If the matter could not otherwise be settled, the code would enable a civil servant to bring it before an independent body such as a Select Committee of Parliament or an ombudsman.

The Select Committee on Defence ended its report on the Westland affair in July 1986 by inviting anyone who felt traduced by the findings of the committee to give oral or written evidence, in public or private, to the Committee.\textsuperscript{16} The First Division Association protested that if any civil servants took up this offer they would be in breach of the code of conduct laid down by Sir Robert Armstrong which stated that their duty was "first and foremost" to their Ministers.

Responding to the Select Committee, the Government proposed to make clear to civil servants giving evidence to Select Committees that they should not answer questions which were or appeared to be directed to the conduct of themselves or of other named individual civil servants.\textsuperscript{17} In a subsequent debate, the Leader of the House (John Biffen) indicated that there could be further discussion before new guidelines to civil servants were finally and formally issued.\textsuperscript{18}

The Treasury and Civil Service Committee responded with a report on Ministers and Civil Servants.\textsuperscript{19} They distinguished "actions" of civil servants from their "conduct," defining "actions" as those activities which were carried out on the instructions of, or were consistent with the policies of, the Minister concerned. They noted that Select Committees regularly took evidence from officials concerning their actions, and they had no doubt that it would be quite wrong and entirely unacceptable for any restriction to be placed on the giving of such evidence. The Select Committee

\textsuperscript{16} Supra, note 1 at para. 237, 239-40.


defined "conduct" as activities falling outside their definition of "actions;" such "conduct" might amount to misconduct. They agreed that it would only on rare occasions be necessary for Select Committees to investigate "conduct."

The Liaison Committee of the House of Commons also reported a few days later on the accountability of Ministers and civil servants. The Liaison Committee accepted the distinction between "actions" and "conduct," at least to the extent of agreeing that a Select Committee finding something amiss in conduct would pursue the matter with the Minister before reporting to the House. They recommended that the guidelines proposed by the Leader of the House should not be issued. Drawing on their experience in the Westland affair, the Liaison Committee asked for an undertaking that, in the future, the Government would always ensure that a Minister was accountable to the appropriate Select Committee.\(^\text{20}\)

The Government replied to both these reports.\(^\text{21}\) They accepted that if civil servants giving evidence to a Select Committee were unable to answer a question to the Committee's satisfaction because they were inhibited by their duty to, or the instructions of, Ministers, the relevant Departmental Minister should be prepared to attend the Committee. The Government also accepted that there was intention to place restrictions on the giving of the evidence about "actions" subject to national security, confidentiality, and the preservation of collective responsibility.

To their reply, the Government appended supplementary guidelines for officials giving evidence to Departmental Select Committees. These stated that civil servants were accountable to Ministers, and that Ministers were accountable to Parliament. So civil servants were subject to the instructions of Ministers and remained bound to observe their duty of confidentiality to Ministers. When questions appeared to be directed to the "conduct" of individual civil servants, carrying the implication of allocating individual criticism or blame, it was for the Minister to make inquiry

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and to inform the Select Committee what had happened and what had been done to put the matter right and to prevent a recurrence.

Here again the pressure of politics on principle became acute. The PM clearly hoped to re-assert her overall and comprehensive control over civil servants, whom she appears to regard as her own personal domestics. But the Leader of the House, although a Cabinet Minister, was not willing to adopt quite so rigorous an approach, especially when Select Committees of the House of Commons were part of the argument. As it happens, both the Leader (Mr. Biffen) and the principal spokesman for the Committees (Mr. Terence Higgins) are men of considerable political experience and personal integrity. And so the simple principle that civil servants should do as Ministers tell them, should seldom be seen and never heard, has given way to a political compromise under which Select Committees may still question them closely and will expect them to continue to be accountable within the limits of their constitutional role.

No sooner had the last of these interchanges occurred in February 1987 than the Government was plunged into another constitutional crisis. In October 1986, according to the PM, it became clear to the Government that a British Broadcasting Corporation (hereinafter BBC) television programme to be shown in the near future would deal with specific material on a secret defence project known as Zircon satellite. This programme was one of a series called "The Secret Society," written by Duncan Campbell, a well known journalist of the New Statesman. Later the BBC decided not to broadcast this programme. Following press reports on 18 January that the film would be given a private showing, the Attorney-General on 21 January applied for an ex parte injunction against Duncan Campbell. This was granted. Further press reports suggested that two Members of Parliament (hereinafter MPs) intended to show the film in a room in the House of Commons on 22 January. To prevent this, the Attorney-General applied for a second injunction to the same judge, but this was refused on the ground that the House should regulate its own proceedings. Application was then made to the Speaker of the House of Commons who ordered that the film should not be shown in rooms under the control of the House until the House had an opportunity
to discuss the matter. On 27 January, the House debated a Government motion to confirm the Speaker’s order and continue that order so long as the injunction granted against Duncan Campbell remained in effect.

A question that immediately arose affected the power of Select Committees. The Leader of the House (Mr. Biffen) said that under the terms of the motion it would be open to a Select Committee, should the occasion arise, to apply to the House for authority to see the film within the precincts of the House if it felt that was necessary for the proper conduct of its inquiries. He assured the House that if that were required the Government would act promptly to provide time for the House to reach a decision on such a request. The Chair of the Committee, which acts as a Liaison for all the Select Committees, referred to a question put the previous week to the Leader of the House: "[w]hen my right hon. Friend considers the terms of the motion, will he ensure there is nothing in it that might impair the rights of the Select Committees of the House?" To which the Leader then replied: "I can give the undertaking sought by my hon. Friend in respect of Select Committees." 22

The Chair of the Liaison Committee now asked the Leader to repeat, without qualification, that assurance. But the Leader would go no further than his promise to give time for a debate, and it may be that the PM did not wholly approve of the statement he had made the previous week. The Leader of the Opposition also pressed the Leader. So did others.

In the event, the Government motion was not put, but a motion to refer the matter to the Committee of Privileges was approved without a division. The Speaker told the House that he understood this to mean that his decision forbidding the showing of the film within the precincts of the House stood until the Committee of Privileges reported to the House and the House took a decision.

It is clear that relationships between the Select Committees of the House and the Government are becoming more and more contentious. It is not always realized how strong a hold the

Government has over what goes on in the House and in its Committees. This is because of the hold the Government has over its supporters, partly because of tradition and partly because the Whips have the means to enforce discipline. Nevertheless, this is not wholly and inevitably true. Members are on occasion ready to defy the Whips.

The conflict between the Executive and the Commons is perennial but always changing. It is conditioned by the Executive’s majority in the House, but also by a consciousness, which Government backbenchers are also aware of, that Governments need watching. If Government backbenchers could always be relied on to do as they were told by Government Whips, the pressures on the Government would be much less. And outside the House, public opinion may emerge on any particular issue that is critical of Government action. And when this happens, it feeds back through Members of Parliament. Members in their debates do provide copy for the press and television. But the activity is two-way.

Here principle and politics become indistinguishable. It is not true to say simply that in principle Parliament is sovereign, but in political practice the Executive controls Parliament through its majority. This has never been true. The only senses in which Parliament is sovereign are that the assent of both Houses is needed before a new law in the shape of an Act of Parliament can be made, and that a defeat in the House of Commons on a matter of confidence brings down a Government and forces a general election. In all other senses, the Queen’s Ministers are sovereign. They may, it is true, do only those things for which they have legal authority, derived from statutes made by Parliament, or by virtue of the royal prerogative. But the making of policy and its execution are essentially matters for Her Majesty’s Ministers. That is principle as well as political practice.

I turn now to another example: that of principle and politics in adjudication.

IV. PRINCIPLE AND POLITICS IN ADJUDICATION

An example of the conflict between principle and politics will be familiar to the lawyers amongst you. When Mr. Liversidge was
interned without trial in 1940 under the Defence Regulations then in force, he sought to challenge his detention on the ground that the power of the Home Secretary was conditional on the Home Secretary having reasonable cause to believe that he had hostile associations. The HL decided, however, that it was sufficient if the Home Secretary thought he had reasonable cause, and if no objective challenge on the existence or otherwise of reasonable cause itself was permissible. This decision was come to, no doubt, in the public interest, for the pragmatic political reason that whatever the words of the Defence Regulations, we could not allow legal niceties to threaten national survival in time of war. Lord Atkin dissented in the most famous dissenting judgment of the century in the UK. "In this country, amid the clash of arms," he said:

the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.\(^{23}\)

It seems to me clear that the majority were concerned above all to ensure that the Executive was not impeded in the successful prosecution of any war in which His Majesty might be engaged. This is hardly a dishonourable purpose. And the apparent starkness of the conflict between principle and political expediency in this case is perhaps misleading. Lord Atkin did not believe that his view, if adopted, would endanger the war effort significantly. The majority perhaps thought that, in the circumstances, their underwriting of Executive power was not a severe inroad into the principle of individual liberty. A cynic might say that the outcome of the case was a typical example of the British genius for compromise or, alternatively, for hypocrisy. After all, in the end, Mr. Liversidge and people similarly interned remained locked up while at the same time we were presented with a ringing declaration of individual liberty.

It reminds me of that large number of cases on *habeas corpus* where judges begin by extolling the virtue of this great writ which epitomizes the dedication of the British people to freedom, liberty, and individual rights, and end by finding special reasons why in the particular case before them, the incarcerated must stay incarcerated.

I want, however, to address a much more difficult problem in public law—perhaps the most difficult in this article. In the last twenty years or so, we have been told by members of the senior judiciary on many occasions that administrative law is now an O.K. subject, that judicial review is a good thing so long as it is exercised in moderation, and that if we watch closely we shall see the emergence of comprehensive legal principles. Already the vocabulary is being introduced and we are judicially encouraged to use words like irrationality, illegality, and procedural impropriety.

I want to suggest that this much heralded development of legal principle has in fact largely failed to materialize and indeed that there is some evidence to indicate that Her Majesty's judges are a long way from recognizing the principles of public law. The fault cannot be wholly theirs. It must in part be ours (by which I mean legal academics), and this is nonetheless so despite our knowledge that they would consider what we have to say on the matter at best with condescension and at worst with scorn. I have reluctantly come to the conclusion that the judges of the High Court and above in England do not believe they have much to learn from anyone except their judicial superiors and sometimes their political peers. As almost none of them has ever progressed in the study of the law beyond their first degrees, and some of them not beyond bar finals set forty or more years previously, it is perhaps not surprising we look in vain for them to lead the way in the development of comprehensive principles in the field of public law.

The contrast between the views of academic lawyers and the judiciary on the nature and development of administrative law is striking and says a great deal about the two professions.

Let us remember that the present political dispute began nearly sixty years ago with the publication of Robson's *Justice and
Administrative Law\textsuperscript{24} in 1928 and Lord Hewart's \textit{The New Despotism}\textsuperscript{25} in 1929. This was followed, on the academic side, by Sir Ivor Jennings' \textit{Law and the Constitution}\textsuperscript{26} in 1933. Much of the discussion was about the development of a system of administrative law. There were many decisions handed down, with the courts generally seeking to extend their jurisdiction and getting bogged down in conceptual distinctions between judicial, quasi-judicial, and administrative functions, with occasional dashes for freedom in pursuit of error of law on the face of the record. Then was supposed to come the great breakthrough. When we heard the famous words of Lord Reid in \textit{Ridge v. Baldwin} in 1964, "[w]e do not have a developed system of administrative law — perhaps because until recently we did not need it...",\textsuperscript{27} we were struck with a sense of wonder that the persistent failure of Her Majesty's judges over so long a period of muddle and uncertainty could be explained in such terms. It was, I suppose, absurd on our part to have thought for a moment that they might have been aware of the attempts of academic writers to construct such a system. But nothing was quite so absurd as the claim made a few years later in \textit{O'Reilly v. Mackman} by Lord Diplock that this reproach to English law had been removed and that by 1977 we did have a developed system of administrative law.\textsuperscript{28}

It is difficult to disentangle principle, or the lack of it, from politics, or the pursuit of it, in this matter. I recently attended a lecture given in a University in the UK by a Lord Justice of the Court of Appeal. He was talking about the new judicial review procedure brought in by Order 53 of the Rules of the Supreme


\textsuperscript{25} Lord Hewart of Bury, \textit{The New Despotism}, (London: E. Benn, 1929).


Court. The Lord Justice was alarmed because the number of applications for judicial review had greatly increased over a four year period because of this reform so that the courts were becoming overcrowded and delay was growing. To deal with this outburst of popularity brought about by the reform, Her Majesty's judges moved the goal posts so as to make it more difficult for applicants to bring their cases. In particular, two types of applicant who felt they were suffering injustice had to be discouraged. These two categories were homeless persons and immigrants. The change in the rules largely excluded them from the remedy. Here the politics does seem clearly to have got the upper hand over the principle. But we are still looking for that system of administrative law. This search sometimes seems like a cross between Sir Galahad seeking the Holy Grail and Glenn Miller seeking that distinctive sound. However, since both were ultimately successful, so perhaps shall we.

Just what the courts ought to be doing in this field is the big question. Some people think that they should be doing very little, and that they will find solutions in the expansion of democratic institutions and in their more efficient functioning. It is a respectable position. But standards of conduct, even amongst locally elected administrative authorities, are not always perfect, and it may not be altogether realistic to believe that these can be maintained by the working of the democratic processes.

The learned editor of *Public Law* recently drew attention to a simple little case and its handling by the Court of Appeal in London. It shows what kind of public law we have, and we must consider whether it is what we want, whether these are proper principles, and what are the political implications. The case is called *R. v. Lancashire County Council ex parte Huddleston*. The applicant was a young woman of eighteen years of age in 1983. Her parents are UK citizens and she was born in the UK. She has a UK passport and is entitled to live in the UK. In 1970, at age of five, she went to Hong Kong (hereinafter HK) with her parents.

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There she lived until June 1983 when she became resident in Lancashire. Her father is Lancastrian born and bred. He is a chartered electrical engineer, and until 1970 had always lived in or not far from Lancashire. Then he went to work in HK. He sold his house in Lancashire and lived with his family in quarters provided by his employers on terms that he would vacate them when his employment ended. He wished to return to work in the UK when he could get a job and would have returned earlier had the employment position been better. In 1977, he bought a house in Lancashire and furnished it. The family occupied the house each year during his leave. So he had been a local ratepayer since 1977, and he also voluntarily kept up his national insurance payments in the UK.

In 1983, his daughter Lynne, the applicant, was minded to take a B.Sc. in psychology at Bedford College, London. She applied for a mandatory grant from her local education authority (hereinafter LEA), that is, Lancashire County Council. This she would have been entitled to had she been "ordinarily resident" for the last three years, or if her father was "temporarily employed" outside the UK.\(^{31}\)

The Court of Appeal held she had not been "ordinarily resident" for three years and that her father’s employment outside the UK had not been temporary.

*The Education Act 1962*\(^{32}\) also provides that an LEA may in its discretion bestow an award on any person where that person is not eligible for a mandatory award. Having been refused a mandatory award, Lynne Huddleston applied for a discretionary grant.

Sir John Donaldson, Master of the Rolls (hereinafter MR), said:

> Although we were assured, and I fully accept, that some consideration was given to the grant of a discretionary award ... there is no outward and visible sign of this in the contemporary correspondence and I am driven to conclude that any such

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\(^{31}\) *Ibid.* at 943.

\(^{32}\) *Education Act 1962* (U.K.) 10 & 11 Eliz 2, c. 12.
consideration was cursory and inadequate.\textsuperscript{33}

After these proceedings were begun, the Chair of the further education subcommittee reconsidered the application, and an officer's affidavit stated:

"Having considered the circumstances of this case and having been informed that local education authorities do not receive reimbursement from central government of 90 percent of their expenditure under the specific grant arrangements, the said Chairman, on behalf of the County Council, felt that there were no special circumstances to justify him making such an award."\textsuperscript{34}

The reference to 90 percent is that that is the amount recoverable from the central Government on mandatory awards.

The MR said he did not find this reply wholly satisfactory. Counsel for the Lancashire City Council argued that it might be an undesirable practice to give full, or perhaps any, reasons to every applicant, if only because this would be likely to lead to endless arguments. Sir John said that if an applicant could satisfy a judge that the facts disclosed were sufficient to entitle the applicant to apply for judicial review, the duty of the respondent was to make full and fair disclosure. He said that the development of judicial review had created a new relationship between the courts and public authorities, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration. Public authorities must discharge their duties in accordance with public law. The courts respected the fact that it was not for them to intervene in the administrative field, unless there was a reason to inquire whether a particular authority had failed to discharge its duties in accordance with public law.

It was for the applicant, said the MR, to satisfy the court of her entitlement to judicial review. But it was a process which fell to be conducted with all the cards face upwards on the table, and the vast majority of the cards would start in the hands of the public authority.

The judges who man the public law court are, or very soon become, specialists with a very real appreciation of the realities of public administration.... But authorities

\textsuperscript{33} *Supra*, note 30 at 944.

\textsuperscript{34} *Ibid*.
assist neither themselves nor the courts, if their response is a blanket assertion of having acted in accordance with law or one which begs the question.\textsuperscript{35}

The MR went on to say that the LEA was entitled to have regard to the cost to the ratepayers. It was also entitled to take into account the means of the father, his Lancastrian connections, that he was a ratepayer, how long he had been working overseas and his declared intention that this was temporary, and the applicant's personal circumstances and academic achievements. At this point in the judgment, the applicant may have been optimistic. Judicial criticism of the LEA had been severe. But the MR suddenly concluded with these words:

However, in the absence of such further and more detailed explanation, we have to decide whether on the materials which we have the authority erred in the exercise of its discretion. Although I would have liked more reassurance, I am not satisfied that it did and I would dismiss the appeal.\textsuperscript{36}

Now this is surely a dog's breakfast of a judgment from the MR. Whether or not a UK citizen who resides abroad in these circumstances should be entitled as of right to a university grant is a matter of policy, and the two criteria of residence in the UK and the permanence or otherwise of parental overseas employment, are politically defensible. As criteria, they are indisputable in the courts, being statutory. The court's application of those criteria to the facts in this case is also defensible. So we come to what happened to the application for a discretionary award.

The MR began by saying that the first consideration by the LEA of the application was "cursory and inadequate."\textsuperscript{37} He said of the second consideration put forward in the affidavit that it was not "wholly satisfactory."\textsuperscript{38} He did not comment on the argument that it might have been undesirable for the LEA to give reasons for rejecting applications because this might lead to endless arguments,

\begin{footnotes}
\footnote{\textit{Ibid.} at 945.}
\footnote{\textit{Ibid.} at 946.}
\footnote{\textit{Ibid.} at 944.}
\footnote{\textit{Ibid.}}
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though I would have thought the classic argument of the bad bureaucrat could have at least produced a judicial raising of the eyebrows. At this point, the MR becomes difficult to follow. He said that if an applicant could satisfy a judge that the facts disclosed were sufficient to entitle the applicant to apply for judicial review (and here, by definition, they were sufficient), then the duty of the respondent was to make full and fair disclosure. As he had already concluded that consideration of the application was cursory, the examination was inadequate, and the reasons were unsatisfactory, either the decision was bad on those grounds or more disclosure was called for. He claimed that the development of judicial review had created a new relationship between courts and public authorities with a common aim of maintaining the highest standards of administration. This was news to me, but if it were so, and the courts were no longer playing the old adversarial game of who can prove what, never mind the truth of the matter, then we certainly need full and fair disclosure. He said that the process of judicial review required all cards to be placed face upwards, which clearly they were not in this case. He said authorities should not make blanket assertions or beg questions, which the LEA had done in this case. He listed some relevant considerations about the applicant and her father, with no indication on the evidence that they had been taken into account. And then he came to the conclusion that in the absence of all this information he had to decide whether on the materials which he had, the LEA had erred in the exercise of its discretion. And although, he said, he would have liked more reassurance, he was not satisfied that the LEA had erred, and so would dismiss the appeal.

Whatever happened to full and fair disclosure? Whatever happened to cards being face upwards on the table? Whatever happened to no blanket assertions and no begged questions? And above all, whatever happened to the new relationship, to the common aim, to the maintenance of the highest standards of public administration?

You may think I have spent too long on this case, that it is too flimsy a basis on which to mount an attack. But for me, in this area of judicial decision making, it raises the most crucial questions of principle, of politics, and of public law. Let us assume, as we
may fairly do, that this application for public money was received and rejected first of all by a fairly junior officer who had been told that the LEA had decided as a matter of policy, given their relative impoverishment, that applicants who did not qualify for mandatory awards for first degrees were not to be given discretionary awards. It is well known that discretionary awards are very difficult to come by. So at that stage, none of the particular circumstances were looked at. Alternatively, the junior officer might have been told to put up only those applications which had certain features. We can go on to assume that, when the issue was known to be possibly coming to court, the policy decision was taken not to spell out the reasons why the particular circumstances of this applicant were regarded as insufficient to merit an award, but to put up an affidavit which said the absolute minimum; and that one of the reasons for this reticence was that otherwise a precedent might be created in which the officers might have to give reasoned replies and not just rejections based on "cursory and inadequate" consideration.

Now the question is, do we want the courts to do anything about this? In particular, do we want them to insist that evidence is produced of how much genuine consideration was given to the application? If we want the courts to get full and fair disclosure, with cards face upwards, what do we want them to do — this is the next big question — when they decide that the high standards of public administration have not been achieved? In this case, do we want the courts to decide that Lynne Huddleston should be given her grant? Or do we want only that the case should be sent back to the LEA for reconsideration of all the relevant facts as indicated by the courts?

I do not want the courts to be able to exercise the discretion vested in the LEA. But I would be happy if the courts were able to insist on reasons being given so that they might consider whether those reasons were serious. In this case, the affidavit disclosed one reason which by itself was clearly inadequate, and if it stood alone was probably illegal and *ultra vires*. I mean that whereas mandatory grants were 90 percent financed by the central government, discretionary grants were not. To turn down all applications on that ground could not amount to a proper exercise of discretion. The other consideration taken into account — it can hardly be called a
reason — was "the circumstances of this case" and the decision that they were not "special." On the face of it, they look "special." If they are not, what might be "special?" I believe the courts should intervene to the extent that they insist on full disclosure, if need be on cross-examination of affidavit evidence, even calling witnesses themselves if neither side shows any inclination to do so.

My general reaction to this decision is how extraordinarily weak it is. Where is all that forthrightness and boldness which enabled courts to strike down the Ministerial finding in *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* that an LEA had acted unreasonably, or to decide that the Greater London Council (hereinafter GLC) had betrayed the trust placed in its hands by its ratepayers in providing them with cheaper transport fares? But the second reaction, after a few moments' reflection, is that the decision was not so much lacking in fortitude as being wholly consistent with the general pattern of inconsistency. Indeed,

It's honour rooted in dishonour stood
And faith, unfaithful, kept it falsely true.

For against those cases of judicial boldness in standing up for the individual against the mightiest in the land — well not so much the individual in the *Tameside* case, but rather another political party, and not so much the individual in the *GLC* case, but rather another political party, but no matter — we can find the judiciary *not* standing up against the mightiest in the land in the *Secretary of State

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43 *Supra*, note 41.

44 *Supra*, note 42.
for Defence v. Guardian Newspapers Ltd case\textsuperscript{45} and not requiring an adequate affidavit from the SoS for Defence before requiring the Guardian newspaper to disclose its sources, and not protecting freedom of the press in the thalidomide case,\textsuperscript{46} or in British Steel Corporation v. Granada Television Ltd,\textsuperscript{47} or in Harriet Harman's case,\textsuperscript{48} and coming as close as was possible to emasculating habeas corpus without actually performing the operation. So it does seem that while occasionally the lions under the throne may roar they are most likely to be found doing so as watchdogs protecting the throne.

Another recent case poses the problem of what we want our judges to do in a slightly different situation. For many years now, certainly since 1979 — a date which is beginning to look like the beginning of political history before which it is assumed nothing happened, and whereof the memory of man runneth not to the contrary — Her Majesty's Government has been trying to stop local authorities from spending money on social services. First the Government asked them not to. Then, when they took no notice, the Government reduced the central grant. When local authorities, or some of them, promptly increased their local tax, the Government further penalized them. Then the Government put a limit on the level of local tax — the famous rate-capping exercise — and finally capped their total expenditure.

The mechanism for all this was very complicated and the ingenuity of local treasurers quite remarkable. Creative accounting became the thing everyone was into. One casualty, if that's the word, was the normal distinction between capital and revenue expenditure. The future has been heavily mortgaged by borrowing money at high rates of interest under arrangements whereby no part of the capital or interest is repayable for the first few years.


Thereafter, a fairy godmother is confidently expected to appear, possibly heavily disguised as Mr. Roy Hattersley, the next Labour Chancellor. This of course involves Labour first winning a general election. In this case, I am not sure I would personally put my money where my mouth is.

In a case last year, 49 Nottinghamshire County Council (hereinafter NCC) sought judicial review of a Ministerial decision which bore heavily on the finances of that authority as a result of a distinction made between high spending and low spending local authorities. The arguments were two. First, the NCC argued that the Minister could not so distinguish because the Act 50 said the principles were to be applicable to all authorities. This the HL held did not stop the Minister from doing what he did. Secondly, the NCC argued that the Minister had acted unreasonably because the application of the principles was disproportionately disadvantageous to high spenders.

The Law Lords, led by Lord Scarman, held that in the absence of exceptional circumstances, such as bad faith, improper motive, or that the consequences were so absurd that the Minister must have taken leave of his senses, it was inappropriate for the court to intervene on the ground of unreasonableness in a matter of public financial administration that had been one for the political judgment of the Minister and the House of Commons (which had approved the regulations by resolution), the principles being concerned with the limits of public expenditure and the incidence of the tax burden between central and local taxpayers.

Lord Scarman was at some pains to insist on the constitutional importance of his opinion. He seemed to want to elevate what he was saying into the putting down of markers on the boundary line between judicial principle and political rule making. His reluctance to have the courts intervene on matters of public financial administration and the distribution of the tax burden between central and local taxpayers, looks very odd when compared


with his opinion in the GLC transport fares case when the Lords showed positive enthusiasm for such intervention.

What all this represents is probably no more than one of the seasonal swings that are inevitable when questions of public law are decided, not on principle, but on mood and idiosyncrasy. From time to time, the senior judiciary gambol about like septuagenarians on a spree and lash into Governments and political policies with abandon and high spirits. They will invoke political philosophers to curb the political aspirations of party politicians. At other times, they adopt the solemn faces of elder statesmen and step most circumspectly around propositions that they should uphold the claims of individuals against Ministers of the Crown.

Perhaps I am being a little unfair in suggesting that these swings in judicial pronouncement are wholly without principle. But it is certain that the principles are not those of treating all persons as equal before the law.

So we come to the final question in this consideration of adjudication: what should be the judicial principles in public law? What are judges for?

First, they should insist on procedures being fair, and that means that the rules of procedure hold a balance evenly between the contestants. Secondly, they should ensure that public authorities achieve a high standard of administration, that they come to their decisions, to use the old words of Lord Halsbury in 1891, "according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is to be not arbitrary, vague, fanciful but legal and regular." To know when to intervene and when not to intervene, to know how to intervene and to what extent to intervene, in the review of the decisions and actions of public authorities, from PMs and Foreign Secretaries to minor local government officials, the courts should seek to know all the facts, they should try to find out the truth of the matter, and not be content necessarily with what counsel choose to put before them.

51 Supra, note 42.

When they look at an exercise of public power by public authorities, they should ask the question: Is it well done?

I am aware that the laying down of general principles leaves all the marginal questions open. About those the arguments are perennial and will remain so. There will always be differences between rational people about the desirable extent of judicial intervention. But the real problem today, as it seems to me, is that the senior courts in the UK are not performing well. Their job requires them to go beyond procedural matters and to determine where the public interest lies. But if judges are to develop a system of public law wherein the elements of political decision making on the one hand, and judicial policing of the administration on the other, are combined so that (at least) a high standard of public administration is achieved, the courts must make themselves aware of the nature and extent of administrative activity to a far greater degree than they do at present. The rules they apply must originate in a real understanding of public administration so that public law takes its place as an actor, in a supporting rather than a principal role, but an actor nevertheless, in the unending conflict between principles and politics.