

*Note* Two versions follow, the second with footnotes.

## **Local Government Finance: is the Capping Regime Lawful?**

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In this article I raise the question whether the regime operated by the Secretary of State under Chapter V of Part I of the Local Government Finance Act 1992 ("the capping legislation") may be illegal in not taking sufficient account of the fact that most local government expenditure is compulsory. {By virtue of the Interpretation Act 1978 s 5 and Sch 1 "the Secretary of State" means one of Her Majesty's principal Secretaries of State, the allocation being made by the Prime Minister of the day. Currently the duties under the capping legislation are allocated to the Secretary of State for the Environment, Transport and the Regions. In this article I use "the DETR" to refer both to the Secretary of State and his department. }

I begin with an examination of recent developments in how the courts view the multifarious statutory provisions by which duties are imposed on local authorities to carry out various functions and thereby necessarily incur the costs involved.

### **How the courts regard local authority duties**

The leading case is *R v East Sussex County Council, ex p Tandy* [1998] 2 All ER 769. This concerned the duty imposed on local education authorities by the Education Act 1993 s 298 {Now re-enacted in the Education Act 1996 s 19.} to make arrangements for the provision of suitable education for children of compulsory school age who by reason of illness or otherwise might have to go without this unless such arrangements were made for them. After providing full service for a while, the East Sussex County Council reduced its provision for the appellant Beth Tandy to a level that was ruled by the House of Lords not to comply with the statutory duty. The ground for this reduction of service was that the council had insufficient funds to perform the duty fully. The chairman of the education committee told Beth's parents in October 1996: "The County Council had to make some very difficult decisions last March regarding the level of budget for education and I regret that it was considered necessary to reduce expenditure on home tuition". Lord Browne-Wilkinson said {At 772.}-

"Like all other local authorities, the respondent county council is in an unenviable position. It is now prevented from obtaining either from central government or from local taxation the financial resources necessary to discharge its functions as it would like to do. In a period when the aim of central government, of whatever political colour, has been to achieve a reduction in public spending, local authorities have not been relieved of statutory duties imposed upon them by Parliament in times past when different attitudes prevailed."

The House of Lords held that there was nothing in the 1993 Act to suggest that resource considerations were relevant to the question of what was a "suitable" education, though an authority would be entitled

to consider its resources in deciding between two or more practicable methods under each of which a "suitable" education would be provided. They distinguished *R v Gloucestershire CC, ex p Barry* [1997] AC 584, where the House had held by three to two that financial resources were relevant when deciding on the "needs" of a disabled person under the Chronically Sick and Disabled Persons Act 1970 s 2(1). The ground for the distinction was that the requirement made by the 1970 Act is, as Lord Browne-Wilkinson put it, a "strange" one because it treats such trivial things as the provision of a radio or of a particular recreational activity as being a "need". He added: "In those circumstances it is perhaps not surprising that the majority of your Lordships looked for some other more stringent criteria enabling the local authority to determine what was to be treated as a need by reference to the resources available to it". {The House of Lords thus marginalised *Barry*, indicating its agreement with the view of that decision expressed in Bennion, *Statutory Interpretation* (3rd edn, 1997), p 83.}

After thus dismissing *Barry*, the House of Lords went on to give its considered view on the position of a local authority when faced with lack of the financial resources needed to carry out a statutory duty. The other Lords concurred in the following remarks of Lord Browne-Wilkinson. {At 776-777.}

"There remains the suggestion that, given the control which central government now exercises over local authority spending, the court cannot, or at least should not, require performance of a statutory duty by a local authority which it is unable to afford . . . I believe your Lordships should resist this approach to statutory duties. First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under s 298. Very understandably it does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s 298. But it can, if it wishes, divert money from other educational, or other, applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by s 298. The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds (*sic*) that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power . . .

"Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions." {See also the decision of the House of Lords in *R v Sefton Metropolitan BC, ex p Help the Aged* [1997] 4 All ER 532., where the House also held that where a local authority is subject to a clear statutory duty, shortage of resources does not excuse a failure by the authority to perform its duty. The House said that, while there is no doubt "a limited subjective element" in judging exactly how the duty is to be performed, that fact does not enable the authority to escape carrying out what is on any reasonable view the minimum needed to perform the duty as the statute requires.}

The important ruling in *Tandy* applies to all statutory duties imposed on local authorities. It means that it is illegal for a local authority, on the ground of lack of financial resources, not to carry out to the full every statutory duty imposed on it. The illegality can be countered either by an action in tort brought by an individual suffering damage from it {This is available only where in laying down the duty Parliament intended there to be a private law remedy: see Bennion, *op. cit.*, s 14.} or, as in *Tandy*, on an application for judicial review of the decision by the authority to commit or allow the illegality.

There is in my submission a further significant consequence of the decision in *Tandy*. This is that in applying to any local authority the powers granted to the DETR by the capping legislation the DETR must allow in full the required budget for carrying out each and every one of that authority's statutory duties. Such has not been the practice.

The latter argument is developed below. First though I need to explain in more detail the nature of the statutory duties imposed on local authorities. There are a wide variety of these. I will concentrate, as

typical mainstream examples, on the duties of highway maintenance and the duties of public library provision. {I have chosen these topics because in both cases I drafted the relevant legislation and am therefore familiar with it.}

## Highway maintenance

The Highways Act 1980 s 41(1) imposes on the authority which is for the time being the highway authority for a highway maintainable at the public expense (outside London the county council) a duty "to maintain the highway". {By virtue of s 329 of the Act maintenance includes repair.} The leading case, *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564, decided that although this duty is absolute, and not merely a duty to take reasonable care, it must be measured by reasonable standards and applied practically. This means, for example, that the authority is to be allowed a reasonable time to repair defects in a highway or remove temporary deficiencies such as snow and ice.

That case also illustrates that the duty may apply in different ways to a carriageway and a footway or bridleway. However the duty in relation to a highway of any kind is "to put [and keep] it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition". {*Burnside v Emerson* [1968] 1 WLR 1490, *per Diplock LJ* at 1496-1497, cited by *Evans LJ* in *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564 at 569. I have added the words in square brackets because they are necessarily implied.}

So, by virtue of s 41(1), a local authority which is a highway authority is obliged in relation to each financial year to consider how it is to carry out, and budget for, its duty of highway maintenance in that year. It must consider whether each one of its maintainable carriageways, footways, bridleways etc. is "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition". If any maintainable highways are not in this state the law says the authority must as soon as practicable (and without regard to financial constraints) carry out the work needed to rectify the defect.

That is the statutory duty of the highway authority. As pointed out in *Tandy*, the duty has in no way been modified by the capping legislation and remains fully operative. To carry it out the authority must from time to time ask itself certain questions. I will state these simply, disregarding the various complications.

The basic questions are as follows. What is the present condition of the maintainable highways in the county? What maintenance work, *including work to deal with any backlog*, needs to be carried out to those highways in the next financial year to enable the statutory duty to be fulfilled? {I italicise the duty regarding backlogs of needed maintenance work because it is often assumed there is a choice about whether to remedy these. In law there is no such choice.} Which contractors or other agencies shall we use to carry out that work? What will be the cost to the council of doing this?

There is some margin for discretion here. Different views may legitimately be taken about whether, in order to comply with the statutory duty, a certain item of work must be done in the next financial year or can be held over until the following one. Again, there may legitimately be different views about the standard to which certain work needs to be done, or even whether it needs doing at all.

The upshot is that the authority can put the money required for the necessary work in the next year within a certain range, say for the sake of example between ,20m and ,25m. As ,20m is the minimum amount which needs to be spent to carry out the s 41 duty, then the authority are under a legal obligation to execute the work within the year *and spend that money*. As Lord Browne-Wilkinson said in *Tandy*, in law this obligation is not in any way affected by the capping legislation, though many local authorities behave as if it were.

*Tandy* shows that the authority could be compelled by court order to spend the ,20m. Being a public authority they are under an obligation, knowing their duty, not to wait for a court order but to act in a "high-principled way" {See *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858 at 876-877; Bennion, *op. cit.*, p 616.} and perform the duty anyway. So they should go ahead and spend at least the ,20m. That is what the law requires.

Under the present regime, they are unlikely to do this. In fact most highway authorities, on the ground of lack of finance, seriously underspend on the needed provision and run extensive backlogs of maintenance work.

### **Public libraries**

Public libraries are regulated by and under the Public Libraries and Museums Act 1964 ("the 1964 Act"), which makes county councils library authorities outside London. Section 1(1) of the 1964 Act states that it shall be the duty of the Secretary of State to superintend, and promote the improvement of, the public library service and secure the proper discharge by local authorities of their functions under the Act. {On "the Secretary of State" see footnote 1 above. For public libraries the current allocation is to the Secretary of State for Culture, Media and Sport. I refer to him and his department as "the DCMS". }

Section 7(1) of the 1964 Act states that it is the duty of a library authority to provide a comprehensive and efficient library service for all persons desiring to make use thereof, but that this duty does not extend to persons other than those whose residence or place of work is in its area or who are undergoing full-time education within the area. {This deliberately altered the previous law under which provision of a public library service by local authorities was a discretionary power and not a duty.} Section 7(2) specifies various matters to which the authority are required to have regard, including the desirability of securing that the books etc. available are sufficient to meet the general requirements and any special requirements of both adults and children.

Section 10(1) of the 1964 Act states that if a complaint is made to the Secretary of State that any library authority has failed to carry out its duties under the Act he may, after holding a local inquiry, make an order declaring it to be in default. The order may direct the authority, for the purpose of removing the default, to carry out such of its duties, in such manner and within such time, as may be specified in the order.

The public library regime thus differs from the highway maintenance regime in two important respects. First, the working of the public library regime in practice depends much more on individual judgment. Second, the Secretary of State is given a direct responsibility.

On the first point, whether, in the words of Lord Justice Diplock cited above, a particular highway is "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition" is largely a question of fact. On the other hand, what must be provided in a library area to constitute "a comprehensive and efficient library service for all persons desiring to make use thereof" allows wide variations of opinion.

In discovering the intention as to public library provision underlying the 1964 Act it is helpful to look at the Hansard report of the second reading debate in the House of Commons on 5 February 1964. {Commons Hansard, vol. 688. In what follows I refer to column numbers of this.} After the House of Lords ruling in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, recourse can now be had to Hansard in cases of doubt as to the legal meaning of an Act.

The 1964 Act was intended to be administered by the Ministry of Education, since public libraries were then regarded as a branch of the education service. {One wonders why this was changed, and the

Act is not now administered by the Department for Education and Employment.) In the debate the Conservative Minister of Education said that the Labour spokesperson winding up "is quite right when he says that the important principle in the Bill is that the Ministry of Education becomes responsible for promoting the library service".{Col. 1278.} The Labour spokesperson winding up said "we welcome . . . the acceptance of responsibility by the Minister of Education for the library services".{Col. 1276.}

It was intended that the Ministry of Education would provide ongoing guidance and supervision to library authorities{Col. 1180.} and send out circulars.{Col. 1279.} The Parliamentary Secretary quoted the definition by André Maurois for UNESCO of education "as but a key to open the doors of libraries".{Col. 1181.} The Labour spokesperson opening said ". . . if we look at it from the point of view of education, I would have expected, frankly, that there would be a sort of partnership between the Minister [of Education] and library authorities, as there is between the Minister and local education authorities".{Col. 1184.} She also said that many students in further education "will rely on their public libraries for books which they will need during vacations".{Col. 1183.} The Labour spokesperson winding up, citing the Newsam report, said-

". . . here we have not only the importance of the provision of the library in the schools but the importance of encouraging children to turn to libraries outside the schools, and the use of the library directly for educational purposes. Newsam points out - we get this at every stage when we consider education - that there is valuable co-operation in some areas and in other areas very little co-operation between libraries and schools . . . We must particularly consider, especially in the next few years, the importance of the public library to the student."{Col. 1275.}

The Parliamentary Secretary said "We . . . see the public library as complementary to all branches of the education service, as an indispensable aid to many activities in the industrial, commercial, scientific, and technological life of the country and as an essential element in the cultural life of the country".{Col. 1173.} The Parliamentary Secretary also recognised that "often the library itself is the only building in a local community which has any claims as a cultural centre".{Col. 1171.}

The Hansard report throws light on the standard of the "comprehensive and efficient" library service required by the Act. The Minister of Education stressed that "[o]ne of the most valuable functions a library can perform is to cater for a large number of minority tastes. One must recognise that it is the books and other materials - films, records whatever it may be - required by minority tastes which are often the most expensive".{Col. 1284.} The Act was based on the reports of the Roberts Committee and two subsequent working parties, which set out exhaustively what the standard should be. The Minister of Education said "I envisage a circular being sent out setting standards pretty close to those already adopted by the Working Party".{Col. 1280.}

We can extract from the provisions cited above that the key words are (1) "it is the *duty* of the authority to provide a *comprehensive* and *efficient* library service for *all* persons desiring to make use thereof", (2) "securing that the books etc. available are *sufficient* to meet the general requirements and any special requirements of both adults and children", and (3) "superintend, and promote the *improvement* of, the public library service". The fact that these are general words means there is room for argument. However their generality does not mean the substance of the words can be ignored.

In my submission the fact that the DCMS is expressly required to promote the *improvement* of the library service means that local authorities are under an implied duty to improve their own library services, as well as merely maintaining them. This does not mean that there must be an improvement every year, or no cutting back in a particular year for budgetary reasons. It does mean that on average the expenditure graph must steadily rise, and by more than the amount required to meet inflation. Currently this requirement is not being met by library authorities. On the contrary, the trend over the past few years is downwards and there has been much public anxiety about the deterioration of the service, with reductions of hours, cutting of book stocks, and even the closure of branch libraries.

Again, the reason given is lack of funds.

Yet in the same way as we saw in relation to highway maintenance, a local authority which is a library authority is obliged by law to consider how it is to carry out, and budget for, its duty under the 1964 Act in each financial year. It must consider whether, in each one of its libraries, it is providing a comprehensive and efficient library service for all persons desiring to make use of the library. It must consider whether additional libraries (including mobile libraries) are required, and so on. As pointed out in *Tandy*, the duty has in no way been modified by the capping legislation and remains fully operative. To carry it out the authority must from time to time ask itself certain questions. Again I will state these simply, disregarding the various complications.

The basic questions are as follows. What is the present condition of the libraries in the county and their stock? What additions need to be made to the stock of books etc? What maintenance work, including work to deal with any backlog, needs to be carried out to the library buildings in the next financial year to enable the statutory duty to be fulfilled? Which contractors or other agencies shall we use to carry out that work? What will be the cost to the council of doing all this?

There is a wide margin for discretion here. Different views may legitimately be taken about whether, in order to comply with the statutory duty, a certain item of work must be done in the next financial year or can be held over until the following one. Again, there may legitimately be different views about the standard to which certain work needs to be done, or even whether it needs doing at all. All this is the same as for highways except that, as acknowledged above, with libraries there is more scope for differences of view.

The upshot again is that the authority can put the money required for the necessary work in the next financial year within a certain range, say for the sake of example between ,2m and ,3m. As ,2m is the minimum amount which needs to be spent to carry out the 1964 Act duty, then the authority are under a legal obligation to execute the work and provide the services within the year *and spend that money*. If they do not, they face the possibility of a complaint to the DCMS under s 10(1) of the 1964 Act. If the DCMS does not handle the complaint properly it faces the risk of an application for judicial review.

### **The capping regime**

I have described the statutory duties which exist in relation to highway maintenance and public libraries. Broadly the same principles apply to other types of statutory duty imposed on local authorities. Does the capping legislation make any difference to the performance of these duties? In law the answer is no. As Lord Browne-Wilkinson said in *Tandy* (cited above), "local authorities have not been relieved of statutory duties imposed upon them by Parliament in times past when different attitudes prevailed".

We must next ask whether Parliament, in enacting the capping legislation, intended to deprive local authorities of money they need to raise in order to fulfil these duties, which Parliament left unaltered. As we all know, the legislation is applied in practice as if Parliament did have that intention. Lord Browne-Wilkinson appeared to accept this when he said of the East Sussex County Council "it is now prevented from obtaining either from central government or from local taxation the financial resources necessary to discharge its functions as it would like to do". Was he correct in this observation?

It appears that in a legal as opposed to a practical sense he was not correct. There is no express statement to that effect anywhere in the legislation dealing with local government finance. Nowhere does it say in so many words that the capping regime can be operated by Government so as to prevent local authorities from carrying out their statutory duties. So, if the capping legislation did authorise the Government to prevent local authorities from carrying out their statutory duties, this must be by implication. It is true that legislation does often embody implications as well as express statements, and these must be acted on. {See Bennion, *op. cit.*, ss 172-175.} However the wording of the capping

legislation gives no ground for drawing such an implication. Moreover there are general reasons, not arising from that wording, which suggest that it would be improper to find any such implication. For example a sensible legislature does not on the one hand order a body to perform a certain duty and on the other deprive it of the funds needed to do so. Such behaviour would be absurd, and it is a presumption of statutory interpretation that Parliament does not intend an absurdity. {See Bennion, *op. cit.*, s 312.}

With all that in mind, I now turn to the actual details of the capping legislation. Unless otherwise stated, references in what follows are to the Local Government Finance Act 1992. I shall omit elements not relevant to the present argument, and simplify as far as it is possible to do so without misleading.

Chapter V of Part I of the Act is headed "Limitation of Council Tax and Precepts". It begins in s 53 by explaining that when referring to an "authority" it means a billing authority {Defined in s 1(2) of the Act.} or a major precepting authority {Defined in s 39(1) of the Act.} other than the Receiver for the Metropolitan Police District. Then s 54 confers certain powers on the Secretary of State or DETR. {See footnote 1 above.} The prelude to capping is "designation" by the DETR. As regards a financial year the DETR may "designate" an authority if in its opinion one of two factors is present. These are (1) that the amount calculated by the authority as its budget requirement for the year is excessive, or (2) there is an excessive increase in the amount so calculated over the amount calculated by it as its budget requirement for the preceding financial year.

So we need to look at that phrase "calculated. . . as its budget requirement for the year". We are told what it means by s 53(2), which in the case of a billing authority sends us to s 32(4) of the Act. {From now on I will ignore major precepting authorities, since the argument applies no differently to them.} This states that the budget requirement is the difference between two figures: (1) the expenditure which the authority estimates it will incur in the year in performing its functions plus other items we can ignore, and (2) the amount of the financial reserves which the authority estimates that it will use in order to provide for the expenditure mentioned in (1), again plus other items we can ignore. In other words, putting it very broadly, the budget requirement for the year is just what we would expect it to be, namely the excess of the authority's expenditure over the amount it can draw from reserves as a contribution to that expenditure. There is nothing here about not spending on statutory duties the full amount which the law requires. If, as it should be, that full amount is to be spent, then it can be shown as part of the budget requirement for the year.

The Secretary of State, when considering whether to "cap" an authority, has to ask himself whether its budget is "excessive" in itself or involves an "excessive" increase over the previous year. In doing this he must first examine expenditure on fulfilling statutory duties. Only if it is shown there will be an overspend, that is a going beyond what the duty, properly interpreted, requires, can the Secretary of State say that such expenditure is excessive. Then the Secretary of State must no doubt go on to consider proposed expenditure on discretionary services. I am not concerned with that area, where of course the Secretary of State has a much freer hand.

Is that the end of the matter? Well I rather think it is, because in my submission it clearly indicates that the DETR, in operating the capping regime, are required by the primary legislation to take full account of what local authorities actually need to spend in order to carry out to the full their statutory duties. This is not of course how the capping regime is actually operated by the DETR. Under it, the DETR finds expenditure "excessive" on general grounds, without examining in full the actual situation authority by authority. So in practice local authorities are starved of funds they need to perform their statutory duties and are therefore forced to underperform those duties to a serious extent.

I ought to go on to consider some other provisions. Section 54(2) says that a decision whether to designate an authority "shall be made in accordance with principles determined by the Secretary of State". Strangely, the Act gives no idea whatever of what sort of principles it has in mind here. Could this possibly enable the DETR to lay down some provision requiring authorities not to carry out their

statutory duties to the full? There are strong arguments based on the interpretative criteria governing legislation against reading this power into s 54(2). It is not necessary to deploy them because since the beginning of the capping regime the DETR has not in fact interpreted its powers under s 54(2) in that way.

So what "principles" have been determined under s 54(2)? The latest version is in a statement annexed to a letter sent to local authorities on 2 February 1998 and headed "Limitation of Council Tax and Precepts for 1998/99". It shows that the basic tool of the system is a figure for each authority known as the standing spending assessment or SSA. This is described as an amount calculated for an authority for the relevant year in accordance with the Local Government Finance Report for that year. {Local Government Finance Reports are made under the Local Government Finance Act 1988 s 78A, as inserted by the Local Government Finance Act 1992 Sch 10 Pt II para 10. They set out the Secretary of State's determination for the year in question, made under the Local Government Finance Act 1988 s 78, as inserted by the Local Government Finance Act 1992 Sch 10 Pt II para 9, of the amount of revenue support grant for the year. Both the revenue support grant and the amount of any "cap" are determined using SSAs.} The SSAs are calculated for individual service blocks, largely on a formulaic basis. The authority's budget for any particular service block is not limited to the SSA for that block, since the capping process operates only on the authority's total budget. This does not mean the authority is free to carry out its statutory duties to the full: if each service block is underfinanced the available total will obviously be less than it should be.

The Local Government Finance Report (England) 1998/99 gives the calculation of SSAs for the financial year 1998/99. It deals with highway maintenance in a separate section. {Annex D, section V.}

Admittedly the formula is related to some actual facts in the area of each highway authority, for example length of highways, actual traffic flow, total resident population. However it does not take account of the actual estimated total cost of carrying out to the full the duty of highway maintenance in the year. The nearest it gets to this, and it is not very near, is to insert a factor reflecting differences in the average cost of highway maintenance between London, the rest of the South East, and the remainder of the country. The true actual cost does not enter the equation. Indeed so irrelevant to the capping regime as operated by the DETR is the true actual cost that most authorities do not trouble to calculate it. There is no point, since the authority knows it will not be allowed to spend the money.

When it comes to public libraries the Local Government Finance Report (England) 1998/99 is even less satisfactory. There is no separate section for this item; it is submerged in a residuary category titled "All Other Services". {Annex D, section VI.} This assembles a number of factors. However apart from population totals for the area these have nothing whatever to do with library use.

A local authority is given an opportunity to challenge the amount of its SSAs and to argue that it should be increased. This gives little scope for improvement in the amount because of the formulaic (i.e. non-realistic) nature of the calculation and the arbitrary nature of the DETR's decisions on whether projected expenditure is "excessive".

### **Conclusion**

The courts have ruled that Parliament has chosen to impose statutory duties, as opposed to mere powers, requiring local authorities to do certain things. In deciding cases brought to enforce these duties, the courts will not downgrade them into what would be, in effect, mere discretions over which the courts would have little control. They will require an authority to perform its duty without regard to financial constraints. If Parliament wishes to reduce public expenditure by local authorities the judicial view is that it is up to Parliament to abolish or reduce individual duties.

Parliament has not in fact done this. Instead it has introduced a capping regime on local authority expenditure which, as operated, fails to distinguish between compulsory and discretionary expenditure. It seems that the legislation under which the capping regime is operated by the DETR does not authorise this Government interference with the carrying out by local authorities of the miscellaneous

statutory duties imposed on them.

As operated, the capping regime pays insufficient regard to the fact that legally the amount of most local authority expenditure is beyond the control of the authority because it is dictated by law. If the authority did what legislation says it must do it would in each financial year spend a certain minimum sum. The capping regime prevents it from spending that sum and requires it to spend a lesser sum.

The result is unlawfully to deprive local authorities of the power to raise by council tax the funds needed to carry out their statutory duties. They are not able to cover the shortfall through the other main source of local authority finance, revenue support grant, because that too is markedly insufficient, being calculated by reference to the very same SSAs that for capping are defective in ignoring the existence and nature of statutory duties.

One is driven to the conclusion that both the capping regime and the revenue support grant regime are operated illegally, though in this article I have concentrated on the former. The obvious remedy for local authorities is to challenge the DETR in the courts, perhaps by an application for judicial review brought by their representative body the Local Government Association.

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I begin with an examination of recent developments in how the courts view the multifarious statutory provisions by which duties are imposed on local authorities to carry out various functions and thereby necessarily incur the costs involved.

### How the courts regard local authority duties

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perform the duty fully. The chairman of the education committee told Beth's parents in October 1996: "The County Council had to make some very difficult decisions last March regarding the level of budget for education and I regret that it was considered necessary to reduce expenditure on home tuition". Lord Browne-Wilkinson said<sup>3</sup>-

"Like all other local authorities, the respondent county council is in an unenviable position. It is now prevented from obtaining either from central government or from local taxation the financial resources necessary to discharge its functions as it would like to do. In a period when the aim of central government, of whatever political colour, has been to achieve a reduction in public spending, local authorities have not been relieved of statutory duties imposed upon them by Parliament in times past when different attitudes prevailed."

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<sup>3</sup>At 772.

The House of Lords held that there was nothing in the 1993 Act to suggest that resource considerations were relevant to the question of what was a "suitable" education, though an authority would be entitled to consider its resources in deciding between two or more practicable methods under each of which a "suitable" education would be provided. They distinguished *R v Gloucestershire CC, ex p Barry* [1997] AC 584, where the House had held by three to two that financial resources were relevant when deciding on the "needs" of a disabled person under the Chronically Sick and Disabled Persons Act 1970 s 2(1). The ground for the distinction was that the requirement made by the 1970 Act is, as Lord Browne-Wilkinson put it, a "strange" one because it treats such trivial things as the provision of a radio or of a particular recreational activity as being a "need". He added: "In those circumstances it is perhaps not surprising that the majority of your Lordships looked for some other more stringent criteria enabling the local authority to determine what was to be treated as a need by reference to the resources available to it".<sup>4</sup>

After thus dismissing *Barry*, the House of Lords went on to give its considered view on the position of a local authority when faced with lack of the financial resources needed to carry out a statutory duty. The other Lords concurred in the following remarks of Lord Browne-Wilkinson.<sup>5</sup>

"There remains the suggestion that, given the control which central government now exercises over local authority spending, the court cannot, or at least should not, require performance of a statutory duty by a local authority which it is unable to afford . . . I believe your Lordships should resist this approach to statutory duties. First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under s 298. Very understandably it does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s 298. But it can, if it wishes, divert money from other educational, or other, applications which are merely discretionary so as to apply such diverted moneys to discharge the statutory duty laid down by s 298. The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds (*sic*) that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power . . .

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<sup>4</sup>The House of Lords thus marginalised *Barry*, indicating its agreement with the view of that decision expressed in Bennion, *Statutory Interpretation* (3rd edn, 1997), p 83.

<sup>5</sup>At 776-777.

"Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little real control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions."<sup>6</sup>

The important ruling in *Tandy* applies to all statutory duties imposed on local authorities. It means that it is illegal for a local authority, on the ground of lack of financial resources, not to carry out to the full every statutory duty imposed on it. The illegality can be countered either by an action in tort brought by an individual suffering damage from it<sup>7</sup> or, as in *Tandy*, on an application for judicial review of the decision by the authority to commit or allow the illegality.

There is in my submission a further significant consequence of the decision in *Tandy*. This is that in applying to any local authority the powers granted to the DETR by the capping legislation the DETR must allow in full the required budget for carrying out each and every one of that authority's statutory duties. Such has not been the practice.

The latter argument is developed below. First though I need to explain in more detail the nature of the statutory duties imposed on local authorities. There are a wide variety of these. I will concentrate, as

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**<sup>6</sup>See also the decision of the House of Lords in *R v Sefton Metropolitan BC, ex p Help the Aged* [1997] 4 All ER 532., where the House also held that where a local authority is subject to a clear statutory duty, shortage of resources does not excuse a failure by the authority to perform its duty. The House said that, while there is no doubt "a limited subjective element" in judging exactly how the duty is to be performed, that fact does not enable the authority to escape carrying out what is on any reasonable view the minimum needed to perform the duty as the statute requires.**

**<sup>7</sup>This is available only where in laying down the duty Parliament intended there to be a private law remedy: see Bennion, *op. cit.*, s 14.**

typical mainstream examples, on the duties of highway maintenance and the duties of public library provision.<sup>8</sup>

### **Highway maintenance**

The Highways Act 1980 s 41(1) imposes on the authority which is for the time being the highway authority for a highway maintainable at the public expense (outside London the county council) a duty "to maintain the highway".<sup>9</sup> The leading case, *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564, decided that although this duty is absolute, and not merely a duty to take reasonable care, it must be measured by reasonable standards and applied practically. This means, for example, that the authority is to be allowed a reasonable time to repair defects in a highway or remove temporary deficiencies such as snow and ice.

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**<sup>8</sup>I have chosen these topics because in both cases I drafted the relevant legislation and am therefore familiar with it.**

**<sup>9</sup>By virtue of s 329 of the Act maintenance includes repair.**

That case also illustrates that the duty may apply in different ways to a carriageway and a footway or bridleway. However the duty in relation to a highway of any kind is "to put [and keep] it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition".<sup>10</sup>

So, by virtue of s 41(1), a local authority which is a highway authority is obliged in relation to each financial year to consider how it is to carry out, and budget for, its duty of highway maintenance in that year. It must consider whether each one of its maintainable carriageways, footways, bridleways etc. is "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition". If any maintainable highways are not in this state the law says the authority must as soon as practicable (and without regard to financial constraints) carry out the work needed to rectify the defect.

That is the statutory duty of the highway authority. As pointed out in *Tandy*, the duty has in no way been modified by the capping legislation and remains fully operative. To carry it out the authority must from time to time ask itself certain questions. I will state these simply, disregarding the various complications.

The basic questions are as follows. What is the present condition of the maintainable highways in the county? What maintenance work, *including work to deal with any backlog*, needs to be carried out to those highways in the next financial year to enable the statutory duty to be fulfilled?<sup>11</sup> Which contractors or other agencies shall we use to carry out that work? What will be the cost to the council of doing this?

There is some margin for discretion here. Different views may legitimately be taken about whether, in order to comply with the statutory duty, a certain item of work must be done in the next financial year or can be held over until the following one. Again, there may legitimately be different views about the standard to which certain work needs to be done, or even whether it needs doing at all.

The upshot is that the authority can put the money required for the necessary work in the next year within a certain range, say for the sake of example between ,20m and ,25m. As ,20m is the minimum amount which needs to be spent to carry out the s 41 duty, then the authority are under a legal

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<sup>10</sup>*Burnside v Emerson* [1968] 1 WLR 1490, *per Diplock LJ* at 1496-1497, cited by Evans LJ in *Cross v Kirklees Metropolitan Borough Council* [1998] 1 All ER 564 at 569. I have added the words in square brackets because they are necessarily implied.

<sup>11</sup>I italicise the duty regarding backlogs of needed maintenance work because it is often assumed there is a choice about whether to remedy these. In law there is no such choice.

obligation to execute the work within the year *and spend that money*. As Lord Browne-Wilkinson said in *Tandy*, in law this obligation is not in any way affected by the capping legislation, though many local authorities behave as if it were.

*Tandy* shows that the authority could be compelled by court order to spend the ,20m. Being a public authority they are under an obligation, knowing their duty, not to wait for a court order but to act in a "high-principled way"<sup>12</sup> and perform the duty anyway. So they should go ahead and spend at least the ,20m. That is what the law requires.

Under the present regime, they are unlikely to do this. In fact most highway authorities, on the ground of lack of finance, seriously underspend on the needed provision and run extensive backlogs of maintenance work.

### **Public libraries**

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<sup>12</sup>See *R v Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd* [1988] AC 858 at 876-877; Bennion, *op. cit.*, p 616.

Public libraries are regulated by and under the Public Libraries and Museums Act 1964 ("the 1964 Act"), which makes county councils library authorities outside London. Section 1(1) of the 1964 Act states that it shall be the duty of the Secretary of State to superintend, and promote the improvement of, the public library service and secure the proper discharge by local authorities of their functions under the Act.<sup>13</sup>

Section 7(1) of the 1964 Act states that it is the duty of a library authority to provide a comprehensive and efficient library service for all persons desiring to make use thereof, but that this duty does not extend to persons other than those whose residence or place of work is in its area or who are undergoing full-time education within the area.<sup>14</sup> Section 7(2) specifies various matters to which the authority are required to have regard, including the desirability of securing that the books etc. available are sufficient to meet the general requirements and any special requirements of both adults and children.

Section 10(1) of the 1964 Act states that if a complaint is made to the Secretary of State that any library authority has failed to carry out its duties under the Act he may, after holding a local inquiry, make an order declaring it to be in default. The order may direct the authority, for the purpose of removing the default, to carry out such of its duties, in such manner and within such time, as may be specified in the order.

The public library regime thus differs from the highway maintenance regime in two important respects. First, the working of the public library regime in practice depends much more on individual judgment. Second, the Secretary of State is given a direct responsibility.

On the first point, whether, in the words of Lord Justice Diplock cited above, a particular highway is "in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition" is largely a question of fact. On the other hand, what must be provided in a library area to constitute "a comprehensive and efficient library service for all persons desiring to make use thereof" allows wide variations of opinion.

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**<sup>13</sup>On "the Secretary of State" see footnote 1 above. For public libraries the current allocation is to the Secretary of State for Culture, Media and Sport. I refer to him and his department as "the DCMS".**

**<sup>14</sup>This deliberately altered the previous law under which provision of a public library service by local authorities was a discretionary power and not a duty.**

In discovering the intention as to public library provision underlying the 1964 Act it is helpful to look at the Hansard report of the second reading debate in the House of Commons on 5 February 1964.<sup>15</sup> After the House of Lords ruling in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, recourse can now be had to Hansard in cases of doubt as to the legal meaning of an Act.

The 1964 Act was intended to be administered by the Ministry of Education, since public libraries were then regarded as a branch of the education service.<sup>16</sup> In the debate the Conservative Minister of Education said that the Labour spokesperson winding up "is quite right when he says that the important principle in the Bill is that the Ministry of Education becomes responsible for promoting the library service".<sup>17</sup> The Labour spokesperson winding up said "we welcome . . . the acceptance of responsibility by the Minister of Education for the library services".<sup>18</sup>

It was intended that the Ministry of Education would provide ongoing guidance and supervision to library authorities<sup>19</sup> and send out circulars.<sup>20</sup> The Parliamentary Secretary quoted the definition by

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<sup>15</sup>Commons Hansard, vol. 688. In what follows I refer to column numbers of this.

<sup>16</sup>One wonders why this was changed, and the Act is not now administered by the Department for Education and Employment.

<sup>17</sup>Col. 1278.

<sup>18</sup>Col. 1276.

<sup>19</sup>Col. 1180.

<sup>20</sup>Col. 1279.

André Maurois for UNESCO of education "as but a key to open the doors of libraries".<sup>21</sup> The Labour spokesperson opening said ". . . if we look at it from the point of view of education, I would have expected, frankly, that there would be a sort of partnership between the Minister [of Education] and library authorities, as there is between the Minister and local education authorities".<sup>22</sup> She also said that many students in further education "will rely on their public libraries for books which they will need during vacations".<sup>23</sup> The Labour spokesperson winding up, citing the Newsam report, said-

". . . here we have not only the importance of the provision of the library in the schools but the importance of encouraging children to turn to libraries outside the schools, and the use of the library directly for educational purposes. Newsam points out - we get this at every stage when we consider education - that there is valuable co-operation in some areas and in other areas very little co-operation between libraries and schools . . . We must particularly consider, especially in the next few years, the importance of the public library to the student."<sup>24</sup>

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<sup>21</sup>Col. 1181.

<sup>22</sup>Col. 1184.

<sup>23</sup>Col. 1183.

<sup>24</sup>Col. 1275.

The Parliamentary Secretary said "We . . . see the public library as complementary to all branches of the education service, as an indispensable aid to many activities in the industrial, commercial, scientific, and technological life of the country and as an essential element in the cultural life of the country".<sup>25</sup> The Parliamentary Secretary also recognised that "often the library itself is the only building in a local community which has any claims as a cultural centre".<sup>26</sup>

The Hansard report throws light on the standard of the "comprehensive and efficient" library service required by the Act. The Minister of Education stressed that "[o]ne of the most valuable functions a library can perform is to cater for a large number of minority tastes. One must recognise that it is the books and other materials - films, records whatever it may be - required by minority tastes which are often the most expensive".<sup>27</sup> The Act was based on the reports of the Roberts Committee and two subsequent working parties, which set out exhaustively what the standard should be. The Minister of Education said "I envisage a circular being sent out setting standards pretty close to those already adopted by the Working Party".<sup>28</sup>

We can extract from the provisions cited above that the key words are (1) "it is the *duty* of the authority to provide a *comprehensive* and *efficient* library service for *all* persons desiring to make use thereof", (2) "securing that the books etc. available are *sufficient* to meet the general requirements and any special requirements of both adults and children", and (3) "superintend, and promote the *improvement* of, the public library service". The fact that these are general words means there is room for argument. However their generality does not mean the substance of the words can be ignored.

In my submission the fact that the DCMS is expressly required to promote the *improvement* of the library service means that local authorities are under an implied duty to improve their own library services, as well as merely maintaining them. This does not mean that there must be an improvement every year, or no cutting back in a particular year for budgetary reasons. It does mean that on average the expenditure graph must steadily rise, and by more than the amount required to meet inflation. Currently this requirement is not being met by library authorities. On the contrary, the trend over the past few years is downwards and there has been much public anxiety about the deterioration of the service, with reductions of hours, cutting of book stocks, and even the closure of branch libraries. Again, the reason given is lack of funds.

Yet in the same way as we saw in relation to highway maintenance, a local authority which is a library authority is obliged by law to consider how it is to carry out, and budget for, its duty under the 1964 Act in each financial year. It must consider whether, in each one of its libraries, it is providing a

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<sup>25</sup>Col. 1173.

<sup>26</sup>Col. 1171.

<sup>27</sup>Col. 1284.

<sup>28</sup>Col. 1280.

comprehensive and efficient library service for all persons desiring to make use of the library. It must consider whether additional libraries (including mobile libraries) are required, and so on. As pointed out in *Tandy*, the duty has in no way been modified by the capping legislation and remains fully operative. To carry it out the authority must from time to time ask itself certain questions. Again I will state these simply, disregarding the various complications.

The basic questions are as follows. What is the present condition of the libraries in the county and their stock? What additions need to be made to the stock of books etc? What maintenance work, including work to deal with any backlog, needs to be carried out to the library buildings in the next financial year to enable the statutory duty to be fulfilled? Which contractors or other agencies shall we use to carry out that work? What will be the cost to the council of doing all this?

There is a wide margin for discretion here. Different views may legitimately be taken about whether, in order to comply with the statutory duty, a certain item of work must be done in the next financial year or can be held over until the following one. Again, there may legitimately be different views about the standard to which certain work needs to be done, or even whether it needs doing at all. All this is the same as for highways except that, as acknowledged above, with libraries there is more scope for differences of view.

The upshot again is that the authority can put the money required for the necessary work in the next financial year within a certain range, say for the sake of example between ,2m and ,3m. As ,2m is the minimum amount which needs to be spent to carry out the 1964 Act duty, then the authority are under a legal obligation to execute the work and provide the services within the year *and spend that money*. If they do not, they face the possibility of a complaint to the DCMS under s 10(1) of the 1964 Act. If the DCMS does not handle the complaint properly it faces the risk of an application for judicial review.

### **The capping regime**

I have described the statutory duties which exist in relation to highway maintenance and public libraries. Broadly the same principles apply to other types of statutory duty imposed on local authorities. Does the capping legislation make any difference to the performance of these duties? In law the answer is no. As Lord Browne-Wilkinson said in *Tandy* (cited above), "local authorities have not been relieved of statutory duties imposed upon them by Parliament in times past when different attitudes prevailed".

We must next ask whether Parliament, in enacting the capping legislation, intended to deprive local authorities of money they need to raise in order to fulfil these duties, which Parliament left unaltered. As we all know, the legislation is applied in practice as if Parliament did have that intention. Lord Browne-Wilkinson appeared to accept this when he said of the East Sussex County Council "it is now prevented from obtaining either from central government or from local taxation the financial resources necessary to discharge its functions as it would like to do". Was he correct in this observation?

It appears that in a legal as opposed to a practical sense he was not correct. There is no express statement to that effect anywhere in the legislation dealing with local government finance. Nowhere does it say in so many words that the capping regime can be operated by Government so as to prevent local authorities from carrying out their statutory duties. So, if the capping legislation did authorise the Government to prevent local authorities from carrying out their statutory duties, this must be by implication. It is true that legislation does often embody implications as well as express statements, and these must be acted on.<sup>29</sup> However the wording of the capping legislation gives no ground for drawing

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<sup>29</sup>See Bennion, *op. cit.*, ss 172-175.

such an implication. Moreover there are general reasons, not arising from that wording, which suggest that it would be improper to find any such implication. For example a sensible legislature does not on the one hand order a body to perform a certain duty and on the other deprive it of the funds needed to do so. Such behaviour would be absurd, and it is a presumption of statutory interpretation that Parliament does not intend an absurdity.<sup>30</sup>

With all that in mind, I now turn to the actual details of the capping legislation. Unless otherwise stated, references in what follows are to the Local Government Finance Act 1992. I shall omit elements not relevant to the present argument, and simplify as far as it is possible to do so without misleading.

Chapter V of Part I of the Act is headed "Limitation of Council Tax and Precepts". It begins in s 53 by explaining that when referring to an "authority" it means a billing authority<sup>31</sup> or a major precepting authority<sup>32</sup> other than the Receiver for the Metropolitan Police District. Then s 54 confers certain powers on the Secretary of State or DETR.<sup>33</sup> The prelude to capping is "designation" by the DETR. As regards a financial year the DETR may "designate" an authority if in its opinion one of two factors is present. These are (1) that the amount calculated by the authority as its budget requirement for the year is excessive, or (2) there is an excessive increase in the amount so calculated over the amount calculated by it as its budget requirement for the preceding financial year.

So we need to look at that phrase "calculated. . . as its budget requirement for the year". We are told what it means by s 53(2), which in the case of a billing authority sends us to s 32(4) of the Act.<sup>34</sup> This states that the budget requirement is the difference between two figures: (1) the expenditure which the authority estimates it will incur in the year in performing its functions plus other items we can ignore, and (2) the amount of the financial reserves which the authority estimates that it will use in order to provide for the expenditure mentioned in (1), again plus other items we can ignore. In other words, putting it very broadly, the budget requirement for the year is just what we would expect it to be, namely the excess of the authority's expenditure over the amount it can draw from reserves as a contribution to that expenditure. There is nothing here about not spending on statutory duties the full amount which the law requires. If, as it should be, that full amount is to be spent, then it can be shown

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<sup>30</sup>See Bennion, *op. cit.*, s 312.

<sup>31</sup>Defined in s 1(2) of the Act.

<sup>32</sup>Defined in s 39(1) of the Act.

<sup>33</sup>See footnote 1 above.

<sup>34</sup>From now on I will ignore major precepting authorities, since the argument applies no differently to them.

as part of the budget requirement for the year.

The Secretary of State, when considering whether to "cap" an authority, has to ask himself whether its budget is "excessive" in itself or involves an "excessive" increase over the previous year. In doing this he must first examine expenditure on fulfilling statutory duties. Only if it is shown there will be an overspend, that is a going beyond what the duty, properly interpreted, requires, can the Secretary of State say that such expenditure is excessive. Then the Secretary of State must no doubt go on to consider proposed expenditure on discretionary services. I am not concerned with that area, where of course the Secretary of State has a much freer hand.

Is that the end of the matter? Well I rather think it is, because in my submission it clearly indicates that the DETR, in operating the capping regime, are required by the primary legislation to take full account of what local authorities actually need to spend in order to carry out to the full their statutory duties. This is not of course how the capping regime is actually operated by the DETR. Under it, the DETR finds expenditure "excessive" on general grounds, without examining in full the actual situation authority by authority. So in practice local authorities are starved of funds they need to perform their statutory duties and are therefore forced to underperform those duties to a serious extent.

I ought to go on to consider some other provisions. Section 54(2) says that a decision whether to designate an authority "shall be made in accordance with principles determined by the Secretary of State". Strangely, the Act gives no idea whatever of what sort of principles it has in mind here. Could this possibly enable the DETR to lay down some provision requiring authorities not to carry out their statutory duties to the full? There are strong arguments based on the interpretative criteria governing legislation against reading this power into s 54(2). It is not necessary to deploy them because since the beginning of the capping regime the DETR has not in fact interpreted its powers under s 54(2) in that way.

So what "principles" have been determined under s 54(2)? The latest version is in a statement annexed to a letter sent to local authorities on 2 February 1998 and headed "Limitation of Council Tax and Precepts for 1998/99". It shows that the basic tool of the system is a figure for each authority known as the standing spending assessment or SSA. This is described as an amount calculated for an authority for the relevant year in accordance with the Local Government Finance Report for that year.<sup>35</sup> The

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**<sup>35</sup>Local Government Finance Reports are made under the Local Government Finance Act 1988 s 78A, as inserted by the Local Government Finance Act 1992 Sch 10 Pt II para 10. They set out the Secretary of State's determination for the year in question, made under the Local Government Finance Act 1988 s 78, as inserted by the Local Government Finance Act 1992 Sch 10 Pt II para 9, of the amount of revenue support grant for the year. Both the revenue support grant and the amount of any "cap" are determined using SSAs.**

SSAs are calculated for individual service blocks, largely on a formulaic basis. The authority's budget for any particular service block is not limited to the SSA for that block, since the capping process operates only on the authority's total budget. This does not mean the authority is free to carry out its statutory duties to the full: if each service block is underfinanced the available total will obviously be less than it should be.

The Local Government Finance Report (England) 1998/99 gives the calculation of SSAs for the financial year 1998/99. It deals with highway maintenance in a separate section.<sup>36</sup> Admittedly the formula is related to some actual facts in the area of each highway authority, for example length of highways, actual traffic flow, total resident population. However it does not take account of the actual estimated total cost of carrying out to the full the duty of highway maintenance in the year. The nearest it gets to this, and it is not very near, is to insert a factor reflecting differences in the average cost of highway maintenance between London, the rest of the South East, and the remainder of the country. The true actual cost does not enter the equation. Indeed so irrelevant to the capping regime as operated by the DETR is the true actual cost that most authorities do not trouble to calculate it. There is no point, since the authority knows it will not be allowed to spend the money.

When it comes to public libraries the Local Government Finance Report (England) 1998/99 is even less satisfactory. There is no separate section for this item; it is submerged in a residuary category titled "All Other Services".<sup>37</sup> This assembles a number of factors. However apart from population totals for the area these have nothing whatever to do with library use.

A local authority is given an opportunity to challenge the amount of its SSAs and to argue that it should be increased. This gives little scope for improvement in the amount because of the formulaic (i.e. non-realistic) nature of the calculation and the arbitrary nature of the DETR's decisions on whether projected expenditure is "excessive".

## **Conclusion**

The courts have ruled that Parliament has chosen to impose statutory duties, as opposed to mere powers, requiring local authorities to do certain things. In deciding cases brought to enforce these duties, the courts will not downgrade them into what would be, in effect, mere discretions over which the courts would have little control. They will require an authority to perform its duty without regard to financial constraints. If Parliament wishes to reduce public expenditure by local authorities the judicial view is that it is up to Parliament to abolish or reduce individual duties.

Parliament has not in fact done this. Instead it has introduced a capping regime on local authority expenditure which, as operated, fails to distinguish between compulsory and discretionary expenditure. It seems that the legislation under which the capping regime is operated by the DETR does not authorise this Government interference with the carrying out by local authorities of the miscellaneous statutory duties imposed on them.

As operated, the capping regime pays insufficient regard to the fact that legally the amount of most local authority expenditure is beyond the control of the authority because it is dictated by law. If the authority did what legislation says it must do it would in each financial year spend a certain minimum sum. The capping regime prevents it from spending that sum and requires it to spend a lesser sum.

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<sup>36</sup>Annex D, section V.

<sup>37</sup>Annex D, section VI.

The result is unlawfully to deprive local authorities of the power to raise by council tax the funds needed to carry out their statutory duties. They are not able to cover the shortfall through the other main source of local authority finance, revenue support grant, because that too is markedly insufficient, being calculated by reference to the very same SSAs that for capping are defective in ignoring the existence and nature of statutory duties.

One is driven to the conclusion that both the capping regime and the revenue support grant regime are operated illegally, though in this article I have concentrated on the former. The obvious remedy for local authorities is to challenge the DETR in the courts, perhaps by an application for judicial review brought by their representative body the Local Government Association.