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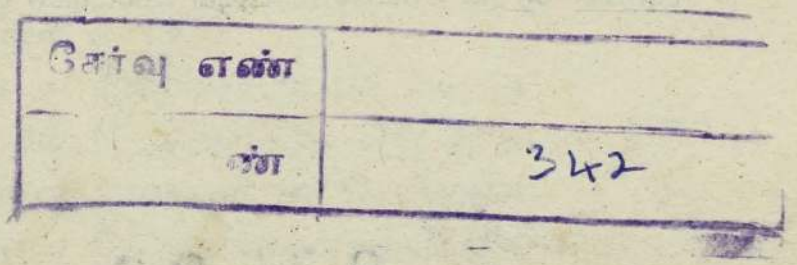

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PREFACE

The purpose of this book is to offer the public, in a convenient form, a series of essays published during the last few years in legal journals in several countries. There is a central theme pervading all eleven essays; they are concerned with the exposition and critical analysis of current legislative and judicial development which have transformed Commonwealth Administrative Law within a remarkably short time-span. The essays contained in this book represent a comprehensive treatment of modern trends relating to such fundamental aspects of the subject as the theory of jurisdiction, procedural and substantive due process, the doctrine of standing, public interest, immunity and the effect of preclusive statutory provisions.

Each of the essays has already been published: 'Natural Justice and the Classification of Powers' in (1983) 25 *Journal of the Indian Law Institute* p. 17-45; 'Jurisdictional Review and Judicial Policy: The Evolving Mosaic' in (1987) 103 *Law Quarterly Review* p. 66-105; 'Natural Justice and Degrees of Invalidity of Administrative Action' in (1983) *Public Law* p. 634-655; 'Patent Error of Law and the Borders of Jurisiction: The Commonwealth Experience Assessed' in (1984) *Legal Studies*, volume 4, number 3, p. 271-299; 'Codification of Grounds of Review: The Australian Experience' in (1986) 19 *Comparative and International Law Journal of Southern Africa* p. 27-69; '*Wednesbury* Unreasonableness: The Expanding Canvas' in (1987) 46 *Cambridge Law Journal* p. 53-82; 'The Amenability of Commissions of Inquiry to Writs of *Certiorari* and Prohibition: Analogies in Canadian and Sri Lankan Law' in *Survey of Sri Lanka Law* (1981), volume 1, p. 41-56; 'Procedural Fairness in Relation to Administration Decisions: Recent Trends in Canadian Law' in (1982) 15 *Comparative and International Law Journal of Southern Africa* p. 57-80; 'Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law' in [1982] *Public Law* p. 451-472; 'The Dimensions of Crown Privilege in Commonwealth Law: A Comparative Study' in (1982) 24 *Malaya Law Review* p. 275-308; and 'The Doctrine of *Locus Standi* in Commonwealth Administrative Law' in [1983] *Public Law* p. 52-90.

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NATURAL JUSTICE AND CLASSIFICATION OF POWERS: INDIA AND SRI LANKA

Introduction

THERE HAVE been significant developments recently in the field of administrative law in India and Sri Lanka. Although the principles applicable to both jurisdictions are derived from English law, the scope of the remedies has been adapted imaginatively, especially in India, to suit local circumstances. The classification of powers is part of the structural framework of the law, but the utility and value of the technique of classification have been questioned in recent times. The purpose of this chapter is to examine the basis of the classification of powers in the overall context of the effectiveness of judicial control of administrative action. Recent trends in India and Sri Lanka are surveyed, and some suggestions are made for improvement of the law in keeping with contemporary needs and priorities.

Requirement relating to duty to act judicially

The duty to act judicially, which has been adopted traditionally by the English courts'[1] as a requisite of *certiorari,* has in practice operated as a significant limitation on the scope of the remedy when it is invoked on the ground of breach of the rules of natural justice. The assumption has been made in a series of judicial decisions that the requirement of compliance with the rules of natural justice is confined to the ambit of judicial and quasi-judicial as distinguished from administrative functions.

The Privy Council, at a time when appeals were entertained from India, excluded the remedy of *certiorari* to correct purely executive acts.[2] Although it has been acknowledged in India that the phrase "judicial act" is interpreted in this context in a wide sense embracing many acts which would not ordinarily be termed judicial,[3] the dichotomy between quasi-judicial and administrative functions has been a central feature of the reasoning of Indian courts.[4] It has been recognized in India that, of the four elements involved in the proposition of law enunciated in the *Electricity Commissioners* ruling,[5] three may be characteristic of an administrative or executive act as well.[6]

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1. See *R.* v. *Electricity Commissioners,* [1924] 1 K.B. 171 at 204-05.
2. *Ryots of Garabandho* v. *Zamindar of Parlakimedi,* A.I.R. 1943 P.C. 164.
3. *Jugilal Kamlapat* v. *Collector of Bombay,* A.I.R. 1946 Bom.280.
4. See, *e.g. Dwarka Nath* v. *Income-Tax Officer,* A.I.R. 1966 S.C.81
5. See *R.* v. *Electricity Commissioners,* (1924) 1 K.B.171 at 204-05.
6. *In re Banwarilal Roy,* 48 C.W.N.766.

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A comparable approach is reflected in a strand of Sri Lankan judicial decisions. Representative of this attitude is the comment by a Sri Lankan judge: "While I would welcome the day when the rules of natural justice are observed even in the performance of purely executive action, I cannot overlook the circumstance that the law has hitherto not recognised the existence of such a duty."[7] In the context of an application for *certiorari* occasioned by the dismissal of a university professor, the Supreme Court of Sri Lanka defined its approach as follows: "The application turns on the question whether at any stage in arriving at the administrative or subjective decision as to unfitness, the Council (of the University) is required to consider certain matters judicially."[8]

The wide connotations of a function, performance of which entails the duty to act judicially, are apparent in the case law of India and Sri Lanka. The decision by the controller of textiles not to issue or to withdraw a textile licence,[9] action taken by the vice-chancellor of a university to remove the name of a candidate for an examination from the pass list,[10] and termination of the employment of an officer by the Local Government Service Commission in pursuance of powers conferred on it by statute[11] have been characterized by the courts of Sri Lanka as involving the discharge of quasi-judicial functions. Similarly, in India, the issue of permits,[12] alteration of conditions of a teacher's employment to his detriment,[13] termination of an employee's services by a state corporation,[14] reduction of the status of an officer or servant under statutory rules,[15] removal of a member from a committee,[16] or board,[17] allotment of a quota,[18] revocation of a

7. *Hassan* v. *Controller of Imports and Exports,* (1967) 70 N.L.R.149 at 152.

8. *Linus Silva* v. *University Council of the Vidyodaya University,* (1961) 64 N.L.R.104 at 108.

9. *Abdul Thassim* v. *Edmund Rodrigo,* (1947) 48 N.L.R. 121; *Buhari* v. *Jayaratne,* (1947) 48 N.L.R.224; *Mohamed & Co.* v. *Controller of Textiles,* (1947) 48 N.L.R. 461; *Mohamed Miya* v. *Controller of Textiles,* (1947) 48 N.L.R. 492.

10. *Fernando* v. *University of Ceylon,* (1956) 58 N.L.R. 265 (Supreme Court); (1960) 61 N.L.R.505 (Privy Council).

11. *Abeyagunasekera* v. *Local Government Service Commission,* (1949) 51 N.L.R.8 at 10. See contra: *Suriyawansa* v. *Local Government Service Commission,* (1947) 48 N.L.R.433 at 438.

12. *Raman and Raman Ltd* v. *State of Madras,* A.I.R. 1959 S.C. 694 at 697.

13. *Jagdish Pandey* v. *Chancellor, Bihar University,* A.I.R. 1968 S.C. 353 at 357.

14. *Mafatlal Barot* v *J.D. Rathod,* A.I.R. 1966 S.C. 1364 at 1365. *Cf. Dock Labour Board,* v. *Jaffar Immam,* A.I.R. 1966 S.C. 282 at 286.

15. *S.R. Tewari* v. *District Board,* A.I.R. 1964 S.C. 1680.

16. *Bhagat Ram* v. *State of Punjab,* A.I.R. 1972 S.C. 1572 at 1578.

17. *State of Punjab* v. *Bakhtawar Singh,* A.I.R. 1972 S.C. 2083 at 2085.

18. *C.M. Shah* v. *M. Patil,* A.I.R. 1970 Guj. 67 at 71.

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licence,[20] suspension[21] or cancellation[22] of a permit, declaration of a slum clearance area,[23] the blacklisting of contractors,[24] supersession of a municipal council,[25] dissolution of a panchayat,[26] cancellation of a mining lease,[27] revision of a valuation claim[28] and compulsory acquisition of property[29] have all been held to entail a quasi-judicial component requiring compliance with the rules of natural justice. The Indian and Sri Lankan experience certainly confirms the assertion that "the functions... described as [quasi-judicial] can vary from those which are almost entirely judicial to those in which the judicial constituent is small indeed..."[30]

However, in both jurisdictions, the conceptual distinction between quasi-judicial and administrative functions has been strongly assailed from the standpoint of policy. The Supreme Court of Sri Lanka has declared that "if the purpose of the rules of natural justice is to prevent miscarriage of justice, it cannot be appreciated why these rules should not apply to administrative inquiries. An unjust decision in an administrative inquiry in the context of a Welfare State may have greater effect than a decision in a quasi-judicial inquiry."[31] This represents a direct attack on the dichotomy between "quasi-judicial" and "administrative" functions, in the setting of the law of natural justice.

It has been pointed out by an Indian academic authority that a function may be "administrative at some stage or for some purpose, and quasi-judicial at another stage or for other purposes",[32] and that this artificial division of the same proceeding into distinct compartments may be misleading. This view derives support from a series of Indian judicial decisions. The Supreme Court of India has commented that

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19. *Digambar Panda* v. *Additional District Magistrate,* 1970 Ori. 110 at 113.
20. *Purshottam Bahel,* v. *A.C. Baruah,* A.I.R. 1971 A. & N. 173 at 175.
21. *Krishna Gopal* v. *Regional Transport Authority,* 1960 Raj. L.W. 156.
22. *Shib Kumar Dutta* v. *Appellate Sub-Committee of the State Transport Authority,* A.I.R. 1970 Cal. 174 at 175.
23. *Government of Mysore* v. *J.V. Bhat,* A.I.R. 1975 S.C. 596 at 601.
24. *E.E. & Co. Ltd* v. *State of West Bengal,* A.I.R. 1975 S.C. 266 at 269. *Cf. Joseph Vilangandan* v. *Executive Engineer* A.I.R. 1978 S.C. 930.
25. *Jairam Ramchandra Sirsat* v. *Figneredo,* A.I.R. 1973 Goa 32 at 41.
26. *Radhakrishnan Chettiar* v. *State of Tamil Nadu,* A.I.R. 1974 S.C. 1862 at 1863.
27. *D.N. Roy* v. *State of Bihar,* A.I.R. 1971 S.C.1045 at 1048.
28. *Jaswant Singh Saluja* v. *Chief Settlement Commissioner,* A.I.R. 1971 S.C.748 at 749.
29. *State of Punjab* v. *Gurdial Singh,* A.I.R. 1980 S.C. 319.
30. *Vine* v. *National Dock Labour Board* [1956] 3 All E.R. 939 at 943.
31. *Fernando* v. *Jayaratna,* (1974) 78 N.L.R.123 at 130.
32. M.P. Jain and S.N. Jain, *Principles of Administrative Law* 131 (3rd ed. 1979).

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the dividing line between administrative and quasi-judicial powers is "quite thin and is being gradually obliterated."[33] It has been insisted that "even an administrative order which involves civil consequences must be made consistently with the rules of natural justice."[34] This extension has been justified on the basis that the object of the rules of natural justice is to prevent miscarriage of justice.[35] The "supposed distinction"[36] between quasi-judicial and administrative powers has incurred the disapproval of the Supreme Court of India.[37] The courts of India are mindful that "a duty to act judicially may arise in widely different circumstances and it is not possible or advisable to lay down a hard and fast rule or an inexorable rule of guidance."[38]

Exclusion of legislative acts

It is settled law in Sri Lanka that the validity of legislation or of a subordinate legislative instrument cannot be impeached on the ground of violation of the rules of natural justice.[39] This limitation is explicable by reference to the extensive range of policy considerations moulding the content of principal and subordinate legislation.

The distinction between legislative and adjudicative facts is an integral part of the administrative law of India. The High Court of Kerala has observed: "Generally for adjudicating truth of adjudicative, as distinct from legislative, facts, notice and an opportunity of being heard are essential."[40] Determination of the fair price of consumer items has been treated as a legislative function,[41] with the criterion of reasonableness operating as an effective check.[42] The distinction between legislative and quasi-judicial powers has been predicated on the predominance of factors connected with policy and expediency.[43] The Supreme Court of India has held that the making of a legislative instrument does not entail compliance with the rules of natural justice.[44]

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33. *Chandra Bhawan Boarding and Lodging,* v. *State of Mysore,* A.I.R. 1970 S.C. 2042 at 2050.

34. *A.K. Kraipak* v. *Union of India,* A.I.R. 1970 S.C. 150 at 155.

35. *G. Sarana* v. *University of Lucknow,* A.I.R. 1976 S.C. 2428 at 2431.

36. *Swadeshi Cotton Mills* v. *Union of India,* (1981) 1 S.C.C.664.

37. *Maneka Gandhi* v. *Union of India,* (1978) 1 S.C.C. 248 at 284-85.

38. *Radheshyam* v. *State of Madhya Pradesh,* A.I.R. 1959 S.C.107 at 134.

39. *P.S. Bus Co. Ltd* v. *Members and Secretary of the Ceylon Transport Board* (1958) 61 N.L.R.491.

40. *President, Commonwealth Co-operative Society Ltd,* v. *Joint Registrar (General) of Co-operative Societies,* A.I.R. 1971 Ker.34 at 36.

41. *Premier Automobiles Ltd* v. *Union of India,* A.I.R. 1972 S.C.1690.

42. *Panipat Co-operative Sugar Mills* v. *Union of India,* A.I.R. 1973 S.C.537 at 546; *S.I. Syndicate Ltd* v. *Union of India,* A.I.R. 1975 S.C.460 at 464.

43. *Shree Meenakshi Mills Co. Ltd,* v. *Union of India,* A.I.R. 1974 S.C.366 at 380.

44. *R.K. Porwal* v. *State of Maharashtra,* A.I.R. 1981 S.C.1127 at 1142. *Cf. Tulsipur Sugar Co. Ltd* v. *Notified Area Committee,* A.I.R. 1980 S.C. 882 at 887.

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Changing judicial attitudes

The stringency of the qualification on the purview of the writs based on the criterion of a judicial function is enhanced by the attitude that "in order that a body may satisfy the required test, it is not enough that it should have legal authority to determine questions affecting the rights of subjects, there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially."[45] But this view no longer prevails in English law. The House of Lords has recognized that the duty to act in conformity with the rules of natural justice, far from being confined to situations in which the concept of an analytically judicial function is superadded, could legitimately be inferred from a duty to decide "what the rights of an individual should be."[46] The implication of applicability of the rules of natural justice from the nature of the power, and the consequences of its invocation, is sound in principle. Unfortunately, in Sri Lanka, the narrow view which regards the duty to act judicially as a distinct precondition of relevance of the principles of natural justice, has persisted. Referring to the leading Privy Council opinion [47] which typifies this approach, the Supreme Court of Sri Lanka has observed: "It is undoubtedly correct that this decision has been the subject of some criticism from academic lawyers. In a court of law, however, it is a decision of very high authority and, in a Sri Lankan court, it remains of the highest and binding authority."[48]

This attitude to the doctrine of *stare decisis,* which deprives the courts of the opportunity of preventing the perpetuation of error, does not blend readily with other trends emerging from the Sri Lankan decisions-in particular, with the principle that even where a power is held to be purely administrative, a writ will lie if the order is made without authority or in excess of the authority conferred,[49] or if it could be shown that there was no ground whatsoever on which the body performing the administrative function could have arrived at its conclusion.[50] A conclusion reached in violation of the rules of natural justice should, in principle, be capable of being impugned for want of compliance with rudimentary procedural requirements as altogether devoid of validity, in a manner indistinguishable from any other act which is *ultra vires.*

45. *R.* v. *Legislative Committee of the Church Assembly,* [1928] 1 K.B.411 at 415.
46. *Ridge* v. *Baldwin,* [1964] A.C.40 at 75.
47. *Nakkuda Ali* v. *Jayaratne,* (1950) 51 N.L.R.457.
48. *Hassan* v. *Controller of Imports and Exports,* (1967) 70 N.L.R.149 at 152.
49. *Fernando* v. *University of Ceylon,* (1956) 58 N.L.R.265 at 281.
50. *Don Samuel* v. *de Silva,*)1959) 60 N.L.R.547 at 552.

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The ambit of the writs is significantly limited by the assumption reflected in a strand of Sri Lankan decisions that "the essence of a 'judicial' act is where the law predicates an inquiry by the judicial process before the reaching of the conclusion which results in the act. On the other hand, an executive act is done by a process where the law predicates no prior judicial process before the arrival of a mental decision preceding the act."[5] This formulation of the antithesis between "judicial" and "administrative" functions – convincingly assailed in later English decisions[52] – echoes the assertion by the Privy Council, in the context of the statutory powers of the controller of textiles, that "it is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something, he can only arrive at that belief by a course of conduct analogous to the judicial process."[53]

The Indian case law indicates a fundamental change in judicial attitudes. Recent pronouncements by the courts of India attach due weight to contemporary needs and priorities.

The view was expressed at one time that an authority could be held under a duty to act judicially only if the law under which the authority was making the decision itself specifically required a judicial approach.[54] However, this view has since been rejected decisively by the courts of India. It is settled principle in India today that the duty to act judicially may arise from the very nature of the function intended to be performed.[55] It is not necessary that the obligation to observe the principles of natural justice should be imposed expressly.[56] The Supreme Court of India has conceded that the exercise of quasi-judicial powers is not precluded merely because the official or body is not explicitly required to be guided by any recognized substantive law in resolving the dispute submitted to it.[57]

Accordingly, the implication of a power to act judicially has been considered legitimate in a wide variety of circumstances. The Supreme

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51. *Board of Trustees of the Maradana Mosque* v. *Minister of Education*, (1963) 65 N.L.R.376 at 378-79.

52. See, *e.g.*, *Wiseman* v. *Borneman*, [1971] A.C.297.

53. *Nakkuda Ali* v. *Jayaratne*, (1950) 51 N.L.R.457 at 462.

54. *Province of Bombay* v. *Kushaldas Advani*, A.I.R. 1950 S.C.222. *Cf. Nagendra Nath Bora* v. *Commissioner of Hills Division and Appeals*, A.I.R. 1958 S.C.398; *Gullapalli Nageswara Rao* v. *A.P. State Road Transport Corporation*, A.I.R. 1959 S.C.308; *Shivji Nathubhai* v. *Union of India*, A.I.R. 1960 S.C.606.

55. *State of Orissa* v. *Binapani Dei*, A.I.R. 1967 S.C.1269.

56. *Shri Bhagwan* v. *Ram Chand*, A.I.R. 1965 S.C.1767 at 1770.

57. *Bharat Bank Ltd* v. *Employees of the Bharat Bank Ltd*, A.I.R. 1950 S.C.188 at 190.

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Court of India has made the emphatic comment that "if there is power to decide and determine to the prejudice of a person, the duty to act judicially is implicit in the exercise of such power."[58] In these circumstances, the character of the statutory duty imposed necessarily implies the duty to accord a hearing before a conclusion is reached. [59] Recognition of the duty to observe the rules of natural justice may well be a matter of inference.[60] The court has referred, as the source of this duty, to "express or implied provision."[61] In appropriate circumstances the courts of India have taken the view that "the omission of the legislature to insert positive words imposing an obligation of a judicial approach appears to be supplied by the plainest principles of justice on which our Constitution is founded."[62]

Liberal scope for implication is permitted by the approach that "the duty to act judicially will depend on the express provisions of the statute, read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute."[63] A conspicuous feature of the development of the Indian case law is the departure from a literal approach and the willingness to imply a duty to act judicially in an extensive range of situations.[64]

The decided cases in India furnish indications as to the factors justifying implication of a duty to act judicially. The mere circumstance that a question of fact has to be determined as a preliminary condition before action can be taken under the statute does not, *per se,* warrant this implication; there must be some indication in the statute as to the manner in which this preliminary fact is to be determined.[65] Among the relevant indicia are the material statutory provisions, the nature of the powers conferred on the authority or body, the nature of the rights of citizens affected by the decisions of such authority or body and other surrounding circumstances.[66] A factual basis for the determination suggests, tentatively, the exercise of a quasi-judicial

58. *State of Orissa* v. *Binapani Dei,* A.I.R. 1967 S.C.1269 at 1271.
59. *Government of Mysore* v. *J.V. Bhat,* A.I.R. 1975 S.C.596 at 599.
60. *Suresh Koshy George* v. *University of Kerala,* A.I.R. 1969 S.C.198.
61. *State of Punjab* v. *K.R. Erry,* A.I.R. 1973 S.C.834 at 839.
62. *Municipal Committee* v. *State of Punjab,* A.I.R. 1967 Punj. 430.
63. *Board of High School* v. *Ghanshyam,* A.I.R. 1962 S.C.1110 at 1114.
64. *D.L. Board* v. *Jaffar Imam,* A.I.R. 1966 S.C.282.*Cf. Lakhanpal* v. *Union of India,* A.I.R. 1967 S.C.1507 disapproving of the literal approach in *Sadhu Singh* v. *Delhi Administration,* A.I.R. 1966 S.C.91.
65. *Radeshyam* v. *State of Madhya Pradesh,* A.I.R. 1959 S.C.107 at 118.
66. *A.S.C. Society* v. *Union of India,* A.I.R. 1970 Mys. 243 at 248.

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power.[67] The Supreme Court of India has recognized that "it is the nature of the power and the circumstances and conditions under which it is exercised that will occasion the invocation of the principles of natural justice."[68] Accordingly, where a power can be exercised on specified grounds only, and only after a condition precedent is shown to exist, the duty to act judicially may be implied with justification".[69] Judicial trends in India evince lack of inhibition in implying this duty.[70] Where a dispute has to be resolved "in the light of the facts adduced in the proceedings and according to law,"[71] the duty to comply with the rules of natural justice may generally be implied. On the other hand, the legitimacy of action founded on a mere opinion ordinarily precludes the duty to act judicially.[72] The implication of this duty may derive from the general scheme incorporated in the statute.[73] The obligation to construe documents submitted to a board and to apply statutory provisions to such documents is normally indicative of a duty to act judicially devolving on the board.[74]

The conflict of judicial opinion in India regarding the propriety of implication of the duty to act judicially may now be considered resolved. The view that a hearing is unnecessary in circumstances where it had not been provided for in express terms by the relevant legislation had been taken at one time by the courts of Madhya Pradesh,[75] Punjab,[76] and Rajasthan.[77] However, the contrary view-that the duty may be implied legitimately from the nature of the power-has been adopted in other Indian jurisdictions including Patna,[78] Calcutta,[79]

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67. *Assistant Collector of Customs* v. *Charan Das Malhotra*, A.I.R. 1972 S.C. 689 at 695. But see *Ganeshmul Channilal* v. *Collector of Central Excise*, A.I.R. 1968 Mys. 89.

68. *Daud Ahmad* v. *District Magistrate*, A.I.R. 1972 S.C. 896 at 899.

69. *Malkapur Municipality* v. *State*, A.I.R. 1977 Bom. 244 at 254.

70. See, *e.g.*, *Kareli* v. *State of Madhya Pradesh*, A.I.R. 1958 M.P. 323; *Maursinha* v. *State of Madhya Pradesh*, A.I.R. 158 M.P. 397; *Suresh Seth* v. *State*, A.I.R. 1970 M.P. 154; *State of Uttar Pradesh* v. *Krishna Chandra Gupta*, 1974 All. L.J. 58

71. *Indo-China Steam Navigation Co. Ltd* v. *Jasjit Singh*, A.I.R. 1964 S.C. 1140 at 1148.

72. *Iqbal Ahamad* v. *State of Uttar Pradesh*, A.I.R. 1962 All. 264 at 265.

73. *Glaxo Laboratories* v. *Venkataswaran*, A.I.R. 1959 Bom. 372 at 379.

74. *Board of Revenue* v. *Sardarni Vidyawati*, A.I.R. 1962 S.C. 1217 at 1220.

75. *Moti Miyan* v. *Commissioner*, A.I.R. 1960 M.P. 157; *Ahmadnoor* v. *State of Madhya Pradesh, A.I.R. 1962 M.P.133.*

76. *Godha Singh* v. *District Magistrate*, A.I.R: 1956 Punj. 33.

77. *Kishore Singh* v. *State of Rajasthan*, A.I.R. 1954 Raj. 264.

78. *Sudhansu Kanta* v. *State of Bihar*, A.I.R. 1954 Pat. 229.

79. *Haji Vakil* v. *Commissioner of Police*, A.I.R. 1954 Cal.157; *Kshirode Chandra* v. *District Magistrate*, A.I.R. 1956 Cal.96.

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Madras,[80] Allahabad[81] and Kerala.[82] The latter view, compatible as it is with modern social policy as well as with current judicial attitudes, is to be preferred.

The extension of the dimensions of natural justice is reflected in the comment by the Supreme Court of India that "the area where the principles of natural justice have to be followed and judicial approach has to be adopted, has become wider and consequently the horizon of the writ jurisdiction has been extended in a corresponding manner."[83] This extension, it is submitted, is entirely salutary from the standpoint of principle. Thus, in connection with the requirement of a hearing, it has been suggested that "if the authority has within its knowledge all the relevant facts and issues involved in a situation, it would come to a right decision."[84] This approach derives support from Indian judicial authority.[85] Reaffirming the fundamental value of the underlying principle, the Supreme Court of India has aptly remarked: "Principles of natural justice are to some minds burdensome, but this price-a small price indeed-has to be paid if we desire a society governed by the Rule of Law."[86] This assumption sustains the observation that "in dealing with the question of the liberty and livelihood of a citizen, considerations of expediency which are not permitted by law can have no relevance whatever."[87] The liberal scope of the requisites of natural justice is underscored by the recent comment of the Indian Supreme Court that only by compliance with these rudiments of fairplay will administrative authorities exercising quasi-judicial functions be able "to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process."[88]

A counterveiling factor, articulated by the Supreme Court of India, is that "to make [administrative] decisions depend upon a full fledged judicial inquiry would hold up the functioning of such autonomous

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80. *In re the State of Madras*, A.I.R. 1957 Mad. 692.

81. *Jai Narain* v. *District Magistrate*, A.I.R. 1966 All. 265; *State* v. *Jaswant Singh*, A.I.R. 1968 All. 383.

82. *Raman Nair* v. *Additional District Magistrate*, A.I.R. 1968 Ker.65.

83. *Associated Cement Companies* v. *P.N.Sharma*, A.I.R. 1965 S.C. 1595 at 1601.

84. Jain and Jain, *supra* note 32 at 127.

85. *A.S.C. Society* v. *Union of India*, A.I.R. 1970 Mys. 243 at 248.

86. *Board of High School and Intermediate Education*, v. *Chittra*, A.I.R. 1970 S.C. 1039 at 1040.

87. *Dock Labour Board, Calcutta* v. *Jaffar Imam*, A.I.R. 1966 S.C. 282 at 287.

88. *Siemens Engineering and Manufacturing Co. of India Ltd* v. *Union of India*, A.I.R. 1976 S.C. 1785 at 1789.

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bodies as universities and school boards."[89] This consideration, however, does not outweigh the intrinsic value of the rules of natural justice. But it is clear that the applicability of the rules of natural justice can be excluded by manifest statutory provisions. The Supreme Court of India has pointed out that "if ... a statutory provision either specifically or by necessary implication excludes the application of any or all of the rules or principles of natural justice, then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice."[90] Thus, where the legislature has devised methods other than a hearing, and these entail adequate protection, the rules of natural justice are not capable of invocation. The rationale is that "where the legislature prescribes a procedure, the principles of natural justice cannot be superimposed over it."[91]

However, Indian judicial authority highlights the principle that the rules of natural justice are not excluded in circumstances where adherence to them would probably have made no difference. "The non-observance of natural justice is itself prejudice to any man, and proof of prejudice independently of proof of denial of natural justice is unnecessary."[92] This is in accordance with established trends in Indian administrative law.[93] A strict application of the doctrine of implicit exclusion of natural justice is represented by the judicial observation that "the silence of a statute has no exclusionary effect except where it flows from necessary implication."[94] Since "hearing [a party] before depriving him is both reasonable and pre-emptive of arbitrariness... denial of this administrative fairness is constitutional anathema except for good reasons."[95] The courts of India have been consistently reluctant in recent times to abrogate the protection conferred by the rules of natural justice except in face of unequivocal statutory provisions.[96] The consensus of judicial opinion in India is crystallized in the comment that "the court must make every effort

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89. *Bihar School Examination Board* v. *Subhash Chandra,* A.I.R. 1970 S.C. 1269 at 1273.

90. *Union of India* v. *J.N. Sinha,* A.I.R. 1971 S.C. 40 at 42.

91. *Subhash Oil Industries* v. *State of Uttar Pradesh,* A.I.R. 1975 All. 19 at 23.

92. *S.L. Kapoor* v. *Jagmohan,* A.I.R. 1981 S.C. 136 at 147.

93. *Chintapalli Agency Taluk Arrack Sales Co-operative Society Ltd* v. *Secretary (Food and Agriculture), Government of Andhra Pradesh,* A.I.R. 1977 S.C. 2313.

94. *Mohinder Singh Gill* v. *The Chief Election Commissioner,* (1978) 2 S.C.R. 272 at 316.

95. *State of Punjab* v. *Gurdial Singh,* A.I.R. 1980 S.C. 319.

96. *Narayan Govind Gavate* v. *State of Maharashtra,* A.I.R. 1977 S.C. 183; *Dora Phalauli* v. *State of Punjab,* A.I.R. 1979 S.C. 1594.

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to salvage this cardinal rule to the maximum extent possible, with situational modifications."[97] In compelling contexts, however, the public interest has been considered paramount in a sense which requires the rules of natural justice to be dispensed with.[98]

Applicable tests

Some of the salient considerations emerging from the decided cases in Sri Lanka and in India as aids to the identification of quasi-judicial functions may be evaluated.

Objectivity

The degree of objectivity characterizing the exercise of the power is a material factor. The general approach of the Sri Lankan courts has been that "when a court is called upon to decide a question of this kind, the duty cast upon it is to decide on a consideration of all the relevant provisions of the enabling Act whether the test to be applied is a subjective or an objective one. If it is subjective, then it is the administrative process that comes into operation; if it is objective it is the judicial process."[99]

The Sri Lankan judgments which characterize the power conferred as administrative are often founded on the premise that no indication of legislative intent that the rules of natural justice are to be observed, is discoverable in the statutory provision. With regard to the power granted to the controller of textiles to revoke a licence, it was stated, as one of the grounds of the decision that no judicial function devolved on the controller, that "the power conferred upon the Controller stands by itself upon the bare words of the Regulation and, if the mere requirement that the Controller must have reasonable grounds of belief (in the unfitness of the dealer) is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules."[100] The Privy Council, construing the power of dismissal of public offiers vested in the public service commisision by rules made under the Ceylon (Constitution)

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97. *Swadeshi Coton Mills* v. *Union of India,* A.I.R. 1981 S.C. 818 at 832.

98. See, *e.g., Prag Ice and Oil Mills* v. *Union of India,* A.I.R. 1978 S.C. 1296; *Laxmi Khandsari* v. *State of Uttar Pradesh,* A.I.R. 1981 S.C. 873 at 895.

99. *Don Samuel* v. *de Silva,* (1959) 60 N.L.R.549 at 549-50.

100. *Nakkuda Ali* v. *Jayaratne,* (1950) 51 N.L.R.457 at 463.

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Order-in-Council 1946, observed that the power of the commissioner to require a public officer to retire at any time after his completing the age of optional retirement was "unqualified and required no preliminary steps for the justification of the order."[101] It supported, on this basis, the conclusion that the commission was not bound by the rules of natural justice. A similar view has been taken in respect of the registrar-general as the authority empowered to appoint and remove registrars of births and deaths,[102] since he had "the unfettered power"[103] to make and to terminate an appointment.

However, contemporary judicial attitudes in Sri Lanka acknowledge that the various formulas embodied in statutory provisions furnish no conclusive guidance but only tentative indications as to the incidence of the duty to act judicially.[104] If the statute is unequivocal in its purport, *cadit quaestio,* but any inherent ambiguity needs to be resolved in the light of the principle that "although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omissions of the legislature."[105] Among the considerations which have a bearing on the decision whether the implication of this principle is warranted or not, are the nature of the property or office held, or status enjoyed, or the services to be performed by the complainant of injustice, the circumstances in which the person claiming to be entitled to exercise a measure of control may lawfully intervene, and the character and severity of the sanctions which may be imposed.[106]

In keeping with these criteria the courts of Sri Lanka, in suitable contexts, have had little compunction in holding that a power couched in ostensibly subjective terms contains a judicial element. An arbitrator appointed under the Industrial Disputes Act 1950,[107] whose duty is to make an award which "appears to him just and equitable",[108] has been held to be under a duty to act judicially.[109] The Supreme Court

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101. *de Zoysa* v. *Public Service Commission,* (1963) 64 N.E.R.505 at 510.

102. See s. 3(1), Births and Deaths Registration Ordinance, No.17 of 1951, read with ss. 12 and 14(f), Interpretation Ordinance, No.21 of 1901.

103. *Thenabadu* v. *Sameresekera,* (1967) 70 N.L.R.472 at 473.

104. *Durayappah* v. *Fernando,* (1966) 69 N.L.R.265.

105. *Cooper* v. *Wandsworth Board of Works,* (1863) 14 C.B. (N.S.) 180.

106. *Durayappah* v. *Fernando,* (1966) 69 N.L.R.265 at 270.

107. No. 43.

108. S. 17(1).

109. *Heath and Co. (Ceylon) Ltd* v. *Kariyawasam,* (1968) 71 N.L.R.382. *Cf. Taos Ltd* v. *Fernando,* (1963) 65 N.L.R.259; *Stratheden Tea Co. Ltd* v. *Selvadurai,* (1963) 66 N.L.R.6. In Sri Lanka a similar view has been taken of the functions of labour

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of Sri Lanka has observed: 'His function is judicial in the sense that he has to hear the parties, decide facts and apply rules with judicial impartiality."[110] The position is no different in Sri Lanka in respect of industrial courts,[111] the powers of which are defined in identical phraseology.[112]

Where the *facta* conditioning exercise of the power are of a readily ascertainable character and may be verified by the application of objective norms, the imputation of a judicial function to the recipient of the power is facilitated.[113] The commission of an act involving exposure to a penalty or forfeiture under the Customs Ordinance 1869[114] exemplifies, clearly, an objective factum.[115] Where provision was made in the code of regulations for assisted schools that "where the manager proves unsatisfactory, the Director of Education may assume the management or appoint a manager temporarily,"[116] it was held that duty to act judicially was imposed on the director of education.[117] This finding is reinforced by the consideration that the factors set out in the regulation as instances of want of suitability are refusal to act, absence from duty and financial embarrassment.[118] The power entrusted to a commission of inquiry to investigate and report whether any member of a municipal council had committed acts of bribery was considered to entail a duty to act judicially, insofar as the finding by the commissioner had necessarily to depend on proof of allegations of fact.[119] Where the question for the controller of textiles was whether the holder of a licence had made fraudulent interpolations and contrived to obtain in the ledger account credit for a larger sum than he was entitled to on the basis of the coupons

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tribunals: *Ceylon Workers' Congress* v. *Superintendent of Kallebokke Estate,* (1962) 63 N.L.R.536 at 542; *Urban Council v. Cooray,* (1971) 75 N.L.R.236 at 238.

110. *Nadaraja Ltd* v. *Krishnadasan,* (1973) 78 N.L.R. 255 at 261.

111. *Hayleys Ltd* v. *Crossette-Thambiah,* (1961) 63 N.L.R.248 at 257; *Virakesari Ltd* v. *Fernando,* (1963) 66 N.L.R.145.

112. S. 24(1), Industrial Disputes Act.

113. *Manickam* v. *Permanent Secretary to the Ministry of Defence and External Affairs,* (1960) 62 N.L.R.204 at 208.

114. S. 127.

115. *Tennekoon* v. *Principal Collector of Customs,* (1959) 61 N.L.R.232. *Cf. Omer* v. *Caspersz,* (1963) 65 N.L.R.494.

116. Reg. 32(iii).

117. *Don Samuel* v. *de Silva,* (1959) 60 N.L.R.547.

118. See *supra* note 116.

119. *de Mel* v. *de Silva,* (1949) 51 N.L.R.105.

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surrendered by him, the nature of the allegation and the evidentiary material pertaining to it were such as to necessitate the discharge of a judicial function by the controller.[120]

The courts of Sri Lanka have been disposed to regard predominance of considerations of policy and expediency in arriving at a decision as a factor which militates strongly against the classification of the function as judicial. The principle has been laid down that, in general, a duty to act judicially would arise where an administrative body, in reaching its decision, has to consider the matter "solely on the facts and the evidence before it, and apart from any extraneous considerations such as policy and expediency."[121] Sri Lankan judges have been convinced, perhaps too readily, by the argument that "the courts can exercise no form of control or supervision in the decision as to what is or is not in the interest of the public. That is a decision committed by Parliament solely to the specified public officer."[122] Commenting on the power available to an officer of a local authority under the Public Performance Ordinance 1912[123] to "grant a licence subject to the conditions he may consider necessary in the interests of the safety and comfort of the public,"[124] the Supreme Court of Sri Lanka has stated: "His decision in the matter of granting a licence must obviously be actuated in whole, or in part, by questions of policy or expediency and he is, therefore, performing merely an executive act."[125]

On the other side of the line a judicial function was considered to be part of determinations which could not be made fairly "except by the application of the judicial process or a form of procedure closely analogous to it."[126] Thus, the vice-chancellor of a university, in deciding whether to suspend a candidate from an examination or to expunge his name from the pass list, is under a duty to act judicially and in that "no question of policy or expediency arises."[127]

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120. *Mohamed and Co.* v. *Controller of Textiles,* (1947) 48 N.L.R.461 at 467.

121. *Tennekoon* v. *Principal Collector of Customs,* (1959) 61 N.L.R.232 at 234. *Cf. Weeraratne* v. *Poulier,* (1947) 48 N.L.R.441; *Edirisinghe* v. *Rajendra,* (1948) 49 N.L.R. 500.

122. *Kadawata Mada Korale Multi-Purpose Co-operative Societies Union Ltd* v. *Ratnavale,* (1963) 66 N.L.R.220 at 230.

123. No. 7.

124. See reg. A5 made under s.3.

125. *Munasinghe* v. *Jayasinghe,* (1958) 61 N.L.R.425 at 428. *Cf. Jayawardene* v. *Silva* (1969) 72 N.L.R.25 at 36.

126. *Fernando* v. *University of Ceylon,* (1956) 58 N.L.R.265 at 279.

127. *Ibid. Cf. Vadamarachchy Hindu Educational Society Ltd* v. *Minister of Education,* (1961) 63 N.L.R.322 at 327.

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A similar conclusion in regard to the power vested in the minister of local government to remove a member of a town council from office on account of misconduct was supported on the ground that the question whether there was sufficient proof of misconduct "is one that can only be decided on evidence and not on considerations of policy or expediency."[128]

The Sri Lankan courts have steadfastly considered the amplitude of discretion as an overwhelming indication of the absence of any judicial quality in the statutory power conferred.[129] By contrast, a limited discretion exercisable in consonance with definite criteria is wholly compatible with a judicial function.[130] It is submitted that the Sri Lankan decisions, on the whole, are marred by too great an emphasis on the policy content of the discretion as a factor obviating the need for compliance with the rules of natural justice. Although a substantial element of policy or expediency may be conducive to removal of a discretion from the ambit of judicial surveillance on the basis that factors conditioning the use of discretion are not appropriately amenable to judicial investigation, the extent of the discretion *per se* is not reasonably repugnant to a duty to act judicially. Where general considerations of policy need to be balanced against the interest of the individual, the opportunity of a hearing is indispensable from the standpoint of fairness.

A comparable criterion prominently pervades the case law of India, Where "the decision has manifestly to stand... objective tests are not merely to be founded on the subjective satisfaction of the authority deciding the question."[131] The power conferred has been held to be quasi-judicial. The distinction between objective and subjective satisfaction has been adverted to explicitly by the Supreme Court of India.[132] In the former context, an essential prerequisite is "some evidence"[133] supporting the conclusion reached by the officer or tribunal. This view has been taken in India with regard to the acquisition of land[134] and the issue of a passport.[135] The essence of

128. *Subramaniam* v. *Minister of Local Government and Cultural Affairs*, (1957) 59 N.L.R.254 at 260.

129. *Gunadasa Silva* v. *Jayasuriya*, (1965) 67 N.L.R.514 at 515.

130. *South Western Bus Co. Ltd* v. *Arumugam*, (1947) 48 N.L.R. 385.

131. *Harinagar Sugar Mills* v. *Shyam Sunder*, A.I.R. 1961 S.C. 1669 at 1675.

132. *Shankarlal* v. *Shankarlal*, A.I.R. 1965 S.C. 507 at 571.

133. *Shib Kumar Dutta* v. *Appellate Sub-Committee of the State Transport Authority*, A.I.R. 1970 Cal. 174 at 175.

134. *State of Gujarat* v. *Patel Chaturbhai Narsinbhai*, A.I.R. 1975 S.C. 629 at 633.

135. *Md. Ayub Khan* v. *Commissioner of Police, Madras*, A.I.R. 1965 S.C. 1623 at 1627.

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the function is " a judicial appraisal of the facts and circumstances."[136] The assertion of satisfaction in the authority may be refuted by demonstrating that the required conditions did not exist, or that no reasonable body of persons acquainted with the law would have reached the decision which the tribunal did.[137] Consultation with the interests concerned is a necessary concomitant of a quasi-judicial function.[138] On the other hand, where subjective satisfaction of the determining authority is the operative criterion, the courts of India will generally not inquire into the sufficiency of the materials on which the order is founded, or into the propriety of the order.[139]

Formalities

The circumstance that a tribunal is endowed with the "trappings" of a court has been referred to in Sri Lanka as a tentative pointer that the tribunal is expected to act judicially. The power to summon witnesses and to examine them on oath,[140] the applicability of penal sanctions to false evidence preferred before the tribunal,[141] and the existence of a right of appeal to a higher administrative tribunal [142] or to a minister[143] have been regarded, in the absence of counterveiling factors, as accompanying features of a judicial function. With regard to the last mentioned attribute it has been pointed out that "a right of appeal ordinarily involves consideration of the sufficiency of grounds upon which an administrative body reaches a decision and carries with it the concept of conflicting claims and a duty cast on the appellate body to decide between them."[144] The Privy Council, in holding that certain provisions in the defence regulations relating to control of the textile trade imposed on the controller only administrative duties, took into account, inter alia, the absence of a right of

136. *Malkapur Municipality* v. *State,* A.I.R. 1977 Bom. 244 at 255.

137. *Rampur Distillery and Chemical Co. Ltd* v. *Company Law Board,* A.I.R. 1970 S.C. 1789 at 1793.

138. *State of Assam* v. *Bharat Kala Bhandar Ltd,* A.I.R. 1967 S.C. 1768 at 1774.

139. *Sadhu Singh* v. *Delhi Administration,* A.I.R. 1966 S.C. 91 at 94-95; *Barium Chemicals Ltd* v. *Company Law Board,* A.I.R. 1967 S.C. 295. *Cf. Collector of Customs* v. *Sampathu Chetty,* A.I.R. 1962 S.C. 316; *Babulal Amthalal* v. *Collector of Customs,* A.I.R. 1957 S.C. 877; *Pukhraj* v. *Kohli,* A.I.R. 1962 S.C. 1559; *Nathmal Jalan* v. *Additional Collector of Customs,* (1966) 70 C.W.N.349.

140. *Kahatagaha Mines Ltd* v. *Fernando,* (1976) 78 N.L.R.273.

141. *Tennekoon* v. *Principal Collector of Customs,* (1959) 61 N.L.R.232.

142. *South Western Bus Service Co. Ltd* v. *Arumugam,* (1947) 48 N.L.R.385.

143. *Don Samuel* v. *de Silva,* (1959) 60 N.L.R.547.

144. *Id.* at 551.

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appeal.[145] That the power had been entrusted to a minister and not to a subordinate officer, and that no right of appeal from his decision was provided for, weighed with the Supreme Court of Sri Lanka in holding that the minister's power to dissolve a local authority was administrative in character.[146]

In India it has been observed that neither the right of appeal nor the right to apply for revision is itself decisive of the existence of a quasi-judicial function.[147] However, a different approach is reflected in the decision by the High Court of Bombay that, when the law confers a right of appeal, this right can be effective only if the authority from whose order an appeal lies, gives reasons for its decision.[148] With regard to the function devolving on the authority having statutory power to hear appeals and to entertain applications for revision, it has been held by the Supreme Court of India that the duty to hear must be discharged judicially.[149]

The courts of Sri Lanka have consistently administered the caution that "the existence of the right to summon witnesses and to examine them on oath can never by itself be conclusive of the question whether a statutory function is judicial."[150] This is true of other procedural characteristics as well. The preoccupation of the courts of both India and Sri Lanka has been with the substance of the power rather than with the formal attributes of the functionary exercising it. "The more reliable test is to inquire to what end or purpose these powers are given."[151] Alluding to the functions of a licensing authority, the Supreme Court of Sri Lanka has observed: "It is true that there is no appeal from his decisions, nor are there provisions in regard to the keeping of records and the procedure to be followed. In spite of the absence of such provisions, the duty to act judicially remains."[152] Where the existing facts had to be determined objectively by a Sri Lankan minister before his decision on the fitness of a member of a town council to hold office was made, he was held to be acting in a judicial capacity although the power to administer an oath and the other "trappings" of a court were lacking.[153]

145. *Nakkuda Ali* v. *Jayaratne*, (1950) 51 N.L.R.457.

146. *Sugathadasa* v. *Jayasinghe*, (1958) 59 N.L.R.457.

147. *Mohd. Ibrahim* v. *State Transport Appellate Tribunal*, A.I.R. 1970 S.C. 1542 at 1545.

148. *Readymoney Ltd C. R. H.* v. *State of Bombay*, A.I.R. 1958 Bom. 181.

149. *Nagendra Nath Bora* v. *Commissioner of Hills Division and Appeals*, A.I.R. 1958 S.C. 398 at 406.

150. *Seneviratne* v. *Attorney-General*, (1968) 71 N. L. R. 439 at 446-47.

151. *ibid.*

152. *Abdul Thassim* v. *Edmund Rodrigo*, (1947) 48 N. L. R. 121 at 129.

153. *Subramaniam* v. *Minister of Local Government and Cultural Affairs*, (1957) 59 N.L.R.254

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Adversary process

The consensus of judicial opinion in India is that "if there is a *lis*, ordinarily there will be a duty on the part of the authority to act judicially."[154] Although the determination of issues between a proposition and an opposition generally involves a quasi-judicial function,[155] the Supreme Court of India has cautiously pointed out: "It does not follow that the absence of a *lis* necessarily negatives the order being judicial."[156]

In conformity with the Indian case law,[157] the balance of judicial authority in Sri Lanka sustains the proposition that the concept of a *lis inter partes* is an essential aspect of the performance of a judicial function. "Judicial action is an adjudication upon the rights of parties who appear before the tribunal and upon whose claims some decision is rendered."[158] The Sri Lankan courts have held that an administrative body is under a duty to act judicially "only if it is bound by statute to decide on evidence between a proposal and an opposition."[159] One of the grounds on which the Privy Council considered that the controller of textiles, in withdrawing a licence, was not under a duty to act judicially, was that "nothing that fairly resembled an appeal or a *lis partes* was taking place."[160]

Legal authority

The requirement of legal authority devolving on the tribunal, as a condition of imputation of the duty to act judicially so as to enable the findings of the tribunal to be reached by the prerogative writs, is embedded in English law.[161] Since the prerogative writs are conceived of as remedies against the excess and abuse of power by public authorities, it is natural that legal authority should be synonymous with statutory authority in India and Sri Lanka as well, in so far as statutory provisions are generally the source of the powers of public authorities.

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154. *Nageswara Rao* v. *Andhra Pradesh State Rood Transport Corporation*, A.I.R. 1959 S.C. 308 at 322. *Cf. Shivji Nathubhai* v. *Union of India*, A.I.R. 1960 S.C. 606 at 609.

155. *Express Newspapers Ltd* v. *Union of India*, A.I.R. 1958 S. C. 578 at 613.

156. *Shankarlal* v. *Shankarlal*, A.I.R. 1965 S.C. 507 at 511. *Cf. Pandyan Insurance Co.* v. *K. J. Khambata.* A.I.R. 1955 Bom. 241; *Express Newspapers (Private) Ltd* v. *Union of India, A.I.R. 1958 S.C. 578 at 612.*

157. *Radeshyam* v. *State of Madhya Pradesh*, A.I.R. 1959 S.C. 107 at 120-21; *Gullapalli Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*, A.I.R. 1959 S.C. 308; *Delhi Administration* v. *V.C. Shukla*, A.I.R. 1980 S.C. 1382.

158. *Suriyawansa* v. *Local Government Service Commission*, (1947) 48 N.L.R.433 at 437.

159. *Hayleys Ltd* v. *Crossette-Thambiah*, (1961) 63 N.L.R.248 at 257.

160. *Jayaratne* v. *Mohamad Miya*, (1950) 52 N.L.R.249 at 252.

161. *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171.

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The Supreme Court of India has recognized that the limitations imposed by the rules of natural justice cannot operate on powers which are governed exclusively by the terms of an agreement.[162] It has been asserted by the Indian courts that "if a right is claimed in terms of a contract, such a right cannot be enforced in a writ petition"[163] and that "a writ petition is not an appropriate remedy for enforcing contractual obligations."[164]

In accordance with the principle that a tribunal, the basis of whose jurisdiction is contractual, is not amenable to the prerogative writs, a private arbitral body, as distinguished from a statutory arbitrator,[165] has been held in Sri Lanka to be outside the purview of the remedies. In one respect, however, judicial attitudes in Sri Lanka have indefensibly curtailed the scope of the writs. The Sri Lankan courts have expressed the view, in the context of the Constitution of 1946, that the public service commission rules relating to the procedure to be followed prior to the retirement of a public officer did not have the same legal effect as a statutory provision and cound not, therefore, be enforced by *certiorari*.[166] In an age, one of the hallmarks of which is the rapid proliferation of administrative tribunals deriving their authority from sources characterized by varying degrees of formality, this approach may be assailed cogently from the standpoint of policy.

Impact on existing rights

According to the traditional formulation, an adverse effect on rights is one of the *facta probanda* of the writs.[167] The duty to act judicially has been narrowly construed in several English,[168] Australian[169] and New Zealand[170] cases which reflect the view that this duty is confined to determinations involving the breach of a right, as opposed to the denial or withdrawal of a privilege. However, a wider signification of rights, in this context, is resorted to by the courts of India and Sri Lanka as a means of supporting the extended range of instruments of judicial review.

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162. *Radhakrishna Agarwal* v. *State of Bihar,* A.I.R. 1977 S.C. 1496 at 1503.

163. *Bachhanidhi Rath* v. *State of Orissa,* A.I.R. 1972 S.C. 843 at 845. *Cf. Lekhraj Sathramadas* v. *M.M. Shah,* A.I.R. 1966 S.C. 334 at 337.

164. *Har Shankar* v. *Deputy Excise and Taxation Commissioner,* A.I.R. 1975 S.C. 1121 at 1126.

165. *Colombo Commercial Co. Ltd* v. *Shanmugalingam,* (1964) 66 N.L.R.26.

166. *de Zoysa* v. *Public Service Commission,* (1960) 62 N.L.R.492.

167. *R.* v. *Electricity Commissioners,* [1924] 1 K.B. 171.

168. *R.* v. *Metropolitan Police Commissioner, ex parte Parker,* [1953] 1 W.L.R. 1150.

169. *Randall* v. *Northcote Corporation,* (1910) 11 C.L.R. 100.

170. *Modern Theatres (Provincial) Ltd* v. *Peryman,* [1960] N.Z.L.R. 191.

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At one end of the spectrum of judicial attitudes, an English judge has suggested that the reference to rights should be replaced by questions affecting subjects.[171] This suggestion was rejected in a Sri Lankan case[172] where it was said that the proposed innovation was inconsistent with the conceptual framework of the law and "was not warranted".[173] This conclusion is contradicted by subsequent judicial trends in Sri Lanka.[174] It is clear, in any event, that the Sri Lankan courts have readily implied the duty to act judicially in relation to proceedings which culminate in an award "potent with consequences to the parties".[175] This applies to an arbitrator appointed under the Industrial Disputes Act, since the ultimate award is binding on the parties without any further step having to be taken. Moreover, a statutory provision[176] which enables a party to repudiate an award does not have the effect of rendering the act of an arbitrator exclusively administrative in character.[177] It has been considered self-evident that the chief valuer functioning under the Mines and Minerals Law 1973[178] has a duty to act judicially, in that "the determination of the Chief Valuer is binding on the person from whom the property was acquired and on the State Graphite Corporation, and also on any other persons who had lesser interests in that property."[179]

The question has arisen whether the rights, the violation of which is challenged by the prerogative writs, must necessarily be legally enforceable rights. There is some Sri Lankan authority stating or implying an answer in the affirmative. *Certiorari* was considered not to lie against a commission of inquiry on the basis that "the report of the respondent has no binding force; it is not a step in consequence of which legally enforceable rights may be created or extinguished."[180]

However, the frontiers of natural justice in Sri Lanka have been considerably extended by a recent strand of judicial opinions that the writs are not restricted to circumstances in which legally enforceable rights are contravened. Soon after the present government of Sri Lanka assumed office in 1977, the President of the Republic by warrants under the public seal appointed two commissioners to inquire into, and report

171. *R.* v. *Criminal Injuries Compensation Board, ex parte Lain,* [1967] 2 Q.B. 864 at 892.
172. *Fernando* v. *Jayaratne,* (1974) 78 N.L.R. 123.
173. *ibid.*
174. *Perera* v. *People's Bank,* (1975) 78 N.L.R. 239.
175. *Nadaraja Ltd* v. *Krishnadasan,* (1975) 78 N.L.R. 255 at 261
176. S. 20, Industrial Disputes Act.
177. *South Ceylon Democratic Workers' Union* v. *Selvadurai,* (1962) 71 N.L.R. 244. at 248
178. No. 4. S. 64(2).
179. *Kahatagaha Mines Ltd* v. *Fernando,* (1979) 78 N.L.R. 273 at 276.
180. *Fernando* v. *Jayaratne,* (1974) 78 N.L.R. 123 at 129.

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on, the affairs of local authorities and the persons who had been responsible for mismanagement, abuse of power, corruption or other irregularities. After the reports of the commissioners were received, Parliament enacted two statutes[181] imposing civic disabilities on persons against whom findings had been made by the commissioners and whose names were set out in the schedules to the two Laws. Fifteen petitioners applied for writs of *certiorari*[182] to quash the findings of the commissioners relating to them on the ground, inter alia, that there had been a failure to observe the rules of natural justice. The Court of Appeal considered, *in limine,* the question whether the inquiries and reports of the commissioners were amenable in whole or in part to *certiorari.* Rejecting the contention that *certiorari* did not lie because no legally enforceable right of the petitioners had been placed in jeopardy, the court, influenced by the consideration that the persons seeking relief were all men in public life, remarked: "To them, more so perhaps than to others, their integrity, character and reputation are all-important. Any adverse decision on these matters would undoubtedly affect their character, reputation and integrity and ruin their future careers; so that, apart from the loss of their civic rights under these two Laws, the determination of the two Commissioners would grievously affect these persons."[183] This approach is indistinguishable, in substance, from expansion of the scope of review by the substitution of the phrase "questions affecting subjects" for "questions affecting the rights of subjects" in the formulation of the requisites of *certiorari.*[184]

Emphasis on transgression of rights is a feature of the Indian decisions as well. The High Court of Punjab and Haryana has held that the function of the advocate-general in giving consent for the filing of a suit was not quasi-judicial, since in giving or refusing his consent, he did not adjudicate on the rights of parties but merely ascertained whether there was a prima facie case warranting submission to the court.[185] However, the Indian courts have expressly acknowledged that "the concept of rights has undergone a radical change due to forward and progressive ideals with which the community is publicly charged."[186] The Supreme Court of India has observed: "Whenever a man's rights are affected by decisions taken under statutory powers, the court would presume the

181. Law No. 38 of 1978 and Law No. 39 of 1978.
182. *Mendis* v. *Silva,* (1978) (unreported) Court of Appeal Application No. 669/78.
183. *Id. at 24.*
184. See *R.* v. *Electricity Commissioners,* (1924) 1 K.B. 171.
185. *Amrita Nand* v. *Advocate-General,* A.I.R. 1974 P. & H. 334 at 338.
186. *K. Chelliah* v. *Chairman, I.F. Corporation,* A.I.R. 1973 Mad, 122 at 126.

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existence of a duty to observe the rules of natural justice."[187] The court has entertained no doubt that an order by the state to the prejudice of a person in derogation of his vested rights may be made only in accordance with the requisites of natural justice.[188] Thus, it has been held by the High Court of Allahabad that every person whose civil rights are affected must have reasonable notice of the case which he has to meet.[189] The liberal interpretation of rights in the contemporary law of India is indicated by the acceptance, in the context of supersession of a local authority, that the denial of a legitimate expectation entails civil consequences of such a nature as to justify the grant of a writ.[190] The requirement postulated by the Supreme Court of India is that an "interest recognised and protected by law"[191] should be in jeopardy.

Determination or decision

Certiorari lies only to quash "a determination or a decision."[192] A report containing mere recommendations cannot be impugned by *certiorari*.[193] However, the dividing line between a determination and a recommendation may be tenuous in some contexts. The Indian courts have observed that "an inquiry necessarily involves investigation into facts and necessitates the collection of material facts from the evidence adduced before or brought to the notice of the person or body conducting the inquiry, and the recording of its findings in its report cannot but be regarded as ancillary to the inquiry itself, for the inquiry becomes useless unless the findings of the inquiring body are made available to the Government which set up the inquiry."[194] The determinative quality of a decision is not destroyed by the circumstance that it is subject to approval by an independent authority.[195] In an Indian case,[196] the function of a selection board was to prepare a list in order of preference for appointment to the Indian forest service and to forward the list to the Union Public Service Commission. In terms of the applicable rules it was evident that the recommendations of the selection

187. *Sukhdev Singh* v. *Bhagatram,* A.I.R. 1975. S.C. 1331 at 1341.
188. *State of Orissa* v. *Binapani Dei,* A.I.R. 1967 S.C. 1269 at 1271.
189. *Mukhtar Singh* v. *State of Uttar Pradesh,* A.I.R. 1957 All. 297.
190. *S.L. Kapoor* v. *Jagmohan,* A.I.R. 1981 S.C. 136 at 141.
191. *Union of India* v. *M.L. Kapoor, A.I.R. 1974 S.C. 87 at 104.*
192. *R.* v. *St. Lawrence's Hospital Statutory Visitors, ex parte Pritchard,* [1953]1 W.L.R. 1158 at 1166.
193. *R.* v. *Macfarlane,* (1923) 32 C.L.R. 518.
194. *Ram Krishna Dalmia* v. *Justice Tendolkar,* A.I.R. 1958 S.C. 538.
195. *Estate and Trust Agencies Ltd* v. *Singapore Investment Trust,* [1937] A.C. 898.
196. A.K. *Kraipak* v. *Union of India,* A.I.R. 1970 S.C. 150.

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board were not binding on the commission which was entitled to base its decision on the observations of the minister and on the records of other eligible officers. Rejecting a submission that the selection board was not required to determine any right, the Supreme Court of India declared: "Looking at the composition of the board and the nature of the duties entrusted to it, we have no doubt that its recommendations should have carried considerable weight with the Commission."[197] In the present condition of the authorities, it is clear that a remedy by way of writ is not confined to situations in which the body responsible for the ultimate determination lacks discretion to refrain from acting on the recommendation made to it.

In a leading Sri Lankan case involving special presidential commission of inquiry,[198] one of the arguments on behalf of the Republic of Sri Lanka was that the finding of the commission, and its recommendation, could not impair any accrued right or attach any new disability without the necessary resolution being passed by Parliament in terms of the Constitution.[199] The Court of Appeal of Sri Lanka rejected this contention on the basis that the finding and the recommendation of the commission should be viewed as "the first step in the process of attaching a new disability."[200] A finding of guilt and a recommendation for the imposition of civic disabilities constituted conditions precedent of action by the legislature. It was apparent that the report of the commissioner was a step "in consequence of which legally enforceable rights may be extinguished, and new disabilities attached."[201] The potential which the report contains, of affecting prejudicially the existing rights of the petitioner, was considered sufficient to invoke the writ.

It has been suggested in Sri Lanka that the duty to act judicially devolves on a commission only where "according to the statutory scheme the report has the probability or potentiality in law of affecting prejudicially the rights of individuals, by reason of the statutory scheme itself making it possible for the report to be the basis of affecting the legal rights or liabilities of a person to whom it relates."[202] But this is too stringent a criterion. It has been pointed out that a writ has been sometimes issued to "persons or bodies making reports, recommendations or preliminary decisions that acquire force only after

197. *id. at* 157.

198. *Bandaranaike* v. *Weeraratne,* (1978) (unreported). (Court of Appeal Application No. 1/1978.)

199. Art. 81. Constitution of 1978.

200. Bandaranaike v. *Weeraratne, 1978* (unreported) (Court of Appeal Application No. 1/1978) at 16.

201. *ibid.*

202. *Fernando* v. *Jayaratne,* (1974) 78 N.L.R. 123 at 128.

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adoption or confirmation or other consequential action by another body."[203] The proper view, it is submitted, is that there is an adequate basis for issue of a writ if the recommendation is an essential and integral part of the proceedings which are capable of culminating in a decision or action which involves extinguishment of, or detraction from, the petitioner's accrued rights.

The contemporary law of Sri Lanka embodies a series of strikingly amorphous principles as to the dimensions of judicial review of administrative decisions or determinations. The assumption pervading the early Sri Lankan cases that a fact finding commission would be treated as a judicial body only if some other body was necessarily required to act on its findings,[204] has been discarded in later judicial pronouncements which recognize that the duty to act judicially may well attend an investigation which could result in a disability or sanction imposed by another body on the basis of recommendations made as a sequel to the investigation.[205]

In India there is a strand of judicial opinions that an exclusively recommendatory function does not involve the exercise of quasi-judicial power.[206] It has been stressed that a report containing mere recommendations is not binding.[207] The Supreme Court of India has pointed out that an authority preparing such a report has no power of adjudication in the sense of passing an order which can be enforced *proprio vigore*.[208] However, the opposite view is also supported by reliable judicial precedents in India. The Supreme Court of India has commented: "The fact that its determination has to be followed by an order of the Government which makes the award binding does not....alter the nature and character of the functions of the tribunal."[209] It has been held, accordingly, that a recommendatory function may nevertheless be considered quasi-judicial in quality.[210]

It is clear, however, that the notion of a penalty is overtly identified in Indian judicial pronouncements as a prominent attribute of a quasi-judicial power. This element has been referred to by the Indian courts in connection with the cancellation of candidature for an

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203. *(Court of Appeal Application No. 669/78)* at 31.
204. *de Mel* v. *de Silva,* (1949) 51 N.L.R. 105 at 111-12.
205. *Mindes* v. *Silva,* (1978) (unreported) (Court of Appeal Application No. 669/78).
206. see, *e.g. Jayantilal Amratlal Shodhan* v. *F.N.Rana,* A.I.R. 1964 S.C. 648.
207. *Abdul Hussain Tayabali* v. *State of Gurarat,* A.I.R. 1968 S.C. 432 at 438.
208. *Ram Krishna Dalmia* v. *Justice Tendolkar,* A.I.R. 1958 S.C. 538.
209. *Bharat Bank Ltd* v. *Employees, of the Bharat Bank Ltd,* A.I.R. 1950 S.C. 188 at 189.
210. *State of Gujarat* v. *Ambalal Haiderbhai,* A.I.R. 1976 S.C. 2002 at 2004.

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examination,[211] the removal of a member of a board,[212] the cancellation[213] or the suspension[214] of a permit and the contravention of a legislative provision.[215]

Interest exposed to jeopardy

In regard to dismissal, the basic distinction is between tenure of an office and a contract of employment.[216] The former entails the conception of status, protection of which has been one of the traditional objectives of the writs in English law. The principle is consistently upheld in the decided cases that compliance with the rules of natural justice is a condition precedent of valid removal of an office holder.[217] On the other hand, since employment is a matter of contract and not of status, the duty to act judicially is not attendant on termination of employment especially in view of the general rule that performance of a contract of service will not be enforced *in specie*.[218]

The case law of Sri Lanka clearly acknowledges the principle that duty to act judicially arises in this context only where "the procedure prior to the act of dismissal is prescribed and requires notice of the charges and an inquiry, or where the grounds for dismissal are specified."[219] The "unfettered power of dismissal"[220] has been treated as an incident of an office held at pleasure. The fact that the powers of the employing authority are derived from statute is inconclusive, in that an office may be constituted otherwise than under a statute, for instance, under the provisions of an instrument of trust[221] and, conversely, the employees of a statutory authority may be merely servants.[222] The courts of Sri Lanka have emphasized: "It is unreasonable to suppose that the legislature,

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211. *Board of High School and Intermediate Education*, v. *Chittra*, A.I.R. 1970 S.C. 1039 at 1040.

212. *State of Punjab* v. *Bakhtawar Singh*, A.I.R. 1972 S.C. 2083 at 2085.

213. *Madan Mohan* v. *State Transport Authority*, AI.R. 1966 M.P. 144; *Devi Sahai* v. *Transport Appellate Tribunal*, A.I.R. 1970 Raj. 48.

214. *Krishna Gopal* v. *Regional Transport Authority*, 1960 Raj. L.W. 156; *S.V.M. Transport* v. *S.T.A. Tribunal*, A.I.R. 1965 Mad. 471.

215. *Kantilal Babulal*, v. *H.C. Patel*, A.I.R. 1968 S.C. 445 at 449. *Cf. Ramiah* v. *State Bank of India*, (1967) 80 Mad. L.W. 616.

216. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 at 114.

217. *Vine* v. *National Dock Labour Board*, [1957] A.C. 488.

218. *ibid.*

219. *Kulatunge* v. *Board of Directors of the Co-operative Wholesale Establishment*, (1963) 66 N.L.R. 169 at 174.

220. *Yakkaduwe Sri Pragnarama Thero* v. *Minister of Education*, (1969)71 N.L.R. 506 at 510.

221. *Fisher* v. *Jackson*, [1891] 2 Ch. 84.

222. *Barber* v. *Manchester Regional Hospital Board*, [1958] 1 W.L.R. 181.

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merely because it by statute provides for the appointment of officers to such institutions, intends that such an officer should be accorded by the courts a greater measure of protection in his employment than a person employed in a similar capacity by a private employer or than a public officer holding high office in the State."[223]

Regrettably, the principles applied in Sri Lanka are more rigid than those evolved in England where, in recent years, a vigorous attempt has been made by judges to adopt a pragmatic approach. There is English authority in support of the proposition that even a contractual servant may be entitled to avoidance of his dismissal if breach of statutory procedural safeguards is proved,[224] but there has been no parallel development in Sri Lanka.

In a Sri Lankan case[225] where statutory power had been conferred on the governing body of a university to dismiss or suspend a teacher, a duty to act judicially was held to have been excluded on the ground that the relationship between the university and the teacher was, simpliciter, that of master and servant. For the conclusion that the duty to act judicially has no application to a statutory authority in deciding to dismiss an employee, one of the reasons spelt out in a Sri Lankan judgment[226] was that the statutory authority was not obliged to state any ground for dismissal. But this reasoning is implausible, since there are contexts in which justice would require that the employee should be heard before action is taken against him, although the employer cannot be compelled to give formal reasons for the course of action he ultimately resolves to take.

The traditional view that the applicability of natural justice is confined to removal from an office, as opposed to the contractual nexus between employer and employee, is reflected in some Indian decisions.[227] The Supreme Court of India has placed emphasis on the principle that a contract of service cannot, as a rule, be enforced specifically.[228]

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223. *Kulatunge* v. *Board of Directors of the Co-operative Wholesale Establishment,* (1963) 66 N.L.R. 169 at 174.

224. *Malloch* v. *Aberdeen Corporation,* [1971] 1 W.L.R. 1578 at 1596.

225. *University Council of the Vidyodaya University* v. *Linus Silva,* (1964) 66 N.L.R. 505.

226. *Kulatunge* v. *Board of Directors of the Co-operative Wholescale Establishment,* (1963) 66 N.L.R. 169 at 174.

227. *Executive Committee of Uttar Pradesh State Warehousing Corporation Ltd* v. *Chandra Kiran Tyagi,* A.I.R. 1970 S.C. 1244; *Indian Airlines Corporation v. Sukhdeo Rai,* A.I.R. 1971 S.C. 1828. See also *Bool Chand* v. *Chancellor, Kurukshetra University,* A.I.R. 1968 S.C. 292 at 297.

228. *S.R. Tewari* v. *District Board,* A.I.R. 1964 S.C. 1680 at 1683. *Cf. Vidya Ram Misra* v. *Managing Committee, Shree Jai Narain College,* A.I.R. 1972 S.C. 1450 at 1455.

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However, a bolder approach affording some measure of protection to servants of statutory bodies such as local authorities is foreshadowed in some Indian decisions.[229] The grant of declaratory relief[230] in these circumstances is supportable as a matter of policy. In any event, the traditional view is significantly mitigated in India by the assumption that statutory regulations in appropriate cases give employees a "statutory status"[231] capable of protection by the writs.

Disciplinary powers

Disciplinary powers have been treated as intrinsically non-judicial in some English[232] and Commonwealth[233] cases. The Sri Lankan decisions, by contrast, while conceding that the procedure appropriate in fulfilling the duty to act judicially is not uniform but varies with the statutory and factual context, have not regarded cases of discipline as a special category precluding, by definition, the characterization of the function or power as judicial. The assumption was made by the Privy Council in a Sri Lankan case[234] that university authorities are bound to conduct an inquiry which may result in disqualification of a candidate from a degree, in accordance with the rules of natural justice. The application to disciplinary cases of general principles governing judicial review, with suitable modification, may be supported from the standpoint of policy and is consistent with the approach of the courts of Sri Lanka. The Supreme Court of India, while refusing to grant absolutism to academic authorities even in purely academic matters, has recognized that the very nature of the function or academic adjudication may negative any right to a hearing,[235] and has shown reluctance to intervene in cases of academic discipline where no allegation of bias or *mala fides* is made.

The Supreme Court of India has acted on the principle that, so long as the inquiry held by the academic authorities is adequate and fair, the matter should not be investigated with the same strictness as that applicable to proof of allegations in a court of criminal jurisdiction.[236]

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229. See, *e.g. Prabhakar Ramakrishna Jodh* v. *A.L. Pande,* (1965) 2 S.C.R. 713; *S.V. Raman* v. *Madras State Warehousing Corporation,* A.I.R. 1971 Mad. 431.

230. *Sirsi Municipality* v. *C.K.F. Tellis,* A.I.R. 1973 S.C. 855 at 862

231. *Sukhdev Singh* v. *Bhagatram,* A.I.R. 1975 S.C. 1331 at 1341.

232. *Ex parte Fry,* [1954]1 W.L.R. 730.

233. *R.* v. *Police Commissioner for the Northern Territory, ex parte Holroyd,* [1966] A.L.R. 243.

234. *University of Ceylon* v. *Fernando,* (1960) 61 N.L.R. 505.

235. *Jawaharlal Nehru University* v. *B.S. Narwal,* A.I.R. 1980 S.C. 1666 at 1669.

236. *Board of High School and Intermediate Education* v. *Bagleshwar Prasad,* A.I.R. 1965 S.C. 875.

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For instance, cross-examination of hostile witnesses is not an integral aspect of natural justice in these circumstances.[237] The factual context has a crucial bearing on the nature of the hearing required by the law.[238] The premise that a conclusion reached by the properly constituted authorities of a university in regard to such matters as alleged misconduct of a candidate at an examination cannot be re-examined by a court except on stringently limited grounds, pervades the Indian decisions.[239] The flexibility of the principles entrenched in the Indian case law is indicated by the ruling that where, in the context of academic discipline, provision for a show-cause notice is made by the law, it does not follow that a copy of the report on the basis of which the notice was issued should be made available to the person proceeded against.[240] There would generally be sufficient compliance with the rules of natural justice if the salient matters embodied in the complaint are brought to the notice of the student and if he is afforded an adequate opportunity to present his defence.[241]

Natural justice and procedural fairness

Despite the dichotomy between administrative and quasi-judicial functions reflected in a strand of judicial opinions in India,[242] the current trend favours the relegation of conceptual and terminological distinctions. The view has been expressed by the Supreme Court of India[243] and by the High Court of Assam and Nagaland[244] that the rules of natural justice should regulate the exercise of administrative powers as well. These rules have been referred to as part of "universal jurisprudence."[245]

A somewhat different approach enjoins on the courts a lesser degree of control of administrative functions than that appropriate to the range of quasi-judicial functions.[246] According to this view, the duty of a body

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237. *Hira Nath Mishra* v. *Principal, Rajendra Medical College,* A.I.R. 1973 S.C. 1260 at 1262.

238. *Bihar School Examination Board* v. *Subhash Chandra,* A.I.R. 1970 S.C. 1269 at 1272.

239. See, *e.g. Prem Prakash* v. *Punjab University,* A.I.R. 1972 S.C. 1408 at 1411.

240. *Suresh Koshi* v. *University of Kerala,* A.I.R 1969 S.C. 198 at 204.

241. *S.K. Puri* v. *Principal, M.A. Mahavidyalaya* A.I.R. 1973 M.P. 278 at 279.

242. *Abdullah Rowther* v. *State Transport Appellate Tribunal,* A.I.R. 1959 S.C. 896 at 899.

243. *D.F.O., South Kheri* v. *Ram Sanehi Singh,* A.I.R. 1973 S.C. 205.

244. *Purshottam Bahel* v. *A. C. Baruah,* A.I.R. 1971 A. & N. 173 at 175.

245. *Queen Empress* v. *Pohpi,* (1891) I.L.R 13 All 171.

246. *Union of India* v. *Anglo-Afghan Agency,* A.I.R. 1968 S.C. 718 at 725.

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exercising administrative powers "is not so much to act judicially as to act fairly."[247] The essence of procedural fairness has been characterized by the Indian courts as good conscience.[248] The Supreme Court of India, formulating the rationale of this doctrine, has pointed out: "the presumption is that in a democratic polity wedded to the rule of law, the State or the legislature does not intend that in the exercise of their statutory powers its functionaries should act unfairly or unjustly."[249] It has been suggested in India that the concept of procedural fairness subsumes only some of the elements of natural justice.[250] Notwithstanding some blurring of the respective spheres of operation of fairness and natural justice,[251] the retention of these distinct concepts in modern administrative law is supportable on pragmatic grounds.[252] It is submitted that demarcation of these respective doctrines is preferable to the view adopted by the High Court of Orissa that natural justice extends to quasi-judicial acts and "to an extent even administrative acts."[253]

With regard to natural justice itself, the courts of India have recognized the difficulty of defining comprehensively the circumstances in which compliance with these rules is mandatory.[254] The Supreme Court of India has made the perceptive comment: "Large and expanding, perhaps rightly, as the field of natural justice and fair dealing is, there are limits to attempts at unnatural extensions of the doctrine *audi alteram partem.*"[255] The variable characteristics of natural justice, sensitive to vagaries of context and circumstance, have been stressed uniformly by the courts of India.[256] Entitlement to cross-examine is not necessarily an attribute of natural justice;[257] nor is an oral hearing necessarily required.[258] Although the giving of reasons in support of a decision arrived at by an administrative authority is desirable to inspire

247. *Kesava Mills Co. Ltd.* v. *Union of India,* A.I.R. 1973 S.C. 389.

248. *Mohinder Singh Gill* v. *Election Commissioner of India,* A.I.R. 1978 S.C. 405 at 434.

249. *Swadeshi Cotton Mills* v. *Union of India,* (1981)1 S.C.C. 664 at 684.

250. *E.E. & Co. Ltd* v. *State of West Bengal,* A.I.R. 1975 S.C. 266 at 269.

251. *Reserve Bank of India* v. *R. N. Dutt & Sons.* A.I.R. 1975 Cal. 48 at 54.

252. Jain and Jain, *supra* note 32 at 132.

253. *Orient Paper Mills Ltd* v. *Deputy Collector, Central Excise,* A.I.R. 1971 Ori. 25 at 27.

254. *India Sugars and Refineries Ltd* v. *Amravathi Service Co-operative Society Ltd* 1976 U.J. (S.C.) 23.

255. *Jawaharlal Nehru University* v. *B. S. Narwal,* A.I.R. 1980 S.C. 1666 at 1669.

256. *New Prakash Transport Co. Ltd* v. *New Sawarna Transport Co. Ltd,* A.I.R. 1957 S.C. 232; *City Corner* v. *Personal Assistant to Collector,* A.I.R. 1976 S.C. 143 at 122.

257. *State of Jammu and Kashmir* v. *Bakshi Gulam Mohammad,* A.I.R. 1967 S.C. 122.

258. *Union of India* v. *Jyoti Prakash,* A.I.R. 1971 S.C. 1093 at 1103.

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public confidence as well as for the information of an appellate tribunal,[259] the inclusion of reasons in the order is not compulsory in all contexts.[260] The practical nature of the concept of natural justice has been underscored in Indian judicial decisions.[261] The adaptability of the concept is mirrored in the comment that "the soul of natural justice is fairplay in action."[262]

On the whole, the courts of Sri Lanka have tended to resist the application of the rules of natural justice outside the area of judicial and quasi-judicial functions. However, it has now been recognized in Sri Lanka that the courts should be free to consider what kind and degree of procedural protection is warranted in different statutory and factual contexts without being encumbered by an inflexible technique of classification.[263] But modern judicial attitudes in Sri Lanka do not envisage that the rules of natural justice, as such, regulate the discharge of administrative functions. Throughout the spectrum of administrative functions there are areas in which a degree of protection falling short of that ensured by the rules of natural justice is appropriate. An intermediate standard is provided by the incipient doctrine of procedural fairness which is rapidly gaining acceptance in India as well as in Sri Lanka.

Conclusion

The Constitution of the Republic of Sri Lanka confers jurisdiction on the Court of Appeal to issue "according to law"[264] orders in the nature of *certiorari* and other writs. The phrase "according to law", in the context of analogous statutory provisions,[265] has been interpreted consistently to mean English law on the basis that the writs were unknown to the Roman-Dutch-law – common law of Sri Lanka – or to the indigenous laws.[266]

However, it is to be regretted that the anomalies which have marred the development of the English case law have insidiously crept into the

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259. *Mahabir Prasad Santosh Kumar* v. *State of Uttar Pradesh*, A.I.R. 1970 S.C. 1302 at 1304

260. *Radheshyam Khare, v. State of Madhya Pradesh*, A.I.R. 1959 S.C. 107. But see *Madhya Pradesh Industries Ltd.* v. *Union of India*, A.I.R. 1966 S.C. 671 at 674.

261. *Chairman, Board of Mining Examination* v. *Ramjee*, A.I.R. 1977 S.C. 965.

262. *Maneka Gandhi* v. *Union of India*, A.I.R. 1978 S.C. 248 at 284.

263. *Jayasena* v. *Punchiappuhamy*, (1980) 2 Sri L.R. 43.

264. Art. 140, Constitution of the Republic of Sri Lanka.

265. S. 42, Courts Ordinance, No. 1 of 1889.

266. *Wijesekera* v. *Assistant Government Agent*, (1943) 44 N.L.R. 533; *Goonesinghe* v. *de Kretser*, (1944) 46 N.L.R. 107.

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Sri Lankan cases as well. There was every reason to exploit in Sri Lanka the full potential of the writs untrammelled by aberrations arising from historical factors. The unreflecting incorporation of the dead wood of English law in the legal system of Sri Lanka as a result of insufficient judicial discrimination has considerably reduced the utility and viability of these remedies in the modern context. Indeed, the sterile controversy surrounding the dimensions of a judicial function contributed largely to the atrophy of *certiorari* in the USA and to its replacement in some areas as liquor licensing by the hybrid remedy of "certiorarified mandamus."[267] Unfortunately, the courts of Sri Lanka have failed in some ways to derive profit from the experience of other jurisdictions in averting pitfalls and in enhancing imaginatively the effectiveness of the remedy. By contrast, the courts of India, adopting a more selective approach to the reception of English law, have discarded to a considerable extent the technicalities and idiosyncratic features of the prerogative remedies and evolved a body of law in harmony with local circumstances.

267. *Cf. douis* L. Jaffe "The American Administrative Procedure Act", *Public Law* 218 at 230 (1956).

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JURISDICTIONAL REVIEW AND JUDICIAL POLICY: THE EVOLVING MOSAIC

Introduction

SOME RECENT judicial developments, marked by striking boldness and imagination, suggest the need to re-examine the conceptual foundations of administrative law. The comment has been made aptly that "nothing is more conspicuous than the failure of English law to evolve a consistent jurisdictional doctrine, even elementary principles are subject to conflicting or irreconcilable views."[1] Growing disillusionment with approaches to judicial review founded on jurisdictional criteria has prompted fresh suggestions which have important implications for many aspects of the subject. The purpose of this chapter is to analyse the major developments which have taken place in respect of error of law, judicial review of findings of fact reached by administrative tribunals and judicial control of discretionary executive power, with a view to assessing the value of the innovations which have been made by the courts in recent years. While the lines of development of the law continue to offer scope for adaptation of the emerging solutions, it would seem that, in many areas, excessively sweeping approaches to which the courts seemed ready to commit themselves have had to be qualified by principles of indeterminate scope and doubtful validity. The primary interest of the new trends lies in the opportunity they provide for remodulation of legal principle in keeping with contemporary policy. Although the radical extension of judicial review in some directions warrants an unreserved welcome, serious difficulties have arisen in connection with other developments. The attempt is worthwhile, at the present stage, to address the question whether the departures from established principle are likely to bring in their wake advantages which outweigh sufficiently the positive elements of traditional doctrine.

The Underpinnings of Jurisdictional Theory

The orthodox theory of administrative law was that error of law, unless it was manifest on the face of the record, vitiated an administrative decision only if it impinged on jurisdiction. The concept of error of

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1. A. Rubinstein, *Jurisdiction and Illegality* (1965), p.194.

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law within jurisdiction sustained a valuable mechanism for curtailing the intensity of judicial review. In the middle of the present century Denning L.J., as he then was, entertained no doubt that "A tribunal may often decide a point of law wrongly whilst keeping well within its jurisdiction."[2]

The distinction between jurisdictional and non-jurisdictional errors of law falls into place within the framework of judicial review. The crucial dichotomy is that between the primary or central question which the tribunal has power to decide conclusively itself, and other questions which circumscribe the scope of the power.[3] The overriding object of supervisory jurisdiction is to ensure that a public authority, by making some mistake as to the extent of its powers, does not resort to action which is outside the ambit of its statutory competence. The *ultra vires* doctrine provides the reviewing court with a lever for determining afresh a collateral issue independent of the merits, as opposed to one of the points involved in the matter committed to the inferior tribunal for decision.[4]

This distinction was considered applicable to errors of law so that, in all cases of latent legal error, the legitimacy of judicial review depended on the question of whether the error imputable to the tribunal assailed the roots of its jurisdiction or not. Thus, where a public authority, in deciding whether a building was insanitary for the purpose of making a demolition order authorized by statute, applied an inappropriate standard, the public authority was held to be acting beyond its powers.[5] Similarly, where a tribunal is empowered by legislation to vary the rent of residential premises consequent on a change of circumstances, the tribunal has no authority to consider the case *de novo* in situations where this condition is not *fulfilled*.[6] If a tribunal has power to reduce rent where a premium had been paid, but the payment had in fact been made in respect of work done by the landlord and not in respect of the grant of the lease, so that the payment could not be characterized as a premium, the

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2. *R.* v. *Northumberland Compensation Appeal Tribunal, Ex p. Shaw* [1952] 1 K.B. 338 at p.346.
3. H. W. R. Wade, *Administrative Law* (5th ed., 1982), pp.251-254.
4. *R.* v. *Lincolnshire Justices, Ex p. Brett* [1926] 2 K. B. 192.
5. *Estate and Trust Agencies (1927) Ltd* v. *Singapore Investment Trust* [1937] A.C. 898 at p.917 (P.C.)
6. *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Hierowski* [1953] 2 Q.B. 147 at p.152. *per* Lynskey J.

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tribunal, by treating it as such, makes an error of law in consequence of which it exceeds the allotted scope of its authority.[7] A tribunal's conclusion as to the validity of withdrawal of a reference may likewise involve an error which stultifies jurisdiction.[8] In these cases the tribunal is exposed to judicial review not merely because it has made an error of law but because the error causes the inquiry made by the tribunal to transcend the matters which it is entitled to consider.[9]

Given the postulate of sovereignty of the legislature, the constitutional foundation of judicial review consists of the legal limits of derived power, in so far as the authority conferred on the subordinate tribunal has to be exercised within the confines envisaged by the empowering instrument.[10] The insistence of the courts is that, by virtue of a mistaken view on a question of law, the tribunal cannot arrogate to itself jurisdiction with which it is not invested.[11] The Commission for Racial Equality was held to have acted *ultra vires* in embarking on a named person investigation in the absence of belief, statutorily required as a condition precedent, that the person named might have committed an act of unlawful racial discrimination;[12] and a possession order has been quashed on the ground that the county court judge had no jurisdiction to make the consent order without obtaining from the tenant the concession that there was no entitlement to statutory protection.[13] Where the tribunal's power to state a case is limited by reference to explicit conditions, an error which leads to disregard of any of these conditions is tantamount to an excess of jurisdiction.[14] Supervisory jurisdiction ensures in these contexts that the whim of the specialist tribunal is subject to the governance of law.[15].

Central to this principle of surveillance is the assumption that "There is always an area, narrow or wide, which is the tribunal's

7. *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe* [1950] 2 All E.R. 211.

8. *R.* v. *Tottenham Districts Rent Tribunal, Ex p. Fryer Ltd* [1971] 2 Q.B. 681.

9. *Seereelal Jhuggroo* v. *Central Arbitration and Control Board* [1953] A.C. 151 at p. 161, *per* Lord Porter (P.C.).

10. Cf. H. W. R. Wade, "Anglo-American Administrative Law: More Reflections" (1966) 82 L.Q.R. 226 at p.232.

11. *R.*v. *Rent Officer for Camden, Ex p. Ebiri* [1981] 1 All E. R. 950.

12. *R.* v. *Commission for Racial Equality, Ex p. Prestige Group* [1984] 1 W.L.R. 335.

13. *R.* v. *Bloomsbury and Marylebone County Court, Ex p. Blackburne* [1984] *The Times,* March 21; see also *R.* v. *Committee of Lloyd's, Ex p. Posgate* [1983] *The Times,* January 12.

14. *Essex C.C.* v. *Essex Incorporated Congregational Church Union* [1963] A.C. 808.

15. T. R. S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" [1985] C.L.J. 111 at p.126.

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area; a residual area, wide or narrow, in which the legislature has previously expressed its will and into which the tribunal may not enter."[16] The paramount importance of restricting the tribunal to the ambit of its *vires* requires that "The question, what is the tribunal's area, is one which it has always been permissible to ask and answer."[17] It is significant, however, that the courts have been prepared consistently to contemplate the possibility that an error of law could quite often, in particular circumstances, not lead to transgression of the *vires* of a tribunal of limited jurisdiction.

Although the whole doctrine of collateral questions has been vigorously attacked on the basis that there is no logical way of distinguishing questions going to the jurisdiction of a tribunal from non-jurisdictional questions,[18] the courts, displaying their commitment to an empirical approach, have found means of establishing a distinction between jurisdictional and non-jurisdictional errors of law. Notwithstanding that objective limiting terms are in general treated as jurisdictional, there are contexts in which the application of these criteria may, on construction of the applicable legislation, be thought subsumed in the matters which the tribunal is empowered to determine conclusively.[19] The nature of the power exercised, the composition and expertise of the tribunal, the terms in which the power is conferred and the occasions on which it is typically resorted to, are among the predominant elements which have been called in aid in deciding whether an error of law attributable to the tribunal erodes its jurisdiction or not.[20] Despite the emphasis that "The courts will always be ready to interfere if tribunals have exceeded their jurisdiction,"[21] a powerful restraint on supervisory jurisdiction has been signified by the steadfast refusal to equate error of law necessarily with jurisdictional excess. Discarding theoretical consistency and metaphysical absolutes, the courts have not infrequently treated the degree of gravity of the error as the decisive factor.[22] The matter in regard to which the inferior tribunal was in error has been

16. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at p.207, *per* Lord Wilberforce.

17. *ibid.*

18. D. M. Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931) 47 L.Q.R. 386.

19. *R.* v. *Special Commissioners of Income Tax* (1888) 21 Q.B.D. 313.

20. See. for example, *Brittain* v. *Kinnaird* (1819) 1 Br & B. 432; *R.* v. *Bolton* (1841) 1 Q.B. 66.

21. *R.* v. *Preston S.B.A.T., Ex p. Moore* [1975] 1 W.L.R. 624 at p.631, *per* Lord Denning M.R.

22. L.L. Jaffe, "Judicial Review: Questions of Law" (1955) 69 Harv. L. Rev. 239.

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characterized as "a fundamental matter" in order to justify the finding that the error of law entailed jurisdictional deficiency.[23] In determining whether misconstruction of statutory provisions or other legal principles amounts to mere error or to want of jurisdiction as well, the courts have not been disinclined to distinguish *ad hoc* between "essential" and lesser lapses.[24] Although subjection in this respect to the courts is looked upon as "a necessary and inseparable incident for all tribunals of limited jurisdiction,"[25] not every error of law made a tribunal vulnerable.

Departures from Orthodoxy

The distinction between jurisdictional and non-jurisdictional error of law continues to be a feature of Australian,[26] Canadian[27] and New Zealand[28] judicial decisions. In line with Commonwealth authority, viability of the concept of intra-jurisdictional legal error is acknowledged by the Judicial Committee of the Privy Council[29] and by dissenting opinions in the House of Lords.[30]

However, a significant transformation of English law is the effect of some dramatic developments in regard to the effect of an error of law on the jurisdiction of a subordinate tribunal. In 1979, in *Pearlman v. Keepers and Governors of Harrow School,*[31] Lord Denning M.R., leading the Court of Appeal, denied that there is room any longer for the notion of error of law within jurisdiction: "The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it."[32] The issue in the case was whether installation of a central heating system constituted "a structural

23. *Relton & Sons (Contracts) Ltd* v. *Whitstable U.D.C.* (1967) 201 E.G. 955.

24. *Re Baines* (1840) Cr. & Ph. 31 at p. 45, *per* Lord Cottenham L.C.; *Spackman* v. *Plumstead Board of Works* (1885) 10 App. Cas. 229 at p.240 *per* Earl of Sellborne L.C.

25. *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* [1910] 2 K.B. 859 at p.880, *per* Farwell L.J.

26. *R.* v. *The Small Claims Tribunal and Syme, Ex p. Barwiner Nominees Pty Ltd* [1975] V.R. 831.

27. *Re Tilly and Gairdner* (1973) 42 D.L.R. (3d) 56.

28. *Attorney-General* v. *Car Haulaways (N.Z.) Ltd* [1974] 2 N.Z.L.R. 331.

29. *South East Asia Fire Bricks Sdn Bdk* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1981] A.C. 363.

30. *In Re Racal Communications Ltd* [1981] A.C. 374 at p.390, *per* Lord Edmund-Davies.

31. [1979] Q.B. 56.

32. At p. 70.

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alteration" within the meaning of the Housing Act 1974. The majority of the Court of Appeal held that an erroneous finding by the judge at first instance on this point deprived him of jurisdiction.

The straws had been in the wind since the *Anisminic* case[33] was decided by the House of Lords a decade before the ruling in *Pearlman*.[34] In the seminal pronouncements in *Anisminic* the idea of jurisdictional blemish was construed so expansively that hardly any scope remained for the continued recognition of error of law within jurisdiction. Lord Reid expressed the view that the Foreign Compensation Commission, in misconstruing the provisions of the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962 as requiring proof by a claimant who was an original owner that his successors in title had British nationality, was making an inquiry which the Order did not empower them to make and that, consequently, they based their decision on a matter which they had no right to take into account.[35]

The narrow concept of jurisdiction, inherent in judicial decisions of impressive antiquity, is coterminous with the right to commence the inquiry.[36] It was an aspect of this approach that an implicit distinction was made between lack of jurisdiction *ab initio* and excess of jurisdiction in the course of the proceedings, so as to support the result that, whenever the right to embark upon the inquiry was indisputable, any error made *medio flumine* was an error within jurisdiction.[37] This is the basis of the principle, firmly entrenched in the nineteenth century, that the question of jurisdiction is determinable at the commencement, rather than at the conclusion, of the inquiry.[38]

Anisminic represents a fresh point of departure with regard to these nuances of jurisdiction. One of the important consequences of this decision is that there is no more any practical difference between the effect of want of jurisdiction at the beginning of the inquiry and that of a lapse on the tribunal's part which constitutes an excess of jurisdiction while the inquiry is in progress. The virtual equiparation of these ideas, so far as the legal consequences of failure of jurisdiction are concerned, was justified in *Anisminic* itself on the footing that the whole range of extraneous motivation, irrelevant considerations and inadmissible tests involves conversion of the inquiry into "something

33. See n. 16 *supra*.
34. See n. 31*supra*.
35. *Anisminic Ltd* v. *Foreign Compensation Commission*[1969] 2 A.C. 147 at p.174.
36. *The Case of the Marshalsea* (1612) 10 Co. Rep. 686.
37. Cf. *Groenvelt* v. *Burwell* (1700) 1 Ld. Raym. 454.
38. *R.* v. *Bolton (1841) 1 Q.B. 66.*

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not directed by Parliament and failure to make the inquiry which Parliament did direct."[39] The pervasive content of the jurisdictional criterion applied by English courts today is reflected in the observation that "It includes any case where the apparent determination of the tribunal turns out on examination to be a nullity, because it cannot properly be called a determination at all."[40]

Nevertheless, *Anisminic*, for all the elasticity with which it construed jurisdictional taint, stopped short of repudiating the existence of a category of error of law within jurisdiction.[41] Lord Wiberforce, in *Anisminic*, insisted that there was no *a priori* reason why subordinate tribunals should be precluded from deciding questions of law, including limited questions of construction of the empowering instrument.[42] Consequently, the assimilation, in *Pearlman*, of error of law with jurisdictional excess marked, in reality, a break in the continuity of development of the law, even though Lord Denning, in *Pearlman*, was eager to present his conclusion as an inference from *Anisminic*. In *Pearlman* itself, the extension sought to be effected in the contours of jurisdictional vice was cogently resisted in the dissenting judgment of Geoffrey Lane L.J. who was satisfied that the error made by the inferior court, if error it was, typified an error within jurisdiction. Existing lines of authority certainly fortified his comment that "If this judge is acting outside his jurisdiction, so then is every judge who comes to a wrong decision on a point of law."[43]

In line with the reasoning of Lord Denning M.R. in *Pearlman*, the suggestion has been made that the inclusion of errors of law, because of their intrinsic nature, in the rubric of jurisdictional defects is an inescapable corollary of the doctrine of collateral or preliminary questions as applied to misconceptions of law. It has been argued that, in so far as legal rules and concepts invariably contain a given meaning, in the sense of a meaning established by the courts, any decision about them by the tribunal is of necessity a preliminary decision concerning the existence of jurisdiction and cannot be part of the exercise of jurisdiction, since the tribunal, although empowered to apply legal rules to factual situations, cannot appropriately decide with conclusive effect the content of the legal rules themselves.[44] It

39. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at p. 195, *per* Lord Pearce.

40. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56 at p. 75.

41. Cf. R. D. McInnes, "Judicial Review after Anisminic" (1977) 9 Vict. Univ. of Wellington L.R. 37.

42. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at p.209.

43. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56 at p. 76.

44. B.C. Gould, "*Anisminic* and Judicial Review" [1970] P.L. 358 at p.366.

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is consistent with this premise that an error of law will always be a jurisdictional error because it relates to a given element whose existence and identity must be decided by the tribunal prior to the exercise of jurisdiction but which, *ex hypothesi*, cannot be varied by the tribunal's decision.[45]

The rigour of this approach is scarcely compatible with subsequent judicial trends. It would seem, by virtue of a gloss imposed by the House of Lords in *Racal*[46] on the *Pearlman* principle, that in assessing the effect of an error of law on the continued existence of jurisdiction, a crucial distinction needs to be made between inferior courts and administrative tribunals.[47] While errors of law are inexorably classified as jurisdictional in relation to bodies of the latter category, the process of characterization *vis-a-vis* the former class is a matter of construction of the governing instrument, untrammelled by any presumption made even tentatively.[48] If, then, the validity of the equation between errors of law and excess of jurisdiction is dependent on inherent attributes of the tribunal to which the error is attributable, the reasoning that legal rules and concepts signify given elements which, as a matter of essential legal policy, objectively demarcate the boundaries of the tribunal's *vires*, hardly carries conviction.

The reality is that some qualification of the scope of the *Pearlman* principle has been found necessary because of a variety of practical considerations which militate against the wide sweep of the rule identifying all errors of law as symptomatic of jurisdictional excess. It is evident that failure of jurisdiction inflexibly generated by error of law renders superfluous rights of appeal conferred by statutory provisions such as those contained[49] in the Tribunals and Inquiries Act 1971. More significantly, the statutory exclusion of designated tribunals from the exercise of this appellate jurisdiction[50] will be circumvented by an indiscriminate avenue of recourse to judicial review. Contemporary judicial trends furnish clear indication of a generous interpretation of the "record,"[51] even to the extent of regarding reasons embodied in the transcript of an oral judgment as

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45. *ibid.*
46. *Re Racal Communications Ltd* [1981] A.C. 374.
47. At pp. 383-384, *per* Lord Diplock.
48. *ibid.*
49. See s. 13(1).
50. s.14(3).
51. *Re Tillmire Common, Heslington* [1982] 2 All E.R. 615; *R.* v. *Crown Court at Knightsbridge, Ex p. Marcrest* [1983]1 All E. R. 1148.

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part of the record,[52] so as to expand the purview of patent error of law resuscitated in the middle of the century as a viable mechanism of judicial review. But if all error of law were to be considered jurisdictional in content, redundancy of the concept of intra-jurisdictional error of law is inevitable.[53] The implications of such an approach cannot but represent open defiance of legislative intent, especially in contexts where preclusive statutory provisions are designed to protect from challenge errors of law committed by a tribunal within jurisdiction.[54] Having regard to the likelihood of exacerbating tensions between the administration and the courts, there is good reason to regret so unrepentantly intrusive a dimension of judicial review.[55] The distinct identity of supervisory and appellate jurisdiction, the separateness of which subserves useful objectives of policy, is blurred by the *Pearlman* approach which, in effect, purports to merge their consequences in an extensive area.[56]

The cumulative impact of these factors underscores the need to contain the *Pearlman* principle, and the refinements emerging from *Racal* represent some movement in this direction. However, quite apart from the cohesion and internal consistency of the limiting devices, the use of which the developing law would appear to sanction individually or in combination, the overall thrust of *Pearlman*, as qualified by *Racal*, presages a reversal of some healthy developments which, had they reached their fruition, would have improved the law.

Determination of Questions of Law within the Framework of Administrative Adjudication

Lord Denning's approach in *Pearlman* has been accorded an enthusiastic welcome on the basis that it is "yet a further step in the direction of making the courts the conclusive arbiters on all questions of law."[57] The underlying principle has been sanctified in modern judicial attitudes as one of overriding constitutional utility. Lord Diplock has considered it a decisive constitutional principle that "Questions of construction of all legislation, primary or secondary, are questions of law to be determined authoritatively by courts of

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52. *R.* v. *Crown Court at Knightsbridge, ex p. International Sporting Club (London) Ltd* [1982] Q.B. 304.

53. Cf. *Watt* v. *Lord Advocate,* 1977 S.L.T. 130 at p. 139.

54. Cf. J. Griffiths. "Judicial Review for Jurisdictional Error" [1979] C.L.J. 11 at p. 14.

55. Cf. H. W. R. Wade, "Anisminic *Ad Infinitum*" (1979) 95 L.Q.R. 163 at p. 166.

56. See J. Beatson, "The Scope of Judicial Review for Error of Law" [1984] Oxf. J. of Leg. St. 22 at pp.32-33.

57. H.W.R. Wade, *Administrative Law* (5th ed., 1982),p.266.

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law; that errors in construing primary or secondary legislation made by inferior tribunals that are not courts of law, however specialised and prestigious they may be, are subject to correction by judicial review."[58]

But it is undeniable that, prior to *Pearlman,* there did exist a sustained judicial trend which was not unsympathetic to the competence of administrative tribunals, in specific contexts, to determine some types of questions of law with the assurance that disagreement in borderline cases with regard to the interpretation or application of law would not lead to reversal of the tribunal's decision in judicial review proceedings. This trend is epitomized by *Anisminic* itself. Lord Wilberforce considered the principle "now well established"[59] that specialized tribunals may, depending on their nature and on the subject matter, have the power to decide questions of law; and his Lordship felt no inhibition in accepting that the position may be reached, as the result of statutory provision, that even if they make what the courts might regard as decisions wrong in law, these are to stand.[60] This amounts to an emphatic disclaimer that there is a necessary reservation of questions of law for the courts. An eclectic approach, allowing the fullest scope for questions of statutory and factual context, commended itself to Lord Pearce who was content to rely on the principle that it is for the courts to decide the true construction of the statute which defines the area of the tribunal's jurisdiction.[61] On the facts of *Anisminic,* Lord Wilberforce thought it beneficial to accord a wide measure of finality to the tribunal's decisions including those impinging on questions of law.[62] Chief among the characteristics of the Foreign Compensation Commission which were considered to warrant this course were the predominantly judicial functions which it was required to discharge, its status as a permanent body, the fact that it comprised lawyers headed by a learned chairman, and the profusion and complexity of the cases with which it dealt.[63]

A fundamental factor which ought to condition approaches to judicial review in this area is that a tribunal, fortified by considerable expertise in the relevant setting, could naturally be expected to accumulate a wealth of experience which is unlikely to be available

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58. *Re Energy Conversion Devices Incorporated* [1982] *The Times,* July 2.
59. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at p. 207.
60. *ibid.*
61. At p. 195.
62. At p. 207.
63. *ibid.*

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to the courts in their general role of statutory interpretation and application of legal principle.[64] The Supreme Court of the United States has rightly declared, therefore, that "when faced with a problem of statutory interpretation, this Court shows great deference to the interpretation given the statute by the agency charged with its administration."[65] A similar willingness to take into account the tribunal's expertise, as a material element, is a feature of English judicial attitudes. In a complex matter involving the demarcation of qualifying activities for purposes of selective employment tax, Lord Wilberforce favoured the approach that Parliament must be taken to have intended to give the tribunal's decisions on questions of classification, including consideration of the classificatory language, a strength only slightly less than that attaching to decisions of fact.[66] A comparable point of departure was thought to be appropriate in reviewing the decision of a specialist tribunal in regard to the question of whether the activities of a petroleum company refuelling aircraft at an airport were encompassed by the heading "air transport" in the statutory scheme.[67] It is in keeping with modern social conditions that, in such matters as the standard industrial classification of a category of activity as interpreted by an industrial tribunal for the purpose of a claim to refund of selective employment tax, the courts should show deference to the findings of a tribunal with specialized knowledge of technical matters, notwithstanding the characterization of these findings as matters of law,[68] provided that the findings lie within the province of the tribunal's expertise.[69]

The absolute denial of competence in a specialist tribunal to determine matters containing elements of law is strikingly incongruous in situations where the matters concerned are peripheral to policy issues which lie at the core of the tribunal's determination. In these contexts Lord Wilberforce, in *Anisminic,* clearly envisaged that an error of law in respect of statutory construction, for instance, may not be held to vitiate jurisdiction in view of the central questions

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64. Cf. R.M. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561.

65. *Udall* v. *Tallman* 380 U.S. I at p. 16 (1965)

66. *Secretary of State for Employment and Productivity* v. *C. Maurice & Son Ltd* [1969] 2 A.C. 346 at p. 361.

67. *Esso Petroleum Co. Ltd* v. *Ministry of Labour* [1969] 1 Q. B. 98.

68. *Fisher-Bendix Ltd* v. *Secretary of State for Employmenrt and Productivity* [1970] 1 W.L.R. 856 at p. 860.

69. *Griffiths* v. *Secretary of State for Social Services* [1974] Q.B. 468.

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of policy which control the determination.[70] This approach has been applied with advantage in New Zealand where the Transport Licensing Appeal Authority was held to have been given power to decide conclusively certain matters of law within a restricted range.[71] Similarly, the Privy Council has held that the decision by the Malaysian Industrial Court that a "lockout" by the apellant company was illegal, reflected an error of law within jurisdiction and that a comprehensive ouster clause therefore effectively barred judicial review.[72]

It is unfortunate that these gradations can no longer be catered for by the blanket allocation, in *Pearlman* confirmed in this respect by *Racal,* of all questions of law to the courts, irrespective of the setting in which the question arises for decision and the nature and objectives of the statutory regime which governs the determination. The allocation of functions between judge and jury, and the reservation of matters of law for the judge, offer an inapposite analogy: for the specialist tribunal unlike a jury, does not exhaust its function after a single instance but, on the contrary, evolves a coherent approach to a limited group of problems in a continuing time-frame. This has been recognized by the courts, even to the extent of considering it permissible for a tribunal to adopt as a useful working rule some decisional criteria which do not overlap precisely with those embedded in the statute,[73] provided that the tribunal is prepared to consider a submission that the statutory language entitles an individual to a favourable decision, even though the application of the informal guideline would not.[74] It is inherent in the nature of things that a generalist court, in contrast with a specialist tribunal, may well lack continuity and depth of involvement in the central contextual issues, so that the sporadic and intermittent character of its intervention detracts basically from the value of its supervisory function.[75]

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70. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at p. 209: cf. *Bromley L.B.C.* v. *G.L.C.* [1983] 1 A.C. 768 at p.821, *per* Lord Dipiock.

71. *Attorney-General* v. *Car Haulaways* [1974] 2 N.Z.L.R. 331.

72. See n. 29 *Supra.*

73. S. A. de Smith, *Judicial Review of Administration Action* (4th ed. by J. M. Evans, 1980), p.136.

74. *Saggers* v. *British Railways Board* [1977] 1 W.L.R. 1090; *R.* v. *Barnsley S.B.A.T., Ex p. Atkinson* [1977] 1 W.L.R. 917.

75. See A.C. Hutchinson. "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 M.L.R. 293; cf. O. Fiss, "Objectivity and Interpretation" [1982] Stan. L. Rev. 739 at p. 745.

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Limitations on the Scope of the Pearlman Principle

(a) *Inferior courts and administration tribunals*

The generality of the *Pearlman* principle is cut down by Lord Diplock's formulation, in *Racal,* which requires distinct points of departure in respect of inferior courts and administrative tribunals. Differing from Lord Denning who identified error of law, with jurisdictional excess as a corollary to a principle of law, Lord Diplock preferred a more resilient approach based on presumptions. The first of these presumptions is that, where a statute gives a decision making body power to decide a particular question, it gives power only to decide the question as it has been defined by the statute.[76] While it is clearly open to Parliament to define the question so as to confer power on a body to decide questions of law as well as questions of fact or administrative policy, the effect of the second presumption is that the legislature did not intend to do so.[77] The contrast between inferior courts and administrative tribunals is that these presumptions, which Lord Diplock sought somewhat tangentially to draw from *Anisminic,* were made exclusively in relation to administrative tribunals and were said to have no bearing on subordinate judicial tribunals.[78] The effect of the *Racal* gloss on *Pearlman* is that the question of whether, in the case of inferior courts, Parliament intended to confer power to decide questions of law as well as questions of fact or not, depends on construction of the governing legislation without reliance on any such presumption as is legitimate in the case of administrative tribunals.

There are indications in the post-*Racal* decisions that this distinction between inferior courts and administrative tribunals has some appeal to contemporary judges as a useful lever for circumscribing the *Pearlman* doctrine. In *R.* v. *Surrey Coroner, ex p. Campbell.*[79] the Court of Appeal, taking for granted that the *Anisminic-Pearlman* principle "was not intended to be applied to a court,"[80] was prepared to regard a coroner's inquest as a proceeding falling outside the ambit of judicial review. The court recognized that the intrinsic attributes of a coroner's inquest give rise to some difficulty in treating the tribunal as a court, for the purpose of the *Racal* classification,

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76. *Re Racal Communications Ltd* [1981] A.C. 374 at p.382.
77. At p. 383.
78. *ibid.*
79. [1982] Q.B. 661.
80. At p. 637. *per* Watkins L.J.

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since its function is to investigate but not to reach a final decision like a judgment order or a verdict of guilt. Nevertheless, the court concluded that a coroner's inqust is immune from review, since its characteristics lend themselves on balance to comparison with those of a curial, rather than an administrative tribunal.[81] In reaching this conclusion the Court of Appeal established the important qualification that the *Anisminic-Pearlman* principle is limited to tribunals brought into being by statute.[82]

While it is natural to feel sympathy with the policy objectives which favour a restrictive interpretation of *Pearlman,* the choice of a dichotomy between inferior courts and administrative tribunals as a mediating technique to achieve this purpose has not been singularly fortunate. It should have been clear from the outset that the basis of the distinction is intolerably infirm, in the absence of stable criteria which could be called in aid to distinguish between the two types of tribunals so as to warrant the attribution of wholly disparate legal consequences; and subsequent judicial experience confirmed the impractical nature of the distinction in a variety of contexts. The House of Lords has acknowledged that a body which is described as a court by the legislation constituting it may in reality perform functions of an administrative nature, so that it is not a court of law which forms part of the judicial system of the country.[83] A local valuation court, for instance, discharges functions which were formerly the responsibility of assessment committees, and the work of such a body has to be seen in perspective as an integral aspect of the process of rating.[84] The inconclusive effect of nomenclature used by Parliament is indicated by the refusal of judges to classify as a judicial tribunal a court of referees under the Unemployment Insurance Act 1920[85] and a court of inquiry under Part II of the Industrial Courts Act 1919.[86]

The difficulty underlying the distinction is the lack of conceptual cogency. Imputability of the duty to act judicially to a tribunal does not necessarily make it a court of law.[87] The area of unpredictability in regard to application of the distinction exceeds acceptable bounds. This is particularly so in the light of the disposition of some judges

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81. *ibid.*
82. *ibid.*
83. See n. 84. *infra.*
84. *Attorney-General* v. *B.B.C.* [1981] A.C. 303 at pp. 339-340. *per* Viscount Dilhorne.
85. *Collins* v. *Henry Whiteway & Co. Ltd* [1927] 2 K.B. 378.
86. See the case cited at n. 84 *supra.*
87. *Attorney-General* v. *B.B.C.* [1981] A.C. 303 at p.340.

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to regard the length of the period for which the tribunal has existed as a crucial factor in distinguishing betwen a court and an administrative body.[88] There is, as well, the danger that the aberrations connected with the duty to act judicially, which hopelessly bedevilled administrative law prior to *Ridge* v. *Baldwin,*[89] will have a lingering influence *via* the expedient of a distinction between courts and tribunals.[90]

The effect of these considerations is the emergence of judicial reservations as to the feasibility of the distinction from the standpoint of policy. In 1985 the Court of Appeal, in *R.* v. *Greater Manchester Coroner, Ex p. Tal,*[91] refusing to follow its own previous ruling, asserted that the *Anisminic-Pearlman* principle applies without discrimination to courts and tribunals. Robert Goff L.J. predicated this approach on the ground that the distinction suggested by Lord Diplock in *Racal* is no longer of impeccable validity in view of the broader formulation which Lord Diplock himself subsequently made, with the support of the remainder of their Lordships, extending to inferior courts and statutory tribunals alike the rigour of the *Pearlman* principle.[92] Lord Diplock's later pronouncement bears comparison on this point with the speech by Lord Salmon in *Racal,*[93] but there is something disingenuous about the attempt by the Court of Appeal to make use of Lord Diplock's subsequent statement, which did not specifically address the point in question, to whittle down a distinction which his Lordship deliberately made in *Racal* as part of an intricate conceptual analysis. The true reasons for the doubts entertained by the Court of Appeal regarding the value of the distinction are probably connected with its insubstantial foundation. These doubts are reinforced by the reflection that, historically, inferior courts have always been subject to judicial review.[94]

The current equivocality of judicial approach leaves unresolved many significant questions as to the parameters of judicial review dramatically invigorated by *Pearlman.* The present stand of the Court of Appeal, although hostile to a distinction between courts and tribunals, is not consistent to the extent of asserting that all inferior courts are exposed to review on the footing of *Anisminic* principles

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88. *Attorney-General* v. *B.B.C.* [1981] A.C. 303 at p.342. *per* Lord Salmon.
89. [1964] A.C. 40.
90. Cf. J. Beatson and M.H. Mathews, *Administrative Law: Cases and Materials* (1982), p.60.
91. [1985]Q.B. 67 at p.82.
92. *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 at p.278.
93. [1981] A.C. 374 at p.386.
94. Cf. H.W.R. Wade, "New Twists in the *Anisminic Skein*" (1980) 96 L.Q.R. 492 at p.495.

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as extended in *Pearlman*. Showing deference to post-*Anisminic* authority disavowing the applicability of judicial review in the case of committing justices,[95] Robert Goff L.J. expressly adverted to a penumbral area, of undefined scope, where the *Anisminic-Pearlman* principle does not govern inferior courts.[96]

The questionable conceptual cogency of the existing law, confounded by the uncertainty introduced by recent trends, is the product of the judicial quest for means of containing *Pearlman*. The methods employed to accomplish this aim have brought in their wake complexities and contradictions. The fundamental problem, however, is a grotesquely distended dimension of judicial review which has had to be abridged by a variety of mechanisms which have not always worked well in combination.

(b) *Appeal and Review*

The distinction between inferior courts and administrative tribunals is related to another distinction – that between situations where the tribunal's decision can and those where it cannot be assailed by procedures alternative to judicial review. The Court of Appeal has suggested, as an element of the rationale of the *Racal* gloss, that there is a statutory right of appeal from most inferior courts – for example, the county court, the Crown Court and magistrates' courts – while it is desirable that the courts should have extensive supervisory control of administrative tribunals, since there is no, or only a limited, statutory right of appeal from the decisions of such tribunals.[97] Watkins L.J. was of opinion that "It is for this reason that in principle a wider power of intervention in relation to tribunals exist."[98] Apart from the objection that this raises, on the threshold of the availability of review, intractable problems regarding adequacy of the scope of appellate procedures under a given statutory regime and, in particular, begs the question whether conferment of a right of appeal on a point of law under the Tribunals and Inquiries Act 1971[99] precludes recourse to judicial review, this approach suffers from a basic weakness.

It is true that intensity of judicial review has in practice often been warranted by awareness that the impugned decision cannot otherwise be reached because of a comprehensive ouster clause and

95. *R.* v. *Ipswich Justices, Ex p. Edwards* (1979) 143 J.P. 699.
96. *R.* v. *Greater Manchester Coroner, Ex p. Tal* [1985] Q.B. 67 at p.81.
97. *R.* v. *Surrey Coroner, Ex p. Campbell* [1982] Q.B. 661 at p. 675.
98. *ibid.*
99. S.13.

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the consequent unavailability of any method of challenging the decision.[100] This is, indeed, the explanation of the actual ruling in *Anisminic*. Conversely, the presence of an alternative remedy has been interpreted frequently as a dependable indication of legislative intention to preclude the automatic invocation of judicial review.[101] This attitude has been adopted, especially where it is considered legally more convenient to pursue an existing remedy other than judicial review,[102] although the courts have been less than uniform in their commitment to this principle.[103] It is in this tentative sense that judicial review has been described as "a residual jurisdiction."[104]

However, the distinction between inferior courts and administrative tribunals, and that between situations where statutory rights of appeal are granted and those where they are withheld, are by no means totally overlapping. There exists today a right of appeal from a number of administrative tribunals, notably from the bodies specified in section 13 of the Tribunals and Inquiries Act 1971, with reference to Schedule 1 to the Act; on the other hand, there is sometimes no appeal from a court, for example a coroner's court.[105] This is one of the reasons why the distinction between courts and tribunals set out in *Racal* is unconvincing. Indeed, if the distinction between courts and tribunals is made primarily with a view to ensuring the fullest scope for judicial review in circumstances where an alternative mode of challenge is unavailable, the device is in fact not suited to attainment of the object. A telling illustration of this is provided by *Pearlman* itself. The decision under attack in this case was that of the county court, which was clearly an inferior court but from which no appeal lay.[106] Consequently, if the *Racal* test were applied, judicial review would be excluded because of the body's complexion as a subordinate court, despite the unavailability of an alternative avenue of redress against the decisions of that body. If the latter is intended to be the governing consideration, it would have to be applied directly rather than via a distinction based on the formal character of the body. From this point of view, the logic of *R.* v. *Greater Manchester Coroner, Ex p. Tal*[107] is more compelling than that reflected in *R.* v. *Surrey Coroner, Ex p. Campbell.*[108]

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100. *R.* v. *Secretary of State for the Environment, Ex p. Ostler* [1977] Q.B. 122 at p.135.
101. *R.* v. *Peterkin, Ex p. Soni* [1972] Imm.A.R. 253.
102. *R.* v. *Chief Adjudication Officer, Ex. p. Bland* [1985] *The Times,* February 6.
103. *R.* v. *Hillingdon L.B.C., Ex p. Royco Homes Ltd* [1974] Q.B. 720.
104. See the case cited at n. 101 *supra.*
105. *R.* v. *Greater Manchester Coroner, Ex p. Tal* [1985] Q.B. 67 at p.81.
106. Housing Act 1974, Sched. 8, para. 2(2).
107. See n. 91 *supra.*
108. See n.79 *supra.*

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Despite a recurring judicial trend which supports the opposite conclusion,[109] review and appeal are best looked upon as entirely distinct procedures, with no oblique impact on each other's incidence. Just as much as the stringently restricted scope of a statutory right of appeal on questions of law may serve as an inducement for the courts to exercise review with minimal restraint as a means of supplying a lacuna and so preventing injustice, there is the equally plausible argument in the opposite direction that the court ought to have regard to the fact that Parliament has not followed the increasingly general practice of providing an appeal on points of law from an inferior tribunal and that the court should therefore be less astute to detect errors of law than on an appeal.[110] But this principle of inferred legislative intent has been honoured quite often in the breach, typically in the setting of speaking orders of professional bodies which have ben energetically quashed in review proceedings despite the lack of provision for appeal.[111] The effect of a right of appeal on the incidence of supervisory jurisdiction is far from self-evident, and no explicit principle can be deduced with confidence because of the inconclusive quality of the competing arguments. The best course is that predicated on delinkage. But if the contrary lead in some of the decided cases[112] is to be followed, it is important at least to insist that the alternative procedure which results in implied exclusion of judicial review is no less prompt, adequate and effective.[113]

(c) *Type of Function* v. *Identity of Tribunal*

In view of other developments in the law, the *Racal* refinement which postulates, *a priori,* for inferior courts a far greater degree of immunity from judicial review than that available to administrative tribunals, strikes a note of incongruity. Established trends in judicial decisions do, indeed buttress an allied distinction between judicial or quasi-judicial functions, on the one hand, and executive or administrative functions, on the other. But the purpose of this distinction is to achieve a result which is the opposite of that aimed at by *Racal.*

109. See n. 100 and 108 *supra.*

110. S. A. de Smith, *op. cit.*, p.137.

111. See, for example, *R.* v. *Medical Appeal Tribunal for South Wales District, Ex p. Griffiths* [1958] 1 W.L.R. 517.

112. *R.* v. *Epping and Harlow General Commissioners, Ex p. Goldstraw* [1983] 3 All E.R. 257 at p. 262; *R.* v. *Chief Constable of the Merseyside Police, Ex p. Calveley* [1986] 2 W.L.R. 144 at p.155.

113. *Ex p. Waldron* [1986] Q.B. 824 at p.852; *R.* v. *Inland Revenue Commissioners, Ex p. Preston* [1985] A.C. 835 at p.862.

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In *Anisminic* Browne J. recognized, at first instance, that "Somewhat different considerations apply to executive or administrative cases from those which apply to decisions of persons or bodies exercising judicial or quasi-judicial functions."[114] The consistent principle infusing judicial attitudes is that it is in the former area, rather than in the latter, that comparative freedom from judicial control is apposite. The Court of Appeal has declined to exercise a general power to examine the proceedings of local authorities to ascertain whether, in coming to "a purely administrative decision,"[115] the local authority had taken into account all those factors which ought to be considered in order to arrive at a proper decision. Stamp L.J., conceding to a local authority in this context a liberal measure of latitude, declared: "There being no evidence that the local authority acted *ultra vires* or dishonestly, I would not enter into the question of whether it did or did not make mistakes in coming to (its) conclusion."[116] Lord Denning M.R., who had no hesitation in distinguishing *Anisminic* from the *East Elloe* case[117] on the ground that, in the former, the House of Lords was considering a determination by "a truly judicial body,"[118] while the latter case was concerned with an order "which was very much in the nature of an administrative decision,"[119] commented: "There is a great difference between the two. In making a judicial decision the tribunal considers the rights of the parties without regard to the public interest. But in an administrative decision the public interest plays an important part."[120] One of the reasons why the Privy Council, in the *South East Asia Fire Bricks* case,[121] held that the error made by the Industrial Court, being non-jurisdictional in character, was made impregnable by an ouster clause was that the Industrial Court could not be said to discharge a completely judicial function. This was because of the involvement of broad questions of policy at the heart of the Industrial Court's decision stemming partly from the statutory injunction addressed to it to have regard to the financial implications of an award on the economy and partly from the assignment of responsibility for the decision of all questions of law arising in proceedings before the Industrial Court

114. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 at pp. 234-235.

115. *R.* v. *Barnet and Canden Rent Tribunal, Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342 at p. 368.

116. *ibid.*

117. *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736.

118. *R.* v. *Secretary of State for the Environment, Ex p. Ostler* [1977] Q.B. 122.

119. *ibid.*

120. *ibid.*

121. See n. 29 *supra.*

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to the Attorney-General whose judgment could be expected to be coloured by political factors.

These developments, which underscore the principles of political accountability and judicial respect for the legislative allocation of responsibility, are conducive to enhanced autonomy for administrative tribunals performing functions of an unreservedly executive character. By contrast, the dichotomy between inferior courts and administrative tribunals is conceived of in *Racal* as a method of granting a substantial dispensation to subordinate courts while subjecting administrative bodies to greater intensity of judicial review. The operation of these principles side by side produces some conflict of policy objectives. The source of the conflict is the application of different criteria generated by parallel tests which ovelap only in part. The test predicated on the nature of the function discharged by the body is not capable of use comfortably in conjunction with a test which puts the focus on the formal identity of the body. The twist which the law received from *Racal* brings into sharp relief the problem of reconciling the results obtained by application of the two tests.

The Dimensions of Error of Law

In the transformed landscape of administrative law, if jurisdictional excess is to be treated as an inherent quality of error of law, demarcation of the scope of legal error would seem decisive in regard to judicial review. The crucial decision is made at the point of classification of the nature of the error, since there would no longer be any room, once the error is identified as an error of law, to address the question whether the error lies within or outside jurisdiction.

The developments which appear to have refurbished the subject almost beyond recognition sharpen all the more the dividing line between the consequences of error of law and those of eror of fact, and it is for this reason vital to aim at precision in regard to delimitation of the respective spheres of these concepts. The disentangling of these notions is warranted by central policy factors. In practice, no doubt, the frontier between law and fact is largely arbitrary, the exact point of demarcation owing at least as much to contextual elements as to any coherent objective norm. All the same, in terms of the strength if not the incidence of judicial review, the distinction between law and fact valuably expresses realistic gradations which are part of current judicial practice.

A difference of approach is broadly valid for a number of reasons. The first of these is the entirely proper deference to expertise which

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the court ungrudgingly accords the tribunal within the area of its special competence. The courts have declined to review a local authority's decision regarding the existence of an acute housing shortage in a particular neighbourhood on the ground that the local authority is "better qualified than the court to judge."[122]

The confidence which the court is inclined to repose in the tribunal, against the background of the court's assessment of the ability of the tribunal and the degree of technicality and detail characterizing its work, is in practice a factor of central importance.[123] Clearly, it is in the realm of factual investigation that value-judgments strengthened by the experience, knowledge and aptitude of the specialist tribunal represent a significant asset.[124] Added to this practical reality is the supportive consideration that, as a key element of the statutory scheme of adjudication, Parliament can be taken to have intended to rely on the accumulated skills of the specialist tribunal. Subservience to the legislative will accounts for the refusal of the Court of Appeal to review the findings of fact of the Price Commission in regard to what items are allowable in computing the profits of a business;[125] for the statutory scheme of price control requires, as an essential condition of viability, ample scope for expert, quick and final decisions.[126]

The overriding considerations, perhaps, are those directly linked with pragmatic constraints inhibiting the reception of evidence in judicial review proceedings which, by their very nature, are not designed to raise issues of fact for determination *de novo*.[127] Although provision now exists for full interlocutory proceedings in applications for judicial review,[128] and notwithstanding the rule that the grant of leave to cross-examine deponents in these applications is governed today by the same principles as those which apply in actions commenced by originating summons,[129] it is nevertheless the view of the House of Lords that powers to grant interlocutory process are "to be sparingly used if the new procedure is to be a success."[130] This spirit

122. *Dowty Boulton Paul Ltd* v. *Wolverhampton Corporation (No. 2)* [1976] ch. 13 at pp.26-27, *per* Russel L.J.

123. Cf. *R.* v. *Industrial Injuries Commissioner, Ex p. A.E.U. (No. 2)* [1966] 2 Q.B. 31 with *Palmer* v. *Peabody Trust* [1975] Q.B. 604.

124. *Lester and Butler* v. *Secretary of State for the Environment* [1978] J.P.L. 308.

125. *G.E.C. Ltd.* v. *Price Commission* [1975] I.C.R. 1

126. *ibid.*

127. *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Zerek* [1951] 2 K.B. 1.

128. R.S.C., Ord. 53, r.8 confirmed by Supreme Court Act, 1981.

129. *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 at p.280 *per* Lord Diplock.

130. *I.R.C.*, v. *Rossminster Ltd* [1980] A. C. 952 at p.1027, *per* Lord Scarman.

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of restraint derives principally from the need for the reviewing court to guard against the temptation to substitute its own impression of the facts for that of the decision-making body entrusted with exclusive jurisdiction to determine facts. [131]In applications for judicial review, therefore, the principle has taken firm root that the tribunal's findings of fact, as distinguished from the legal consequences of the facts found, are not, as a rule, open to review.[132] The general approach is as valid today[133] as it was prior to the legislative reforms of the present decade that "Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there; but when the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere."[134]

Competing elements of practice and policy fortify the intuitive perception that judicial control of error of law made by a tribunal of limited jurisdiction should be appreciably more intrusive than surveillance of fact finding. The Franks Committee, while opposing indiscriminate appeals to the courts on matters of fact, were emphatically of opinion that all decisions of tribunals should be subject to review by the courts on points of law.[135] The perceived difference between the case for review in these areas finds expression in discrepant tests which allow for varying depth of review in regard to legal and factual error. The essence of the contrast is that, with regard to a question of law, the decision of an administrative tribunal will be set aside by the court if it is satisfied that the tribunal's decision is wrong but, where questions of fact are concerned, the tribunal's decision is open to review if it is not only wrong but unreasonable.[136] Lord Bridge of Harwich has reaffirmed[137] that a conclusion of fact reached by the tribunal invested with the power of fact finding can be impugned only on the principles adumbrated

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131. Cf. *George* v. *Secretary of State for the Environment* (1979) 77 L.G.R. 689.

132. Cf. *R.* v. *Board of Visitors of Hull Prison. Ex p. St. Germain (No. 2)* [1979] 1 W.L.R. 1320, at pp.1328-1329. *per* Harman L.J.

133. *R.* v. *Secretary of State for the Home Department, Ex p. Khawaja* [1984] A.C. 74 at pp.104, 105, *per* Lord Wilberforce.

134. *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Zerek* [1951] 2 K. B. 1 at p.11, *per* Devlin J.; cf. *R.* v. *Home Secretary, Ex p. Zamir* [1980] A.C. 930 at p.949, *per* Lord Wilberforce.

135. Report of Administrative Tribunals and Inquiries, Cmnd. 218 (1957), para. 105.

136. *Griffiths* v. *J.P. Harrison (Watford) Ltd* [1962] A.C. 1 at p.16, *per* Lord Reid; *Hadmor Productions Ltd* v. *Hamilton* [1983] 1 A. C. 191 at p.220, *per* Lord Diplock

137. *Cocks* v. *Thanet D. C.* [1983] 2 A.C. 286 at p.294.

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by Viscount Radcliffe in *Edwards* v. *Bairstow*.[138] The substance of these principles is that, even though no misconception is apparent *ex facie* the decision, the facts found are such that no person, acting judicially and properly instructed as to the relevant law, could have come to the decision impeached.[139] The doctrine of *vires* requires that the tribunal's conclusion of fact, albeit incorrect, should stand if it is made within the scope of the power devolving upon it by legislative grant: hence the need for a principle of intervention which is narrower in scope than incorrectness of the decision under attack. The added element, which preserves for the tribunal a margin of error, has been adverted to by the Court of Appeal: "We can interfere if the decision of the Minister was perverse and could not have been properly arrived at on the facts, but otherwise it seems that the legislature has entrusted that part of it to him, and not to us, and we should not interfere."[140] The controlled scope of judicial review engendered by this criterion promotes greater independence on the part of administrative tribunals in the area of factual adjudication.

The disparate tests for identifying the vitiating element in errors of law and errors of fact so as to attract different degrees of judicial review, encapsulated in the standards of incorrectness and unreasonableness, underline the need for stable criteria by reference to which the distinction between error of law and error of fact could be established. The central distinction is that between primary facts and the inferences made from them. Primary facts embrace the phenomena which have occurred "independently or anterior to any assertion as to their legal effect."[141] The terminology of "secondary facts" has been used to describe the conclusions which are arrived at by a process of reasoning from the primary facts which have been characterized as "brute facts",[142] "data of experience"[143] and "the raw material"[144] of the judicial process. The divergent strands of opinion in the decided cases concern the method of classifying secondary facts in the setting of judicial review. While the treatment

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138. [1956] A.C. 14.

139. At pp. 35-36.

140. *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320 at pp.1328-1329, *per* Harman L.J.

141. L. L. Jaffe, *Judicial Control of Administrative Action* (1965), p.546.

142. J. L. Montrose, "Basic Concepts of the Law of Evidence" (1954) 70 L.Q.R. 527 at p. 534.

143. A. L. Goodhart. "Appeals on Questions of Fact" (1955) 71 L.Q.R. 402 at p. 405.

144. Thayer, *Preliminary Treatise on Evidence* (1898), p.194.

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of primary facts as questions of fact is axiomatic, there are competing views with regard to the classification of secondary facts as questions of fact or as questions of law. Lord Denning, in the earlier phases of his judicial career, opted for an approach marked by a high degree of elasticity.[145] In a case decided in the middle of the century Lord Denning was convinced that inferences from primary facts are sometimes conclusions of fact and sometimes conclusions of law, depending on the degree of expertise required to draw the appropriate inference.[146]

However, in his later judicial pronouncements, Lord Denning has veered steadily towards the position that all inferences from primary facts are properly identifiable as matters of law. This development reached its culmination in the uncompromising statement, by Lord Denning, in a case where the question for decision was whether construction work constituted "maintenance" for the purpose of zero-rating under a financial regulation: "Once you have the primary facts established about the underpinning, then the question whether the work comes within the word 'maintenance' or not is a question of law for the judges to decide."[147] It is inherent in this approach, which has attracted the label "analytical", that the application of statutory criteria to primary facts invariably involves questions of law. The premise is that, the primary facts not being in dispute, the correct conclusion to be drawn from them entails the construction of statutory language and therefore amounts to a question of law.[148] With regard to the interpretation of a contract, the effect of the analytical approach is that, although the terms of a contract are questions of fact, and to that extent the determination depends on fact,[149] once the primary facts are established, the ascertainment of the proper inference from the terms of the contract is a question of law.[150]

The strength of the analytical approach consists of the impetus it supplies to certainty and consistency in the process of decision making. This is an especially important consideration in regard to problems which are of frequent and repetitive occurrence in everyday situations.

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145. See, for an example of this approach, *Bracegirdle* v. *Oxley* [1947] 2 K.B. 349 at p. 358.

146. *British Launderers' Association* v. *Borough of Hendon Rating Authority* [1949] 1 K.B. 462 at p.471.

147. *A.C.T. Construction Ltd* v. *Customs and Excise Commissioners* [1981] 1 W.L.R. 49 at p.54.

148. *Woodhouse* v. *Brotherhood Ltd* [1972] 2 Q.B. 520 at p.536.

149. *British Railways Board* v. *Customs and Excise Commissioners* [1977] 1 W.L.R. 588 at p.595 *per* Browne L.J.

150. *Morren* v. *Swinton and Pendlebury B.C.* [1965] 1 W.L.R. 576 at p. 583. *per* Lord Parker C.J.

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Throughout the construction industry, for instance, it is essential that contractors and their employers should know whether particular types of work are to be positive-rated or zero-rated in keeping with the statutory criteria applicable, and "it would be intolerable if one tribunal were to give one view and another tribunal were to give another view, and no one could decide between them."[151] Where two individual tribunals reach different conclusions on the identical facts,[152] or where the minority of a tribunal rejects the view of the majority, [153]one view must be wrong in law, and the court is bound to decide between the competing views not only in the interest of justice for the parties but as a guideline for tribunals similarly situated in the future. Departing from the approach that the application of a statutory term which conforms to its ordinary linguistice usage is a question of fact,[154] Lord Denning has suggested that, however simple the words, their interpretation is always a matter of law.[155] The rationale invoked was that, since they have to be applied in case after case by lawyers, it is necessary in the interest of stability that they should be given the same interpretation and applied in the same way.[156] This argument, based on settled expectations, clarity of professional advice and public confidence in legal transactions, was used by Lord Denning as the pivot for his rejection of the contrary approach recommended by the House of Lords in *Racal.*

The rival "pragmatic" approach is sustained by a series of countervailing values. The sheet anchor of these values is the reflection that, in applying a statutory or other legal standard, there does exist, between approximately definable extremities, an amorphous zone in which a decision either way may appear justifiable.[157] In this hinterland reasonable men may well arrive at different conclusions on the material adduced,[158] and the legitimate function of the apparatus of control envisaged by the courts through the instrumentality of the concept of error of law is to demarcate the frontiers of the zone

151. *A.C.T. Construction Ltd* v. *Customs and Excise Commissioners* [1981] 1 W.L.R. 49 at pp.54-55.

152. ***Huggins*** v. ***Gordon (A.J.) Ltd.*** (1971) 6 I.T.R. 164.

153. ***Woodhouse*** v. ***Brotherhood Ltd*** [1972] 2 Q.B. 520 at p. 537.

154. *Brutus* v. *Cozens* [1973] A.C. 854; *L.T.S.S. Ltd* v. *Hackney L.B.C.* [1976] Q.B. 663; *Simmons* v. *Pizzey* [1979] A.C. 37.

155. *Pearlman* v. *Keepers and Governors of Harrow School*[1979] Q.B. 56 at p.67.

156. *R.* v. *Chief Immigration Officer, Gatwick Airport, Ex p. Kharrazi* [1980] 1 W.L.R. 1396 at p.1403.

157. Cf. C. T. Emery and B. Smythe, "Error of Law in Administrative Law" (1984) 100 L.Q.R. 612.

158. *Scurlock* v. *Secretary of State for Wales* (1977) 33 P.& C.R. 202.

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beyond which a decision is repugnant to reason. So viewed, the court's essential function, didactic no less than corrective, is to formulate guidelines within which the tribunal of fact must address itself to its task.[159] The hallmark of the "pragmatic" approach is its purpose of diminishing the intensity of judicial review by virtue of a process of withdrawal throughout an extended area in which there is room for disagreement without caprice or perversity. This element of flexibility pervades the point of departure adopted by the House of Lords in *Edwards* v. *Bairstow:* all the combinations of circumstances in which the facts warrant a determination either way are viewed as "questions of degree and therefore as questions of fact."[160]

Lord Diplock's espousal of this approach, even more than his effort to restrict the *Pearlman* principle to administrative tribunals, *stricto sensu,* constitutes a powerful brake on the scope of judicial review according to its conception in *Racal.* As between the two restricting techniques, although less evident than the dichotomy between courts and tribunals. Lord Diplock's choice of a comparatively unobtrusive method of discovering error of law is certainly more fundamental in its repercussions. In *Racal* Lord Diplock cautioned against giving free rein to mechanisms of review in situations involving interrelated questions of law, fact and degree determined by the administrative tribunal.[161] In line with this approach, the Court of Appeal, in considering a Minister's decision in regard to the question whether a transaction was a contract of service or a contract for services has held that error of law would be imputable to the Minister only if the facts found are such that no person acting rationally with proper knowledge of the facts could conceivably come to the determination made by the Minister.[162] Where this is not so, mere disagreement on the part of the court as to classification of the transaction according to the relevant legal criteria does not, in terms of the less stringent test, warrant impugning the Minister's decision as being vitiated by an error of law.[163]

The "pragmatic" approach is a particularly useful conceptual tool in circumstances where the court's regard for the expertise of a

159. *Brooks and Burton Ltd* v. *Secretary of State for the Environment* [1977] 1 W.L.R. 1294.

160. [1956] A.C. 14.

161. *In re Racal Communications Ltd* [1981] A.C. 374 at pp.383-384.

162. *Global Plant Ltd* v. *Secretary of State for Social Services* [1972] 1 Q.B. 139 at p. 155, *per* Lord Widgery C.J.

163. Cf. *Taylor* v. *Good* [1974] 1 W.L.R. 556 at p. 560, *per* Russell L.J.

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specialist tribunal is a predominant, if often unstated, element. It is seldom that a court would be prepared to review the decision of an industrial tribunal on a matter involving industrial classification unless the decision is shown to be unreasonable in the *Edwards* v. *Bairstow* sense.[164] Indeed, on suitable occasions, a court may not be unwilling to defer to an expert tribunal's judgment in regard to the relevance of items of evidence.[165] The less defined in content the legal standard applicable, the more cogent is the case for having recourse to the pragmatic approach.[166] In the absence of a statutory definition of "trade" in a specific context, Lord Wilberforce has said: "Sometimes the question whether an activity is to be found to be a trade or business is a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide whether a line is passed."[167] Increased restraint in the exercise of judicial review is typically justifiable in cases where, for example, the substance of the tribunal's decision concerns a material change in the use of property[168] or supervening departures from a contract of employment in such a manner, and to such an extent, that an implied rescission of the pre-existing agreement, and the adoption of fresh consensual terms, represent the contractual intention of the parties.[169] These are, pre-eminently, "questions of fact and degree"[170] in regard to which the judgment of the tribunal of fact ought not to be disturbed except on compelling grounds.

The choice between the "analytical" and "pragmatic" approaches to the discovery of error of law offers, at bottom, generous scope for value-judgments in regard to the degree of penetration thought to be appropriate to the judicial review process in particular combinations of circumstances. Conceptually, the "analytical" standard is meticulous, in so far as it assumes that, over the whole range of inferences from primary facts, there is an objectively correct answer which the court is capable of stating. By contrast, the distinguishing feature of the "pragmatic" approach is its repudiation of this degree of rigidity in borderline cases where more than one answer is regarded as admissible

164. *Secretary of State for Employment and Productivity* v. *C. Maurice Ltd* [1969] 2 A.C. 346 at p. 363, *per* Lord Pearson.

165. *Woods* v. *Cinematograph Film Licensing Authority* [1978] 1 N.Z.L.R. 851 at p.858.

166. Cf. *Customs and Excise Commissioners* v *Viva Gas Appliances* [1984] 1 All E.R. 112; *Furniss* v.*Dawson* [1984] A.C. 474.

167. *Ransom* v. *Higgs* [1974] 1 W.L.R. 1594.

168. *Birmingham Corporation* v. *Habib Ullah* [1964] 1 Q.B. 178

169. *Marriott* v. *Oxford and District Co-operative Society Ltd* [1969] 1 W.L.R. 254.

170. See also *Cole Bros Ltd* v. *Phillips* [1982] 1 W.L.R. 1450: cf. *I.R.C.* v. *Scottish and Newcastle Breweries Ltd* [1982] 1 W.L.R. 322 at p 327. *per* Lord Lowry.

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within the pale of legal acceptability. The essential advantage of the latter approach is that, in a variety of contexts, it may well serve as a safety valve discouraging the aggravation of tensions in sensitive areas of social policy.

The assumptions underlying the two approaches are, indeed, distinct. The perception of this divergence, and of its practical implications, has prompted a writer, surveying the contemporary scene, to relegate the concept of error of law as a major organising principle supplanting jurisdictional notions in modern administrative law: "Lord Diplock and Lord Denning have fundamentally different views about the scope of judicial review even in the context of administrative bodies because they adopt radically different approaches to the method to be used in characterizing an error as one of fact or law. The fact that these differences can remain concealed behind an apparent agreement about the use of the concept of error of law seriously undermines the utility of that concept as an organizing principle."[171] It is paradoxical, however, that Lord Denning, having chosen a yardstick which would appear to postulate review on a strikingly interventionist scale, should, in applying that yardstick, make unfettered use of a profusion of restraining subrules the cumulative effect of which is to blunt the acuity of the chosen instrument, to the point of whittling down very substantially the practical differences between the standards favoured by himself and by Lord Diplock.

The extenuating principles are enveloped, in the main, by the discretionary bars on an extended use of which Lord Denning would seem to rely significantly in counteracting the extravagant effects of the overly distended standard of review to which he declared himself committed. The wide sweep of this standard derives from the combination of the rule that all error of law entails jurisdictional excess, with the pervasive technique employed for identifying errors of law. But the irony is that these instruments, despite their conspicuous range, will accomplish remarkably little because of the constraints which regulate their use. Lord Denning's conceptual scheme contains its own limiting principles which, by a tortuous path, restore the balance that has the appearance of being imperilled by the basic standard he postulates for judicial review.

The qualifying factors, which form an integral aspect of Lord Denning's approach, are as diffuse in scope as they are resilient in content. Lord Denning has administered the sternest caution against

171. J. Beatson, "the Scope for Judicial Review for Error of Law" [1984] Oxf. Journal of Leg. St. 22 at p.35.

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undue involvement on the part of the courts in the merits of routine administrative decisions which generate no broader questions of principle or policy.[172] His expectation would seem to be that the discretionary complexion of judicial review would operate to ensure that only questions of general principle, potentially likely to recur, would agitate the courts.[173] There is positive value in judicial intervention in circumstances where the administrative tribunals themselves are riddled with divisions of opinion which impair the effectiveness of their work.[174] Notwithstanding an error of law ascribable to a tribunal, Lord Denning has refrained from interfering because he was convinced that the tribunal's overall approach was redeemed by countervailing beneficial features.[175] The existence of a convenient remedy by way of appeal has generally been held to preclude judicial review.[176] Even when judicial review is available, exceedingly fastidious approaches have been decried by Lord Denning: "The courts should not enter into a meticulous discussion of the meaning of this or that word in an Act. They should leave the tribunals to interpret the Act in a broad reasonable way, according to the spirit and not to the letter."[177] Most importantly, an ample margin of latitude is available to the reviewing court by virtue of the requirement that an error of law can be successfully impeached, only if it represents an error on which the decision of the case depends.[178] The open-ended texture of this requirement enables a comparatively uninhibited assessment of the causal effectiveness of the impugned error in such a manner as to produce a result which is deemed equitable in the circumstances.

The provocatively intrusive standard of review which Lord Denning was minded to apply in *Pearlman* is accounted for by special reasons peculiar to *Pearlman's* case. The central issue was the legal entitlement of the applicant for relief to have his case for receipt of a pecuniary benefit referred to a valuation officer. The effect of the error made by the subordinate tribunal was to deprive the applicant of a right to which he was entitled under statute; and it is hardly surprising that a court, viewing with sympathy his application for relief, should not be averse to bending the rules in order to meet the requirements

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172. *R.* v. *Preston S.B.A.T., Ex. p. Moore* [1975] 1 W.L.R. 624 at p. 631.
173. *R.* v. *West London S.B.A.T., Ex p. Clarke* [1975] 1 W.L.R. 1396.
174. *R.* v. *National Insurance Commissioners, Ex p. Michael* [1977] 1 W.L.R. 109 at p. 112.
175. See the case cited at n. 172 *supra.*
176. *R.* v. *Hillingdon L.B.C., Ex p. Royco Homes Ltd* [1974] Q.B. 720 at p.729.
177. *R.* v. *Preston S.B.A.T., Ex p. Moore* [1975] 1 W.L.R 624 at p.631.
178. See n.32 *supra.*

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of justice.[179] Apart from this, *Pearlman* envisaged a situation in which the need for an authoritative ruling was acutely felt, since the view entertained by the inferior tribunal in regard to the material question of law was diametrically opposed to previous collateral authority,[180] so that the legal position was confused and uncertain in view of the conflict of judicial opinion. In less compelling circumstances, however, the emphasis on judicial restraint has been paramount. Detachment from the *minutiae* of administrative detail has been enjoined as an indispensable virtue on courts exercising review: "The court should be ready to lay down the broad guidelines for tribunals. But no further. The courts should not be used as if there was an appeal to them. Individual cases of particular application must be left to the tribunals."[181] Indeed, even in the exercise of appellate jurisdiction, the courts have been disinclined to subject the decisions of administrative tribunals to so exacting a scrutiny as to hamper the expeditious discharge of their functions.[182] *A fortiori,* in applications for judicial review, the autonomy of tribunals within their allotted sphere is a cardinal principle. Although the courts have not foreclosed the possibility that a tribunal's omission to give reasons in support of a decision, in contravention of a statutory requirement, may in appropriate cases generate the inference that there was no good reason for reaching the conclusion,[183] there is a strong current of judicial authority[184] that even complete failure to comply with a statutory duty to state reasons is not, *per se,* an error of law.[185] This is a major concession made at the expense of causing partial atrophy of some provisions in the Tribunals and Inquiries legislation relating to the obligation to state reasons. The mechanism used by the courts to secure this result is a less than candid application of the distinction between mandatory and directory legal requirements.[186] The Court of Appeal, exhibiting resolve to contain *Pearlman* and *Racal,* has

179. Cf. H.F. Rawlings, "Judicial Review after *Pearlman*" [1979] P.L. 404.

180. *Pickering* v. *Phillimore*-West London County Court, May 10, 1976.

181. *R.* v. *Preston S.B.A.T., Ex p. Moore* [1975] 1 W.L.R. 624 at p.631.

182. *Fougere* v. *Phoenix Motors Ltd* [1976] 1 W.L.R. 1281.

183. *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 at pp.1061-1062, *per* Lord Upjohn.

184. But see, for the contrary view, *Nudds* v. *Eastwood (W. & J. B.) Ltd* [1978] I.C.R. 171; *U.K.A.P.E.* v. *Acas* [1979] I.C.R. 303.

185. *Mountview Court Properties Ltd* v. *Devlin* (1970) 21 P. & C.R. 686; Re Allan and Mathews Arbitration [1971] 2 Q.B. 518.

186. *Brayhead (Ascot) Ltd* v. *Berkshire C.C.* [1964] 2 Q.B. 303 at pp.313-314; *R.* v. *Liverpool City Council, Ex p. Liverpool Taxi Fleet Operators' Association* [1975] 1 W.L.R. 701 at p.706.

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stressed the *caveat* that "It does not follow that an order of *certiorari* will be made merely because some error of law has been committed."[187]

The evolving mosaic indicates firm reliance on a multiplicity of constraints, all linked with the discretionary bars, as a basis for achieving equilibrium between the effective discharge of administrative functions and the legitimate use of judicial review.[188] This trend of development is not altogether satisfactory, for several reasons. The limiting principles, which are becoming increasingly vital because of the extended scope of judicial review as a sequel to *Pearlman,* do not always co-exist comfortably in one another's company, since the objectives of policy underlying the rules do not point in the same direction. These rules are no more than instruments of judicial policy; and the degree and method of their use, as a means of detracting from the depth of review in a given context, is very much a matter of subjective judicial assessment of competing priorities. The focus on these discretionary elements as the decisive features of judicial review imparts to the law a high degree of casuistry. Reinforcing these negative evaluations is the basic theoretical anomaly of the spectacle of reviewing courts having recourse to discretionary levers to distance themselves from situations where, in keeping with the principles they profess to apply, the administrative determinations impeached are ostensibly vitiated by jurisdictional defects.

Judicial Review of Findings of Fact

There is little merit in carving out for judicial review a uniquely extended area if, hard on the heels of innovative judicial attempts to expand the frontiers of supervisory jurisdiction, the courts become engaged in an assiduous search for qualifying devices which all but negate the effects of the former development. The underlying weakness is the unreal quality of the new criteria defining the scope of review. Regrettably, there are signs that a parallel development, self-stultifying in its overall impact, is likely to take place in the area of judicial review of administrative tribunals on the ground of factual error.

Contrary to the suggestion by a leading textwriter that, where an administrative tribunal has erred on a jurisdictional matter, the

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187. *R.* v. *Greater Manchester Coroner, Ex p. Tal* [1985] Q.B. 67 at p.82, *per* Robert Goff L.J.

188. Cf. *R.* v. *Greenwich B.C. Ex p. Cedar Transport Group Ltd* [1983] *The Times,* August 3.

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reviewability of its decision otherwise than on appeal may depend on whether its error is one of law or of fact,[189] the thrust of judicial practice prior to *Pearlman* was to regard the doctrine of collateral questions as applicable alike to error of law and to error of fact. Asserting that, in the case of all tribunals of limited jurisdiction, the existence of a limit to their *vires* necessitates an authority to determine and to enforce the limit, Farwell L.J. made the comment: "It is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact."[190] But this basic analysis calls for modification in the light of the *Pearlman* innovation, as qualified by *Racal;* for it would now seem that error of law, by definition, has jurisdictional implications, while error of fact may or may not vitiate the roots of jurisdiction. Jurisdictional fact, then, is a live issue in administrative law, but jurisdictional law is a thing of the past.

However, even within the realm of factual adjudication, there are important developments taking place, and the indications are that the principal modalities of review are no longer linked with the theory of jurisdictional fact. It is doubtful that the consequent changes entail any worthwhile benefit to the law.

With regard to error of law, generous scope for judicial review is acceptable intuitively no less than upon reflection. A vigorous superintending role for the courts is benefical in this area, since questions of law are "in the last analysis, those questions that lawyers are equipped to decide."[191] The position in respect of questions of fact is clearly different. The assumptions of the statutory regime under which administrative tribunals function underpin the value of a relatively informal adjudication process, aspiring as it does to greater expedition, procedural simplicity, comparative freedom from technicality and inexpensive modes of fact finding and evaluation. It follows that the ambit of judicial review needs to be controlled far more stringently in regard to factual adjudication than in the area of reasoning or inferences which involve questions of law.

Judicial review in relation to error of fact operates at two levels. The first concerns the proof of primary facts. The question of whether the primary facts exist or do not exist is essentially a question of fact for the tribunal, and the only way in which a court exercising

189. S. A. de Smith. *op. cit.* p.127.

190. *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* [1910] 2 K.B. 859 at p.880.

191. J. M. Landis, "Administrative Policy and the Courts" (1938) 47 Yale L.J. 519 at p.535.

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review can intervene is by asking the question whether there is any evidence to support the finding of fact reached by the tribunal.[192] The principles enabling review on this ground had an unpretentious origin which involved a distinction between lack of evidence and unavailability of adequate evidence of a cogent character. Fifty years ago Swift J. emphatically characterized the court's power as being confined to considering whether there is any material on which the tribunal's findings of fact are based.[193] It was declared that a clearance order under housing legislation could be attacked on the ground that there is no evidence in support of the order, but not on the ground that the evidence is insufficient to justify the order.[194] The remark was explicitly made that, if there is some evidence sustaining the decision, the court would decline to interfere.[195] But the last vestiges of this self-abnegating approach have long since been abandoned. Judicial review on the basis of insufficiency of evidence to support a finding of fact made by an administrative tribunal is commonplace in current usage, and the court generally intervenes on the assumption that the question of whether there is enough evidence to warrant the determination is a question of law.[196]

While this identification of insufficiency of evidence with misapprehension of a question of law enjoys support in the decided cases,[197] there is even a pre-*Pearlman* strand of judicial authority, typically in the setting of habeas corpus proceedings, which regards a finding arrived at without sufficient evidence as being marred by jurisdictional taint.[198] It is not unusual in contemporary practice for judges to assume that a finding of fact which is inadequately substantiated by evidence is reviewable without probing the basis of the assumption[199]; but lack of evidentiary support or meagre evidentiary support for conclusions of fact has been equated with violation of natural justice[200]

192. *R.* v. *Medical Appeal Tribunal, Ex p. Gilmore* [1957] 1 Q.B. 574.
193. *Sheffield Burgesses* v. *Minister of Health* [1935] 154 L.T. 183 n. at p.185.
194. *Re Bowman* [1932] 2 K.B. 621.
195. At p. 635, *per* Swift J.
196. *Quiltotex Co. Ltd* v. *Minister of Housing and Local Government* [1966] 1 Q.B. 704 at p.709.
197. *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* [1965] 1 W.L.R. 1320 at p.1326, *per* Lord Denning M.R.; R. v. *Brixton Prison Governor, Ex p. Armah* [1968] A.C. 192 at p.234 *per* Lord Reid.
198. *R.* v. *Board of Control, Ex p. Rutty* [1956] 2 Q.B. 109 at p.124; *R.* v. *Brixton Prison Governor, Ex p. Ahsan* [1969] 2 Q.B. 222.
199. *A. B. Motor Co. of Hull Ltd* v. *Minister of Housing and Local Government* (1969) 67 L.G.R. 689.
200. *Burwoods (Caterers) Ltd* v. *Secretary of State for the Environment* [1972] Est. Gaz. Dig. 1007.

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or treated as giving rise to capricious or unreasonable findings[201] or findings proceeding upon erroneous legal grounds,[202] properly reviewable as such. The respective spheres of responsibility of the tribunal and the courts were indicated by Lord Wilberforce in the *Tameside* case: "If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for [the tribunal], the court must inquire whether those facts exist, and have been taken into account."[203] One of the disquieting implications of recent trends, however, is that, under the guise of this principle, it is far from difficult for a reviewing court to embark on a substantial retrial of issues which are clearly within the purview of the tribunal of fact. It is open to a court today to examine whether the tribunal's finding is buttressed by "evidence of a kind which would justify a reasonable man in reaching the conclusion."[204] Recurring formulations ingrained in modern judicial usage[205] allow the courts wide latitude in assessing the probative value of the evidentiary material on which the inferior tribunal's findings of fact are based. The amorphous character of the developing test is likely to encourage an unacceptable expansion of the supervisory function because of the potential involvement of the courts in gauging the strength of competing representations of fact and in addressing the whole gamut of circumstantial factors having a bearing on reliability of the evidence adduced before the subordinate tribunal.

The second lever for exercising judicial review of findings of fact is of even greater practical significance. This relates to inferences from the primary facts as found by the tribunal. If "the true and only reasonable conclusion" contradicts the determination reached by the tribunal, the conclusion may be set aside in the exercise of judicial review.[206] This is done on the basis that the court has no option but to assume that there has been some error of law which has been responsible for the determination.[207] This is a broad ground

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201. *Argosy Co. Ltd* v. *I.R.C.* [1971] 1 W.L.R. 514.

202. *R.* v. *Flintshire C.C. Licensing Committee* [1957] 1 Q.B. 350.

203. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

204. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433 at p.441, *per* Buckley L.J.

205. *Attorney-General* v. *Ryan* (1980) A.C. 718; *Ong Ah Chuan* v. *Public Prosecutor* [1981] A.C. 648.

206. *Edwards* v. *Bairstow* [1956] A.C. at pp.35-36.

207. *ibid,;* cf. *R.* v. *Hillingdon Council, Ex p. Islam* [1983] A.C. 688 at p. 717. *per* Lord Lowry.

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of review, in that the court bases its intervention on the premise that the tribunal's view of the facts is one which could not have been reasonably entertained.[208] The elusive factor is that of delimiting the area within which differences of opinion are admissible within the pale of legal reasonableness.[209] The nuances of unreasonableness provide ample gruel for review which may be directed in reality towards substitution of the court's appraisal of the facts for that of the tribunal. The uncertainty of the applicable standard is exemplified by the suggestion that there can be a wide difference between power to set aside unreasonable decisions and power to set aside only those decisions which no reasonable person could make."[210] In the *Tameside* case Lord Salmon based his refusal to strike down the determination of the local authority on the impossibility of asserting that any reasonable person could have been satisfied that no reasonable authority could take, on the evidence, the view which the authority had in fact adopted.[211] But the availability of judicial review on this ground is clear: "If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding-so unreasonable that a reasonable person would not have come to it-the courts will interfere."[212] This course may be adopted either by imputing to the tribunal an unascertained error of law or simply by assuming that the tribunal's lapse in regard to assessment of the relevant factors constitutes a failure of jurisdiction.

The major pivot of review in this area has been the doctrine of jurisdictional fact. The controlling distinction is that between facts which the tribunal has power to determine and facts which must exist objectively before the tribunal has jurisdiction.[213] However, prominent trends in the developing law represent a movement away from jurisdictional criteria in regard to judicial control of factual determinations by administrative tribunals. In a case involving a Minister's decision that a sound building was property "the acquisition of which is reasonably necessary for the satisfactory development"

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208. *ibid.*

209. Cf. *Robertson* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 371.

210. See the comment on *Bendles Motors Ltd* v. *Bristol Corporation* [1963] 1 W.L.R. 247 in S.A. de Smith, *Judicial Review of Administrative Action* (4th ed. by J. M. Evans, 1980), p.137.

211. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

212. *G.E.C. Ltd* v. *Price Commission* [1975] I.C.R. 1 at p.12.

213. H.W.R. Wade, "Anglo-American Administrative Law: More Reflections" (1966) 82 L.Q.R. 226 at pp.229-230.

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of a clearance area,[214] the Court of Appeal quashed the Minister's order on the basis that he was in error in rejecting his inspector's recommendation without having available to him any independent evidence to justify his course.[215] The significant feature of the judgments is their preoccupation with the gravity of the error, rather than with characterization of the matter in regard to which the error was made as jurisdictional in character. The judgment of Lord Denning M.R., in particular, proceeds on the basis that the court could intervene not only on the ground of lack of evidence but to correct any serious misapprehension of fact which, it would seem, may be dealt with by resorting to principles scarcely distinguishable from those governing error of law.[216] But this is the thin end of the wedge: if the review process cast adrift from the comparatively stable moorings of jurisdictional theory, were to countenance judicial control of findings of fact simply on the basis of gravity of factual errors imputable to the tribunal, the character of judicial review cannot but be distorted. Interference with a finding of fact is justified in principle only if the finding is one on which the jurisdiction of the inferior tribunal depends. It is this fundamental principle that is in danger of being put in jeopardy by the shifting sands of contemporary judicial policy. Independently of any connection with jurisdictional taint, the court's assessment of the magnitude of an error thought to vitiate a finding of fact by the tribunal within its ostensible purview is an intolerably precarious standard by reference to which judicial review may be exercised. Such a standard is devoid of content and is so greatly dependent on subjective judgment that its dangers are at least as daunting as those associated with the notion of jurisdictional fact. It is a persuasive objection that the emerging standard opens the door to unbridled judicial intervention, itself lacking in a firm basis of principle.

Yet this is, unfortunately, the course on which the courts seem resolved to embark. Whether the tribunal of fact has given sufficient weight to a particular factor or not, is a matter for the court[217] which is also entitled to intervene on the ground that the findings of fact are "sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence has been misread."[218] The

214. Housing Act 1957, s.43(2).

215. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

216. At p.437.

217. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

218. *Libman* v. *General Medical Council* [1972] A.C. 217 at p. 221 *per* Lord Hailsham of St. Marylebone L.C.

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courts have asserted their power to strike down a determination founded upon "an incorrect basis of fact"[219] or upon "misunderstanding or ignorance of an established or relevant fact."[220] The tribunal of fact is similarly vulnerable where "it plainly misdirects itself in fact"[221] or fails to take into account "the true facts."[222] These formulations, which are consistent with the opportunity to make insidious inroads into the autonomy of administrative tribunals within their allotted sphere, dispense with the point of reference and irrefutable constitutional justification which has been provided for judicial review by jurisdictional doctrine. The gain conferred on the law by these innovative developments is negligible in comparison with the value of what has had to be abandoned by implication.

Judicial Control of Discretionary Administrative powers

It is necessary for a sense of balance in the judicial control of discretionary administrative power that the fullest allowance be made for the variety of options which have been committed by the legislature to the judgment of the administrative body. The first step towards evolving a measure of review, which is suitably controlled in scope, is to recognize the distinct character of discretionary powers. The conceptual framework of the modern law fulfils this requirement, in so far as abuse of discretion or irrationality is recognized as a category intrinsically separate from illegality or abuse of jurisdiction and contravention of the rules of natural justice compendiously described as procedural impropriety.[223]

The distinguishing feature is the freedom of choice available to the administrative tribunal, and it is essential that the instruments selected in exercising judicial review of administrative discretion should not impede legitimate initiative. This consideration is all the more crucial, since it is recognized today that the generality of the rule that judicial review is directed at the decision-making process rather than at the substantive decision, requires qualification in circumstances where an administrative decision is assailed on the ground of abuse of discretion, the quality of the impugned decision

219. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014 at p.1047, *per* Lord Wilberforce.

220. At p. 1030, *per* Scarman L.J. (C.A.).

221. *Secretary of State for Employment* v. *A.S.L.E.F. (No. 2)* [1972] 2 Q.B. 455 at p. 493 followed in *Smith* v. *Inner London Education Authority* [1978] 1 All E.R. 411.

222. *Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.I.R. 130.

223. *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374 at p. 410. *per* Lord Diplock: cf. R.J.F. Gordon, *Judicial Review: Law and Procedure* (1985), p.15.

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being specifically addressed by review mechanisms in this special context.[224] Adiposity of the criterion of *Wednesbury*[225] unreasonableness in the modern law heightens the need for restraint in this area. On the whole, the courts have been sympathetic to the need for a stance of relative detachment. In these cases the tribunal's decision can be reviewed only if it misconstrues its mandate or, on *Wednesbury* principles, must be deemed to have done so, since its decision is one which no reasonable body could have reached on the facts, had it construed its mandate correctly.[226] Where there is evidence on which the conclusion reached by the tribunal could be based, it is not for the court or within its jurisdiction to hold that the conclusion is wrong.[227] These self-effacing judicial approaches are conditioned by inferred legislative intent.[228] In the absence of explicit statutory conditions the courts have refrained from imposing any special procedure on the tribunal, subject to implication of the overriding requirement of fairness.[229] It is fitting that, in the presence of a genuinely extensive discretion,[230] judicial intervention should be confined typically to situations involving attempts to frustrate a statutory scheme[231] or denial of a legal entitlement in the complainant.[232] The judicial function is circumscribed in range, limited as it is to consideration of substantive *vires* in the tribunal and matters connected with procedural regularity, proper motivation and advertence to relevant criteria.[233]

Judicial willingness to allow tribunals wide latitude is indicated by the prevailing principle that the omission of a single relevant factor

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224. *Chief Constable of the North Wales Police Force* v. *Evans* [1982] 1 W.L.R. 1155 at pp.1174-1175, *per* Lord Brightman.

225. *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 K.B. 223 at p.230, *per* Lord Greene M.R.

226. *R.* v. *Criminal Injuries Compensation Board, Ex p. Thompstone* [1984] 1 W.L.R. 1234 at p.1239, *per* Donaldson M.R.

227. *Robertson* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 371 at p.380, *per* Phillips J.

228. *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government*[1965] 1 W.L.R. 1320 at pp. 1328-1329, *per* Harman L.J.

229. *Bushell* v. *Secretary of State for the Environment* [1981] A.C. 75 at p. 104, *per* Lord Diplock.

230. See. for an example, *R.* v. *Broadcasting Complaints Commission, Ex p. Owen* [1985] Q.B. 1153.

231. *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

232. *Congreve* v. *Home Office* [1976] Q.B. 629.

233. *British Dredging (Services) Ltd* v. *Secretary of State for Wales and Monmouthshire* [1975] 1 W.L.R. 687 at p.700. *per* Park J.

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may not be sufficient to justify judicial review[234] and, conversely, that the taking into account of a single irrelevant factor does not necessarily warrant quashing of the decision.[235] The present attitude of the courts is that where they are satisfied that, although a reason relied on by the tribunal may not properly be described as insubstantial, nevertheless even without it the tribunal would probably have come to the same conclusion on valid grounds, it is wrong for the court to exercise its discretion to strike down, in one way or another, the tribunal's decision.[236] This is an important qualification of the principle that the exercise of a discretionary power is invalid if it is shown that the authority exercising the power has taken an irrelevant factor into account, so long as that factor is not insignificant or insubstantial.[237] In cases involving plural motivation, partly proper and partly improper, the ambit of judicial review has been flexibly controlled by identification, in the particular statutory or factual context, of the dominant or overriding purpose.[238]

In curtailing the scope of judicial review of discretionary administrative power, the courts have relied on the distinction between adjudicative and legislative facts.[239] The entire apparatus of control predicated on evidentiary support for findings of fact is inapposite in relation to legislative facts. Modern judicial practice shows sensitivity to practical realities as to the way in which administrative decisions involving judgments based on technical considerations are reached. .In a case concerning projection of traffic flows the House of Lords considered that the use by a government department of the concept of traffic needs in the year of design of a motorway assessed by a specific method as the yardstick for determining the order in which particular stretches of the national motorway network should be constructed, was a matter of government policy and that the refusal by an inspector to permit cross-examination of the department's witnesses as to the reliability and statistical validity of the methods of traffic prediction used did not violate natural justice.[240]

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234. *R.* v. *Barnet and Camden Rent Tribunal, Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342.

235. See the case cited at n.230 *supra.*

236. ibid.

237. *Hanks* v. *Minister of Housing and Local Government* [1963] 1 Q.B. 999 at pp.1018-1019, *per* Megaw J,; cf. *Earl Fitzwilliam's Estates Co.* v. *Minister of Town and Country Planning* [1951] 2 K.B. 284 at p.307, *per* Denning L.J.

238. *R.* v. *I.L.E.A., Ex p. Westminister C.C.* [1984] *The Times,* December 31.

239. See K.C. Davis, *Administrative Law Text* (3rd ed.). para. 15.03.

240. *Bushell* v. *Secretary of State for the Environment* [1981] A.C. 75.

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In contexts such as these the reasoning of ıe courts contains, as a significant element, an attempt to draw a ɔ, but admittedly thin, dividing line between questions of fact and questions of policy. Given that these tend to merge into each other, the recognition of gradations between these two areas contributes to a balanced approach to judicial review. In projecting traffic requirements for the future, Lord Lane C.J. observed that "The question of need is a matter of policy or akin to a matter of policy,"[241] with the implication that the courts should be encouraged to distance themselves. In justifying the decision that the Minister was not entitled to reverse without supporting evidence his inspector's recommendation that a sound building should not be included in a clearance order, on the ground that inclusion of the building was "reasonably necessary"[242] for the satisfactory development of the clearance area, Lord Denning M.R. commented: "The question of what is 'reasonably necessary' is not planning policy. It is an inference of fact."[243] A previous case where the Court of Appeal declined to intervene[244] was distinguished on the basis that the planning legislation there contemplated contained a more peripheral policy element.

But the courts retain at their command malleable instruments of review which can serve them well when occasion demands. The comprehensive rubric of review available to them relates to the exercise of administrative discretion on the basis of incorrect legal principles.[245] However, the approaches which have been developed in relation to this head of review sometimes tend to become unwieldy. It has been suggested, for instance, that a perfectly legitimate consideration might become irrelevant if it is given excessive and disproportionate weight[246] – an attitude which flies in the face of the comment by the Queen's Bench Division that "It is not for this court to consider the weight which ought to have been attached to that part of the evidence or to speculate whether or not the Minister gave undue weight to it."[247] The courts have succumbed to the

241. At p. 123.

242. Housing Act 1957, s.43(2).

243. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* [1971] 1 W.L.R. 433.

244. *Lord Luke of Pavenham* v. *Minister of Housing and Local Government* [1968] 1 Q.B. 172.

245. *Melwood Units Pty Ltd* v. *Commissioner of Main Roads* [1979] A.C. 426 (P.C.); R. v. *Sheffield Crown Court, Ex p. Mecca Leisure Ltd* (1983) 148 J.P. 225.

246. *R.* v. *Police Complaints Board, Ex p. Madden* [1983] 1 W.L.R. 447.

247. *Iveagh (Earl of)* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 147 at p. 159. *per* Megaw J.

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temptation from time to time to go too far in pursuit of the objective that "When discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly."[248] Distention of the applicable criteria is due mainly to too liberal an appeal to the notion that the exercise of discretion on wrong principles amounts to error of law.[249] It is hardly an acceptable approach that grounds such as unreasonableness, self-misdirection, extraneous motivation and irrelevant considerations are "so many and so various that it virtually means that an erroneous exercise of discretion is nearly always due to an error in point of law."[250] This allows too little scope for the exercise of options within the tribunal's competence.

The primary factor which has led to this lack of balance is a somewhat indiscriminate use of the tests of wrong question asked and wrong test applied. This is illustrated by Eveleigh L.J.'s application of the former test in *Pearlman's* case in a situation where the more realistic analysis is that, although the right question was asked, the answer given was wrong in the opinion of the reviewing court.[251] The overlapping bases of review present the courts with little difficulty in manipulating jurisdictional criteria so as to strike down the exercise of discretion on the basis that the repository of the discretion failed to direct his mind to the right question and, consequently, did not direct himself properly in law.[252] A sound approach to judicial review of administrative discretion requires, in principle, firm resolve to contain the area of *Wednesbury* unreasonableness which, in the extended form it seems to have asumed today, lends itself to invocation for the purpose of reversing, in effect, the exercise of an administrative discretion simply upon the ground of judicial preference of one view of the facts to another, or preference of one moral or practical approach to a problem to another. Recent decisions like *Wheeler,*[253] *Gillick* [254] and *R. v. Secretary of State for Transport, ex p. G.L.C.*[255] exemplify the extent of the risk that the courts may

248. *Laker Airways* v. *Department of Trade* [1977] 1 Q.B. 643 at pp. 705-706, *per* Lord Denning M.R.

249. *Priddle* v. *Fisher & Sons* [1968] 1 W.L.R. 1478 at p.1481, *per* Lord Parker C.J.

250. *Re S. (a Minor)* [1977] Q.B. 120 at p.141, *per* Lord Denning M.R.

251. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56 at pp. 76-77. See also *Brassington* v. *Cauldron Wholesale Ltd* [1978] I.C.R. 405.

252. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* [1977] A.C. 1014.

253. *Wheeler* v. *Leicester City Council* [1985] A.C. 1054.

254. *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112.

255. [1986] Q.B. 556.

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become embroiled in political and ethical controversies, in regard to which opinion in the community is marked by the greatest diversity. It is important to restore balance to the law by insisting that *Wednesbury* unreasonableness should extend no further than the area in which one course of action, and no other, is rationally consistent with the established facts.

Conclusion

The ramifications of jurisdictional concepts, and competing principles which have been called in aid increasingly in recent years, represent an intellectual minefield potentially destructive of a good deal of traditional administrative law doctrine. Disenchantment with several aspects of jurisdictional doctrine provided the main stimulus for the new developments. One of the redeeming features of the application of jurisdictional tests has been the growing pragmatism of the courts in considering, as the basis of the question whether a particular element is to be characterized as jurisdictional or not, realities connected with the effective determination of the matter. Where, for example, pleadings and sworn evidence are necessary for the proper decision of a question, the courts have been inclined to treat the matter as jurisdictional so as to transfer responsibility from the tribunal to the court.[256] Recently the Court of Appeal, in holding that it had no role to play in the investigation of refugee status for illegal immigrants, pointed out that the question whether an individual should be afforded asylum might involve the consideration of foreign policy, the assessment of regimes overseas and ancillary matters, with which a court of law is not adequately equipped to deal.[257]

The emerging principles of review presage the eclipse of jurisdictional criteria in regard to matters of law as well as matters of fact. In the former area the identification of all errors of law with jurisdictional excess has made necesary the recognition of a variety of qualifying rules which substitute, in effect, for jurisdictional tests the even greater uncertainty of other conceptual and discretionary principles which reflect no credit on the law. Disingenuous methods have had to be found for reintroducing, by other avenues, restraints on review which sweeping judicial approaches purported to abandon. The practical

256. *R.* v. *Fullham, Hammersmith and Kensington Rent Tribunal, Ex p. Zerek* [1951] 2 K.B. 1 at p.17, *per* Lord Goddard C.J.

257. *R.* v. *Secretary of State for the Home Department, Ex p. Dugdaycay, Santis and Norman* [1986] 1 W.L.R. 155.

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effect of the law remains much the same, and the seemingly dramatic transformation of underlying principle has largely been an unprofitable exercise. In the field of factual adjudication the movement away from jurisdictional notions has been attended by the emergence of broadly formulated tests for intervention which, in the course of further development of the law, are likely to require limiting principles of the kind for which a need was felt in exercising judicial review for error of law. Experience in the latter context engenders little confidence in the utility, or the wisdom, of the incipient movement of the courts towards enhanced control of factual error on the basis of open-ended criteria addressing, in substance, the gravity of the error imputable to the tribunal. Throughout the spectrum of the modern developments the conspicuous feature of the law consists of bold, wide-ranging judicial assertions, almost akin to legislative prescriptions which, in this area, seem to have taken the place of a gradual accretion of principle by the case law technique. But this method of development has proved unrewarding, for each major advance has been followed by a series of critical, if less apparent, withdrawals. The complexity of the evolving mosaic is hardly warranted by the very limited practical gain which has been made.

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3

NATURAL JUSTICE AND DEGREES OF INVALIDITY OF ADMINISTRATIVE ACTION

Introduction

TRANSFORMATION of the content of natural justice, coupled with a reappraisal of the dimensions of the concept in administrative adjudication. represents a significant feature of contemporary administrative law. However, while recent judicial decisions infuse new vigour into natural justice in the modern social context, a lively controversy continues in regard to the degree of vulnerability of administrative action taken in violation of the requirements of natural justice. This finds expression in the familiar dichotomy between "void" and "voidable" administrative acts.

Despite the assertion that "There are no degrees of nullity,"[1] the avenues of development of modern law leave no room for doubt that established gradations are not only inherent in the conceptual frame-work of the subject but have crucial implications from a pragmatic standpoint. Thus, a voidable decision, although capable of being assailed in appropriate proceedings by a party having sufficient interest,[2] is not exposed to collateral impeachment.[3] The circumstance that the act is endowed by the law with qualified validity precludes a person who acts in reliance on a voidable act from being characterized as a trespasser.[4] The distinction between a void and a voidable decision has direct relevance to the approach by a court to the exercise of discretion in respect of availability of the remedy sought,[5] A voidable judgment, furthermore, is insufficient to sustain garnishee proceedings.[6] It has been suggested that the rules governing *locus standi* impose far more stringent limitations in regard to impugning voidable administrative action than those applicable to challenges against action properly classified as void *ab initio*.[7] Statutory provisions

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1. *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 170, *per* Lord Reid.
2. *Gregory* v. *Camden London Borough Council* [1966] 1 W.L.R. 899.
3. *Wildes* v. *Russell* (1866) L.R.I.C.P.722.
4. *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1, 22.
5. *Stevenson* v. *United Road Transport Union* [1977] I.C.R. 893.
6. *Lazard Brothers & Co.* v. *Midland Bank Ltd* [1933] A.C. 289.
7. *Durayappah* v. *Fernando* [1967] 2 A.C. 337.

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which purport to exclude or curtail supervisory jurisdiction are accorded disparate operation in relation to void and voidable acts.[8] This difference of approach is manifested overtly in the judicial interpretation of preclusive provisions which seek to debar the remedy of *certiorari*.[9]

Notwithstanding discrepant judicial assessment of the consequences of an invalid administrative act, dependent on classification, there is remarkably little authority in English and Commonwealth law regarding the proper basis of classification. Contrary to the preponderant view in England that a decision rendered in contravention of the postulate of a hearing is "of no effect and null and void"[10] in consequence of want of jurisdiction,[11] the suggestion has been made that no jurisdictional deficiency vitiates such a decision which may be set aside only in the exercise of judicial discretion.[12] The effect of bias on the validity of a decision has been divergently explained by the terminology of void[13] and voidable.[14] The latter view has found emphatic support in Australia[15] and in Ireland.[16] In the context of actions for money had and received, infraction of the rules of natural justice has been treated as making a decision void,[17] although a countervailing current of authority, too, exists.[18] Similarly, in the setting of actions for trespass in connection with the enforcement of

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8. *Ridge* v. *Baldwin* [1964] A.C. 40, 99–100, *per* Lord Evershed, and 120, *per* Lord Morris.

9. *Ex p. Bradlaugh* (1878) 3 Q.B.D. 509; *cf. R.* v. *Judge Sir Donald Hurst* [1960] 2 Q.B. 133.

10. *Ridge* v. *Baldwin* [1964] A.C. 40, 125, *per* Lord Morris; *cf. Wood* v. *Wood* (1874) L.R. 9 Ex. 190.

11. *R.* v. *North, ex p. Oakey* [1927] 1 K.B. 491, 503.

12. *Ridge* v. *Baldwin* [1964] A.C. 40, 91, *per* Lord Evershed; *cf.* S.A. de Smith, *Judicial Review of Administrative Action* (4th ed., 1980), p.244.

13. *R.* v. *Rand* (1866) L.R. 1 Q.B. 230; *Leeson* v. *General Medical Council* (1889) 43 Ch. D. 366; *Allinson* v. *General Medical Council* [1894] 1 Q.B. 750; *R.* v. *Nat Bell Liquors Ltd* [1922] 2 A.C. 128; *Cooper* v. *Wilson* [1937] 2 K.B. 309; *R.* v. *Paddington Furnished Houses Rent Tribunals, ex p. Kendal Hotels Ltd.* [1947] 1 All E.R. 148; *R.* v. *Paddington Rent Tribunal, ex p. Perry* [1956] 1 Q.B. 229; *Oscroft* v. *Benabo* [1967] 1 W.L.R. 1087.

14. *Dimes* v. *Grand Junction Canal* (1852) 3 H.L.C. 759; *Phillips* v. *Eyre* (1870) L.R. 6 Q.B 1.

15. D.G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971), pp. 153–155.

16. *R.* v. *(Hastings) Galway* JJ. [1906] 2 I.R. 499.

17. *Capel* v. *Child* (1832) 2 C. & J. 558; *Bonaker* v. *Evans* (1850) 16 Q.B. 162; *Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636.

18. See the case cited at note 3, *supra*.

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sanctions imposed without a hearing, the impugned decision has been irreconcilably regarded as void[19] and as voidable.[20] These conflicting lines of authority, reflecting the lack of clarity in the theoretical perspectives of the law, justify re-examination of the problem in the light of current policy objectives.

Void and Voidable Acts: Overlapping Consequences

It has been claimed that "English courts have never allowed the tyranny of words to stand in the way of doing justice."[21] In the field of administrative law. the preoccupation of English courts with the equities inherent in specific factual and statutory contexts has certainly discouraged conceptual and terminological inflexibility. A strand of authority refusing prohibition on the ground that the error complained of did not make the decision or action void,[22] cannot be reconciled convincingly with other decisions envisaging the grant of prohibition without advertence to the disinction between void and voidable acts.[23] In liquor licensing cases mandamus has sometimes been issued unaccompanied by *certiorari* on the basis that a decision which does not conform with the requisites of natural justice is void,[24] but there is a competing current of authority predicated on the assumption that, the decision being only voidable, mandamus does not lie to direct consideration of the matter afresh until the previous decision is deprived of force by *certiorari*.[25] Injunctive relief has been available without discrimination in respect of void[26] and voidable[27] acts. Breach of directory and mandatory provisions governing the exercise of statutory powers may require, in suitable contexts, the denial of legal effect in varying degrees.[28] The vagaries of judicial usage, underscoring

19. *Hopkins* v. *Smethwick Local Board of Health* (1890) 24 Q.B.D. 713.

20. *Goss* v. *Jackson* (1800) 3 Esp. 198.

21. M.B. Akehurst, "Void or Voidable? – Natural Justice and Unnatural Meanings" (1968) 31 M.L.R. 138, 151.

22. *Re Lenaghan* (1848) 2 Exch. 333; *Re Zohrab* v. *Smith* (1848) 17 L.J.Q.B. 174.

23. *R. (Courtenay)* v. *Emerson* [1913] 2 I.R. 377; *R.* v. *Salford Assessments Committee, ex p. Ogden* [1937] 2 K.B. 1.

24. *R.* v. *Cotham* [1898] 1 Q.B. 802; *R.* v. *Birmingham Licensing Planning Committee, ex p. Kennedy* [1972] 2 Q.B. 140; *Fletcher* v. *London (Metropolis) Licensing Planning Committee* [1976] A.C. 150. See also *R.* v. *L.C.C., ex p. Akkersdyk* [1892] 1 Q.B. 190; *R.* v. *Halifax JJ., ex p. Robinson* (1912) 76 J.P. 233.

25. *R.* v. *Kent JJ.* (1880) 44 J.P. 298.

26. *Allinson* v. *General Medical Council* [1894] 1 Q.B. 750.

27. *Annamunthodo* v. *Oilfield Workers' Trade Union* [1961] A.C. 945, 956–957, *per* Lord Denning.

28. S.A. de Smith, *op. cit.* p. 151; *cf Clayton* v. *Heffron* (1960) 105 C.L.R. 214, 247 (H.C.A.).

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the predominance of empirical factors, are illustrated by decided cases in the setting of declaratory proceedings. Although it is theoretically anomalous to regard a voidable decision (vitiated, for instance, by error of law on the face of the record) as redressible by a declaration,[29] English courts have recognized, despite lingering doubts,[30] that supervisory jurisdiction exercised by means of a declaration is not necessarily confined to jurisdictional defects which totally denude the decision assailed of validity.[31]

This salutary resilience in the application of judicial remedies directed towards the control of public power has resulted in a substantial overlap in regard to the consequences of void and voidable acts in several areas.

(a) *The necessity of judicial intervention in respect of void administrative acts.*

Where the decision of an administrative tribunal is a complete nullity, a court may decline to make any order on the ground that judicial intervention is superfluous. However, pragmatic considerations may necessitate relief in circumstances where the party placed in jeopardy by the decision requires the protection of a judicial order that the decision is not binding. The reality that "An order, even if not made in good faith, is still an act capable of legal consequences (and) bears no brand of invalidity upon its forehead"[32] highlights the need for recourse to judicial proceedings to establish the invalidity of an order which would otherwise remain ostensibly effective.

The crucial test of invalidity of an administrative decision is the court's recognition that the decision is a nullity. The presumption of validity of an administrative order in appropriate circumstances[33] heightens the necessity of judicial intervention. Moreover, an

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29. *Healey* v. *Minister of Health* [1955] 1 Q.B. 221; *cf.* H.W.R. Wade, *Administrative Law* (5th ed., 1982), p. 471.

30. *White* v. *Kuzych* [1951] A.C. 585; *East Midlands Gas Board* v. *Doncaster Corporation* [1953] 1 W.L.R. 54; *Punton* v. *Ministry of Pensions and National Insurance* (No.2) [1964] 1 W.L.R. 226.

31. *Memudu Lagunju* v. *Olubadan-in-Council* [1952] A.C. 387; *Kanda* v. *Government of Malaya* [1962] A.C. 322; *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532; *H.T.V. Ltd* v. *Price Commission* [1976] I.C.R.. 170.

32. *Smith* v. *East Elloe Rural District Council* [1956] A.C. 736, 769, *per* Lord Redcliffe; *cf. Lovelock* v. *Minister of Transport* (1980) 40 P. & C.R. 336; *London and Clydeside Estates Ltd* v. *Aberdeen District Council* [1980] 1 W.L.R. 182.

33. *Hoffmann-La Roche (F.) & Co. A.G.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295.

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interlocutory order may be available to restrain the infringement of an administrative decision which, *primae impressionis*, has the appearance of validity.[34] Although, in theory, a void act has no legal effect from the outset, while a voidable act remains valid and binding until it is set aside, the desirability of access to the courts to demonstrate the ineffectiveness of the act is often evident in relation to both categories of acts.

(b) *The incidence of appellate jurisdiction*

Voidness of a decision has been held in some English[35] and New Zealand[36] cases to preclude the invocation of a right of appeal from it to the courts. This situation, it has been suggested, calls for the exercise of supervisory jurisdiction by the instrumentality of *certiorari* rather than for the application of appellate procedures.[37] In keeping with this approach, an appeal against an invalid decision to a higher administrative body has been looked upon as a nullity in subsequent judicial proceedings.[38] In New Zealand it has been declared that appellate proceedings cannot be impugned collaterally in a tribunal of restricted jurisdiction in the absence of a manifest error pertaining to *vires*.[39] This approach, however, is incompatible with the consensus of judicial opinion in the Commonwealth. In England[40] as well as in Australia[41] it is now conceded that a void decision may be susceptible to legitimate appellate proceedings. The conclusion that appellate proceedings in respect of void decisions are not invariably nugatory[42] has been supported on the premise that the impugned

34. *ibid.*; *cf. Re D. (Minors)* [1973] Fam. 179.

35. *Chapman* v. *Earl* [1968] 1 W.L.R. 315; *R.* v. *Jones (Gwyn)* [1969] 2 Q.B. 33. But see *Crane* v. *Public Prosecutor* [1921] 2 A.C. 299. 323.

36. *Denton* v. *Auckland City* [1969] N.Z.L.R. 256 (N.Z.S.C.).

37. *Campbell* v. *Rochdale General Commissioners* [1975] 2 All E.R. 385; *Hanson* v. *Church Commissioners for England* [1978] Q.B. 823.

38. *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34; *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 578.

39. *Reid* v. *Rowley* [1977] 2 N.Z.L.R. 472, 483 (N.Z.S.C.).

40. *Kestell* v. *Langmaid* [1950] 1 K.B.. 233; *Button* v. *Jenkins* [1975] 2 All E.R. 585; *Wilcox* v. *H.G.S.* [1976] I.C.R. 306; *Ottley* v. *Morris* [1979] 1 All E.R. 65.

41. *Meyers* v. *Casey* (1913) 17 C.L.R. 90, 116 *per* Isaacs J. (H.C.A.); *Russel* v. *Bates* (1927) 40 C.L.R. 209 (H.C.A.); *Australian Workers' Union* v. *Bowen (No. 2)* (1948) 77 C.L.R. 601, 618, *per* Latham C.J., 619, *per* Rich J., 632, *per* Dixon J. (H.C.A.); *Culvin* v. *Carr* (1978) 22 A.L.R. 417, 425–426, *per* Lord Wilberforce (P.C.).

42. *Palmer (George A.) Ltd* v. *Beeby* [1978] I.C.R. 196.

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decision, generating consequences which remain operative until the decision is set aside, cannot in any realistic sense be described as legally non-existent.[43]

(c) *The effect of rectification of defects by an appellate administrative tribunal*

Defects vitiating the original determination of an administrative tribunal are not necessarily remedied by impeccable proceedings in an appellate forum.[44] Nevertheless, a defect such as breach of the rules of natural justice may be "cured" by a full and fair hearing *de novo* on appeal,[45] except in circumstances where compliance with natural justice at both stages is thought to be an essential condition of procedural fairness[46] or, possibly, where the original decision is tainted by bias.[47] Whether the decision of an administrative tribunal which would otherwise be vitiated by denial of natural justice has the defect "cured" or not by a fresh hearing on appeal, provided that the latter hearing itself is marred by no comparable defect, depends on such factors as the nature and gravity of the error committed at first instance,[48] the probability of bias at the subsequent hearing[49] and the amplitude of the powers in pursuance of which the hearing on appeal was conducted.[50] By reference to these criteria, a subsequent proper hearing by the same body[51] and, *a fortiori*, by a differently constituted body[52] may be accepted as an adequate rectification of the blemishes attendant on the original hearing. If the subsequent hearing is so conducted as to confer on the appellant every substantial advantage of natural justice,[53] the initial defect no longer taints the ultimate decision[54]; for an appeal which satisfies the

43. *Calvin* v. *Carr* (1978) 22 A.L.R. 417, 426 (P.C.).

44. *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34; *Denton* v. *Auckland City* [1969] N.Z.L.R. 256 (N.Z.S.C.).

45. S.A. de Smith, *op. cit.* p. 243.

46. See the cases cited at note 45, *supra.*

47. *R.* v. *Moylan, ex p. Jenkins* [1974] W.A.R. 176 (S.C. of W.A.).

48. *Anderton* v. *Auckland City Council* [1978] 1 N.Z.L.R. 657, 700 (N.Z.S.C.).

49. S.A. de Smith, *op cit.* p. 243.

50. *Pillai* v. *Singapore City Council* [1968] 1 W.L.R. 1278; *Wislang* v. *Medical Practitioners Disciplinary Committee* [1974] 1 N.Z.L.R. 29 (N.Z.S.C.).

51. *Posluns* v. *Toronto Stock Exchange* [1968] S.C.R. 330 (S.C.C.).

52. *Rose* v. *Humbles* [1972] 1 W.L.R. 33.

53. *King* v. *University of Saskatchewan* (1969) 6 D.L.R. (3d) 120 (S.C.C.).

54. *Stringer* v. *Minister of Housing and Local Government* [1970] 1 W.L.R. 1278; *Glynn* v. *Keele University* [1971] 1 W.L.R. 487.

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postulates of the law is not an "affirmation" of the original invalid decision.[55] The principle, substantiated by firm judicial authority in Australia[56] and in Canada,[57] has a cogent rationale from the standpoint of policy, in so far as the petitioner's grievance is relegated by supervening circumstances to an element of the previous sequence of events.

(d) *Prior exhaustion of domestic or appellate remedies*

There is slender authority in England that a voidable act, since it has initial validity, cannot be impugned effectively in the courts until appellate remedies conferred by the applicable statutory regime have been exhausted.[58] However, the dominant view in English law is that a person aggrieved by an invalid decision is not required, as an indispensable condition of invoking the supervisory jurisdiction of the courts, to exhaust administrative or domestic appellate remedies.[59] But a court may, at its discretion, withhold relief against a void[60] and, *a fortiori,* a voidable decision on the basis of non-exhaustion of domestic appellate remedies. In Australia the view has been favoured that, if an appeal to a domestic tribunal has a curative potential in respect of an error in the original administrative proceedings, the party aggrieved should be required to have recourse to his right of appeal to the superior domestic tribunal before seeking a judicial remedy.[61]

(e) *The doctrine of waiver or approbation*

It is axiomatic that the jurisdiction with which a tribunal is invested cannot be enlarged by the consent of the parties.[62] Nevertheless, a

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55. *De Verteuil* v. *Knaggs* [1918] A.C. 557; *Wahiwala* v. *Secretary of State for the Environment* [1977] J.P.L. 511.

56. *Australian Workers Union* v. *Bowen (No.2)* (1948) 77 C.L.R. 601 (H.C.A.); but see *Hall* v. *New South Wales Trotting Club Ltd* [1976] 1 N.S.W.L.R. 323, 341 (S.C. of N.S.W.).

57. *Re Westbrook Construction Ltd and British Columbia Provincial Council of Carpenters* (1980) 104 D.L.R. (3d) 414 (S.C. of B.C.).

58. *White* v. *Kuzych* [1951] A.C. 585; see, however, *Lawlor* v. *Union of Post Office Workers* [1965] Ch. 712.

59. *Leigh* v. *National Union of Railwaymen* [1970] Ch. 326; *R.* v. *Hillingdon L.B.C., ex p. Royco Homes Ltd* [1974] Q.B. 720; *R.* v. *Hull Prison Board of Visitors, ex p. St Germain* [1979] Q.B. 425.

60. *Miller* v. *Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468; *Kent C.C.* v. *Secretary of State for the Environment* (1977) 75 L.G.R. 452.

61. *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379 (H.C.A.).

62. *Farquharson* v. *Morgan* [1894] 1 Q.B. 552.

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distinction has been drawn between total[63] and contingent[64] want of jurisdiction so as to enable defects encompassed by the latter category to be made impregnable by the conduct of the aggrieved party. A corresponding contrast between nullities and irregularities has been suggested for the purpose of operation of the doctrine of waiver.[65]

The view that waiver is effective only in circumstances where the defect does not impinge on jurisdiction[66] has the oblique support of the House of Lords.[67] The better view, however, is that the foundation of waiver transcends the dichotomy between void and voidable acts.[68] It has been explicitly asserted that entitlement to relief may be forfeited by waiver "no matter whether the proceedings ... are void or voidable."[69] Contrary to the suggestion that some infractions of natural justice are so fundamental in their consequences as to be extrinsic to the scope of legally operative waiver,[70] the preferable approach is that the effect of waiver is referable to conscious acquiescence[71] leading to estoppel[72] and to the discretionary character of prerogative remedies[73] rather than to gradations of invalidity attaching to the impugned act.[74] The decided cases support with moderate consistency the proposition that recourse to appellate procedures in a domestic forum is not construable as an act signifying waiver of the initial transgression.[75]

Degrees of Invalidity: Practical Implications

Although the effects of void and voidable acts intersect demonstrably in many areas, the distinction has practical value in administrative law from several points of view.

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63. *Mayes* v. *Mayes* [1971] 1 W.L.R. 679; *McGrath* v. *Higgins* (1976) 13 S.A.S.R. 365 (S.C. of S.A.).

64. *Jones* v. *James* (1850) 19 L.J.Q.B. 257; *Moore* v. *Gamgee* (1890) 25 Q.B.D. 444.

65. *Hamp-Adams* v. *Hall* [1911] 2 K.B. 942.

66. *Corrigal* v. *London and Blackwell Railway* (1843) 5 Man. & G. 219; *Fry* v. *Moore* (1889) 23 Q.B.D. 395.

67. *Ridge* v. *Baldwin* [1964] A.C. 40, 126, *per* Lord Morris.

68. *ibid.* at pp. 80-81, *per* Lord Reid; *cf. Ex p. Medwin* (1853) 1 E. & B. 609; *Serjeant* v. *Dale* (1877) 2 Q.B.D.558.

69. *R.* v. *Williams, ex p. Phillips* [1914] 1 K.B. 608.

70. *Mayes* v. *Mayes* [1971] 1 W.L.R. 679, 684.

71. *R.* v. *Lilydale Magistrates' Court, ex p. Ciccone* [1973] V.R. 122 (S.C. of Vict.).

72. *ibid.*

73. *R.* v. *Inner London Quarter Sessions, ex. p. D'Souza* [1970] 1 W.L.R. 376.

74. But see *Wakefield Local Board of Health* v. *West Riding and Grimsby Railway* (1865) L.R. 1 Q.B. 85.

75. *Ridge* v. *Baldwin* [1964] A.C. 40, 135–136, *per* Lord Hodson; *Annamunthodo* v. *Oilfield Workers' Trade Union* [1961] A.C. 945.

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(a) *Qualitative evaluation of the breach*

Once the act assailed is regarded as voidable, judicial discretion is the determining factor in regard to the decision whether the act is to be upheld or set aside. The concept of voidability, therefore, entails the practical advantage that the extent to which the consequences of an administrative act are vitiated is controlled by the gravity of the blemish which taints the act. Breach of distinct ramifications of the principle *audi alteram partem*, dissimilar in regard to the seriousness of their effects, has been accorded different assessment in England. Thus, the total absence of notice to a party has been held to render the proceedings void *ab initio*, [76] while the use of substituted service in inappropriate circumstances involves a qualified degree of invalidity subsumed under the notion of voidability.[77] If the substituted service is defective, the sanction is voidness rather than voidability.[78]

An appraisal of qualitative gradations of invalidity is an aspect of the approach that an administrative decision is voidable if it is made without an adequate hearing but void if, in addition to the lack of a proper hearing, the decision has been arrived at on frivolous or unconvincing grounds.[79] This degree of leverage available to the courts in regard to control of the consequences of invalid administrative action is beneficial, but the value of the mechanism is impaired by the equation of manifest defects of jurisdiction with substantial error-a development which has been taken for granted in some judicial observations.[80]

(b) *Causal criteria*

There is a cleavage of judicial opinion in regard to the question whether breach of natural justice, *per se*, is redressible by a prerogative order or declaratory judgment[81] or whether proof of substantial prejudice is an independent requirement of relief.[82] The rigour of

76. *R.* v. *Huntingdon Confirming Authority* [1929] 1 K.B. 698.

77. *Wiseman* v. *Wiseman* [1953] p.79.

78. *Craig* v. *Kanssen* [1943] K.B. 256; *Nair* v. *Teik* [1967] 2 All E.R. 34.

79. *Ridge* v. *Baldwin* [1964] A.C. 40, 91 *per* Lord Evershed.

80. *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417; *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd* [1966] 1 Q.B. 380, 402 *per* Lord Denning M.R.

81. *R.* v. *Registrar of Building Societies* [1960] 1 W.L.R. 669; *R.* v. *Thames Magistrates' Court, ex p. Polemis* [1974] 1 W.L.R. 1371; *R.* v. *Devon and Cornwall Rent Tribunal, ex p. West* (1975) 29 P & C.R. 316.

82. *Scott* v. *Aberdeen Corporation* [1976] S.L.R. 141; *Hickmott* v. *Dorset C.C.* (1977) 35 P. & C.R. 195; *Bhardwaj* v. *Post Office* [1978] I.C.R. 144.

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the former approach, which has encountered a hostile academic response,[83] is mitigated by the refinement involved in the definition of breach of natural justice as including the risk that the lapse complained of might have affected the result.[84] A comparable rationale pervades the disinclination of the courts to dispense remedies in circumstances where it is apparent that conformity with the rules of natural justice would have made no difference to the outcome.[85] Clearly, causal criteria which limit the scope of relief on the ground of an insufficiently proximate nexus of the procedural irregularity with the adverse result reached in the proceedings can be given freer rein in respect of voidable, than in the area of void, administrative acts.[86]

(c) *The ambit of preclusive statutory provisions*

Void, as opposed to voidable, acts are disentitled to the protection of legislative provisions which seek to preclude the exercise of supervisory jurisdiction by the regular courts.[87] The reason is that the acts of a subordinate tribunal, committed in contravention of jurisdictional requirements, are totally devoid of juridical content.[88] The Supreme Court of Queensland has declared that "A privative clause needs for its operation a valid determination, so that if the determination is a nullity there remains nothing for the privative clause to protect from the prerogative power of this court."[89] There is clear authority in the Australian jurisdictions of New South Wales,[90]

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83. M.B. Akehurst, "Void or Voidable? – Natural Justice and Unnatural Meanings" (1968) 31 M.L.R. 2, 7.

84. *R.* v. *Visiting Justice at Her Majesty's Prison, Pentridge, ex p. Walker* [1975] V.R. 883 (S.C. of Vict.); *Lake District Special Planning Board* v. *Secretary of State for the Environment* [1975] J.P.L. 220; *Performance Cars Ltd* v. *Secretary of State for the Environment* (1977) 34 P. & C.R. 92.

85. *Davis* v. *Carew-Pole* [1956] 1 W.L.R. 833; *Byrne* v. *Kinematograph Renters Society Ltd* [1958] 1 W.L.R. 762; *Lamond* v. *Barnett* [1964] N.Z.L.R. 195 (N.Z.S.C.).

86. See the cases cited at note 60, *supra*, for the view that relief may be withheld even against a void act on the ground that actual prejudice has not been sustained by the applicant for relief. See, however, for the contrary view, *Savoury* v. *Secretary of State for Wales* (1976) 31 P. & C.R. 344, 347.

87. *Ridge* v. *Baldwin* [1964] A.C. 40, 81, *per* Lord Reid.

88. *R.* v. *Chairman of General Sessions at Hamilton, ex p. Atterby* [1959] V.R. 800, 808, *per* Smith J. (S.C. of Vict.).

89. *R.* v. *Will and Toon, ex p. Visona* [1960] Q.R. 123, 131, *per* Wanstall J. (S.C. of Q.).

90. *Ex p. Northern Rivers Rutile Pty. Ltd, re Claye* [1965] 82 W.N. (Pt.1) (N.S.W.) 514, 519-520, *per* Asprey J. (S.C. of N.S.W.); *Ex p. Blackwell, re Hateley* [1965] N.S.W.R. 1061, 1064, *per* Wallace J. (S.C. of N.S.W.).

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Victoria[91] and the Northern Territory[92] that the vulnerability of an administrative order made in excess of the *vires* assigned to the tribunal is unaffected by a privative clause duly enacted.[93]

(d) *Repercussions of degrees of invalidity on rules as to standing*

It has been suggested that *locus standi* to assail void and voidable administrative acts is, in principle, distinguishable.[94] The Privy Council, holding that the ex-mayor of a municipal council was not entitled to a writ of *certiorari* quashing a ministerial order which purported to dissolve the council without providing the opportunity for a hearing, has pointed out that relief would have been available to the petitioner if the Minister's action had been void and not voidable.[95] The implication is that a greater degree of interest is required to have a voidable act set aside than is necessary to impugn a void act. However, fluctuating tests of standing based on degrees of invalidity, which have incurred the disapproval of the House of Lords[96] and the Supreme Court of New Zealand,[97] are likely to introduce further perplexity into an already beleaguered area of the law.

The Effect of Breach of the Rules of Natural Justice

(a) *Voidness: the jurisdictional criterion*

Administrative action which infringes the rules of natural justice has been described as "void,"[98] "a nullity,"[99] "null and void,"[100]

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91. *R.* v. *Foster, ex p. Isaacs* [1941] V.L.R. 77, 83, *per* Martin J. (S.C. of Vict.).

92. *R.* v. *Justices of Rankine River, ex p. Sydney* [1962] F.L.R. 215, 217, *per* Bridge J. (S.C. of N.T.).

93. An injunction has been issued, although the order of the tribunal was declared by the empowering legislation to be "binding and conclusive": *Wayman* v. *Perseverance Lodge* [1917] 1 K.B. 677.

94. See the case cited at note 95, *infra*.

95. *Durayappah* v. *Fernando* [1967] 2 A.C. 337.

96. *Hoffmann-La Roche (F.) & Co. A.G.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295, 358, *per* Lord Wilberforce.

97. *Denton* v. *Auckland City* [1969] N.Z.L.R. 256, 268, *per* Speight J. (N.Z.S.C.).

98. *Banks* v. *Transport Regulation Board* (1968) 42 A.L.J.R. 64, 70 *per* Barwick C.J. (H.C.A.); *cf. Att.-Gen.* v. *Ryan* [1980] A.C. 143.

99. *R.* v. *Nat Bell Liquors Ltd* [1922] 2 A.C. 128, 160, *per* Lord Sumner.

100. *Cooper* v. *Wilson* [1937] 2 All E.R. 726; *Vine* v. *National Dock Labour Board* [1956] 3 All E.R. 939; *Cleworth* v. *Barrow* (1978) 20 A.L.R. 359, 371, *per* Sweeney, Evatt and Keely JJ. (F.C.A., Industr. Div.).

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"wholly void,"[101] "void *ab initio*"[102] and "void and of no effect."[103] A strand of opinion, reinforced by decisions of impressive antiquity,[104] characterizes departure from either[105] of the rules of natural justice as necessarily bringing about voidness of the resulting decision or action. Indeed, this uncompromising attitude has been said to be required by "the basic logic of administrative law."[106]

A striking feature of the conceptual basis of this group of authorities is the emphasis on breach of natural justice as a factor symptomatic of erosion of jurisdiction. Failure to comply with natural justice, the House of Lords has remarked, goes "to the root of jurisdiction."[107] English and Commonwealth courts have felt little compunction in identifying a clear,[108] manifest[109] or gross[110] excess of jurisdiction[111] in these circumstances. The underlying assumption is that the duty to satisfy the rudiments of natural justice limits, inferentially, the purview of statutory authority.[112] A judge of the Federal Court of Australia has commented: "I would presume that the legislature intended the power itself to be qualified by natural justice."[113] The conception of natural justice as a fetter on the exercise of discretionary power[114] underpins this approach. The English courts have impliedly held that a decision taken by an administrative tribunal by resorting to a procedure repugnant to natural justice is not one made under the aegis of power conferred by a statutory instrument.[115]

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101. *Allinson* v. *General Medical Council* [1894] 1 Q.B. 750.

102. *Barrier Reef Broadcasting Pty. Ltd* v. *Minister for Post and Telecommunications* [1978] 19 A.L.R. 425, 447, *per* Aickin J. (H.C.A.).

103. *Forbes* v. *New South Wales Trotting Club Ltd* (1979) 25 A.L.R. 1, 35, per Aickin J. (H.C.A.).

104. See, *e.g. Sir Nicholas Bacon's Case* (1563) 2 Dyer 220 b.

105. For the *audi alteram partem* principle, see *R.* v. *North, ex p. Oakey* [1927] 1 K.B. 491; *cf.* for the rule *nemo judex in causa sua, Serjeant* v. *Dale* (1877) 2 Q.B.D. 558.

106. H.W.R. Wade, *Administrative Law* (5th ed., 1982), p. 312.

107. *Andrews* v. *Mitchell* [1905] A.C. 78; *cf.* for Canadian law, *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* [1906] A.C. 535.

108. *Ex p. Northern Rivers Rutile Pty. Ltd, re Claye* [1965] 82 W.N. (Pt.1) (N.S.W.) 514, 519-520 (S.C. of N.S.W.).

109. *R.* v. *Foster, ex p. Isaacs* [1941] V.L.R. 77, 83 (S.C. of Vict.).

110. *Ex p. Blackwell, re Hateley* [1965] N.S.W.R. 1061, 1064 (S.C. of N.S.W.).

111. *R.* v. *Wandsworth Justices, ex p. Read* [1942] 1 All E.R. 56.

112. *Salemi* v. *Minister for Immigration and Ethnic Affairs (No. 2)* [1977] 14 A.L.R. 1, 9, *per* Barwick C.J. (H.C.A.); *Heatley* v. *Tasmanian Racing and Gaming Commission* [1977] 14 A.L.R. 519, 521, *per* Barwick C.J. (H.C.A.).

113. *R.* v. *Wilson, ex p. Donaldson* [1977] 19 A.L.R. 235, 246, *per* Bowen C.J. (F.C.A.).

114. *Gillespie* v. *Ford and the Commonwealth of Australia* [1978] 19 A.L.R. 102, 112, *per* Foster C.J. (S.C. of Northern Territ., Austr.); *cf. Hoggard* v. *Worsborough U.D.C.* [1962] 2 Q.B. 93.

115. *Spackman* v. *Plumstead District Board of Wales* (1885) 10 A.C. 229.

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The implication that breach of natural justice entails jurisdictional vice[116] is supported by the reception of averments contained in affidavits to establish the infringement of natural justice,[117] for evidence extraneous to the record may be adduced solely to prove want or excess of jurisdiction.[118]

(b) *The standard of voidability*

(i) *Utility of the concept*

In contrast with the dominant lines of authority imputing voidness to administrative action incompatible with the requisites of natural justice, there exists a countervailing body of judicial opinion which favours a more cautious approach. Lord Denning, in a series of decisions,[119] has proposed within the spectrum of invalid administrative decisions qualitative distinctions which enable consequences less than complete nullity to be visited upon the acts and orders of administrative tribunals: "It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the (order) is a nullity altogether . The other kind is when the invalidity does not make the (order) void altogether but only voidable. In that case it stands unless and until it is set aside."[120]

There is a parallel current of authority in Australia. The High Court of Australia, which has looked upon adherence to natural justice as "in a broad sense a procedural matter,"[121] has underlined the necessity of a "clear distinction .... between want of jurisdiction and the manner of its exercise."[122] While disregard of procedural conditions which regulate the exercise of jurisdiction warrants avoidance of a judgment or order, this category of case has been distinguished explicitly from circumstances involving substantive lack or excess of

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116. *Lithgow* v. *Secretary of State for Scotland*, 1973 S.L.T. 81; *Fairmount Investments Ltd.* v. *Secretary of State for the Environment* [1976] 1 W.L.R. 1255.

117. *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 160.

118. *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 352-353, *per* Denning L.J.

119. *Director of Public Prosecutions* v. *Head* [1959] A.C. 83; *MacFoy* v. *United Africa Co. Ltd* [1962] A.C. 152; *James* v. *Minister of Housing and Local Government* [1966] 1 W.L.R. 135; *R.* v. *Secretary of State for the Environment, ex p. Ostler* [1977] Q.B. 122.

120. *R.* v. *Paddington Valuation Officer, ex p. Peachey Corporation Ltd* [1966] 1 Q.B. 380, 402, *per* Lord Denning M.R.

121. *Commissioner of Police* v. *Tanos* [1958] 98 C.L.R. 383, 396 (H.C.A.).

122. *Parisienne Basket Shoes* v. *Whyte* [1938] 59 C.L.R. 369, 389, *per* Dixon J. (H.C.A.).

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jurisdiction.[123] In the former situation, the order, although exposed to challenge, is not regarded as made on a matter *coram non judice* but remains operative until judicial intervention.[124] Consistently with this premise the High Court of Australia has concluded that the presence of bias is not tantamount to lack of jurisdiction.[125]

If the risk of insidious pressures negativing objectivity and detachment which clearly constitute essential attributes of fairness,[126] does not suffice to deprive an administrative order altogether of force, it would be implausible in principle to postulate a more stringent sanction in respect of an order not preceded by an adequate hearing. Juxtaposed with a conflicting line of authority which construes breach of the *audi alteram partem* rule as "sufficiently analogous" to jurisdictional fault,[127] the preponderant view in Australia, fortified by academic support,[128] is that administrative adjudication inconsistent with natural justice is not void but voidable.[129] The practical importance of the contrast is that a voidable act, unlike a void act, of an administrative tribunal sustains action resorted to during the intervening period prior to the condemnation of the act by a court.[130]

(ii) *Competing definitions*

Much of the criticism of the standard of "voidability," applied to administrative law, is linked with a definition which is conceptually and pragmatically sterile. No matter how destitute of effect an administrative decision may be, if no initiative is taken by a person possessing sufficient interest to impugn the decision in appropriate proceedings before a court of competent jurisdiction, the order or decision remains in being. "Such an act is valid and operative unless

123. *R.* v. *The War Pensions Entitlement Appeal Tribunal, ex p. Bott* [1933] 50 C.L.R. 228, 242–243, *per* Rich, Dixon and McTiernan JJ. (H.C.A.).

124. *Posner* v. *Collector for Inter-State Destitute Persons (Victoria)* [1946] 74 C.L.R. 461 (H.C.A.).

125. *R.* v. *Anderson, ex p. Bateman* [1978] 21 A.L.R. 56, 57, *per* Gibbs A.C.J. (H.C.A.).

126. *Cooper* v. *Wilson* [1937] 2 K.B. 309, 344, *per* Scott L.J.

127. *R.* v. *Will and Toon, ex p. Visona* [1960] Q.R. 123 (Q.S.C.); *R.* v. *Justices of Rankine River, ex p. Sydney* [1962] F.L.R. 215 (F.C.A.); *Ex p. Northern Rivers Rutile Pty. Ltd., re Claye* [1965] 82 W.N. (Pt. 1) (N.S.W.) 514 (S.C. of N.S.W.).

128. D.G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971), p. 155.

129. See, *e.g.* the cases cited at notes 23–25, *supra.*

130. A. Rubinstein, *Jurisdiction and Illegality* [1965], p. 5; *cf. A.J. Burr Ltd* v. *Blenheim Borough* [1980] 2 N.Z.L.R. 1, 4 (C.A. of N.Z.).

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and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void *ab initio*."[131] Admittedly, to refer to such an order or decision as "voidable" serves no useful object of policy. Yet, the word "voidable" has acquired this connotation in English as well as in Australian usage and, naturally, attracted adverse criticisms.

A variant on this conception of voidable acts, unfortunately of no greater value in terms of policy, is reflected in the comment that "The distinction between void and voidable acts depends on the method by which it is challenged. Voidable acts are those that can be invalidated in certain proceedings; those proceedings are especially formulated for the purpose of directly challenging such acts."[132] This emphasis on the identity and formal attributes of the proceedings which have as their purpose the avoidance of the order of a subordinate tribunal obscures crucial elements of policy which a standard embodying a qualified degree of invalidity may well subserve.

The dichotomy between void and voidable acts had its origin and customary application in the law of contract, but its relevance in administrative law has been strenuously denied.[133] On the other hand, a distinguished Australian judge has entertained no doubt that the terminology has an even more cogent application in the latter area of law than it has always had in the former.[134] It is plain, however, that if the notion of "voidable" administrative acts is to have intrinsic value, it should contemplate not potentially vulnerable acts which, once they are set aside in judicial proceedings, are considered a nullity from the outset, but the distinct category of acts which, even after a judicial order denudes them of force, are declared to give rise to legal consequences during the period intervening between the commission of the acts and their avoidance as the result of judicial intervention. These two categories of acts lacking complete legal

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131. *Forbes* v. *New South Wales Trotting Club Ltd.* [1979] 25 A.L.R. 1. 30. *per* Aickin J. (H.C.A.).

132. A. Rubinstein, *op. cit.* p. 5.

133. H.W.R. Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 L.Q.R.499, 518.

134. *Posner* v. *Collector for Inter-State Destitute Persons* (1946) 74 C.L.R. 461, 483, *per* Dixon J. (H.C.A.).

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validity admit of a meaningful distinction which enriches the law by facilitating the identification of disparate effects stemming from different types of acts.

The unimpaired validity of a voidable act within the interim period supplies the base of a mediating technique which has positive value in providing the courts with a device for taking into account realities such as supervening developments and transactions involving the rights of third parties who need protection despite the invalidity of the initial act. A compelling justification of the intermediate category of "voidable" acts is that judges who have felt inhibited by these realities in concluding that a breach of natural justice has been established, will find welcome leverage in adjusting competing claims if contravention of natural justice is not inflexibly linked with jurisdictional error making for absolute voidness of administrative action. Recognition of "voidable" administrative acts which ensure that accrued rights are safeguarded against jeopardy has the advantage of discouraging disingenuous reasoning which has contributed in no small measure to the bewildering complexity of the law.

(c) *Overall assessment*

A prominent element of the structural framework of the law is the use of the doctrine of *ultra vires* as the rationale underlying voidness of administrative action which cannot be reconciled with the requirements of natural justice. The comment has been made that "It would ... be inconsistent with the doctrine of *ultra vires* as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that an (act) was *ultra vires* were to have any lesser consequence in law than to render (it) incapable of ever having had any legal effect."[135] A leading English writer has remarked: "So long as the *ultra vires* doctrine remains the basis of administrative law, the correct epithet must be "void."[136]

The pervasive weakness typifying this point of departure is associated with the amorphous character and the extensive range of the theory of *vires* in modern administrative law. Jurisdictional taint today envelops not only transgression of the prescribed limits of power by

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135. *Hoffmann-La Roche (F) & Co. A.G.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295, 365, *per* Lord Diplock.

136. H. W. R. Wade, *Administrative Law* (5th ed., 1982), p. 315.

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such methods as the violation of a condition precedent or the performance of unauthorized functions but a whole gamut of factors relating to improper motivation and reference to irrelevant considerations.[137] It has even been suggested in Canada that an administrative order founded on evidence "so palpably insufficient and inadequate as to be valueless"[138] is vitiated by jurisdictional error. The conspicuous characteristic of the theory of jurisdiction embedded in modern law is its infinite elasticity. A legal regime which accords uniform treatment to distinct branches of the *ultra vires* doctrine, fundamentally distinguishable as to their substance and implications, stultifies central objectives of policy by excluding essential nuances in respect of the consequences of judicial superintendence. The wide parameters of jurisdictional tests employed by contemporary courts make it all the more necessary to allow judges reasonable latitude in regard to the effects of avoidance of administrative action on the ground of infringement of natural justice.

The Adequacy of Other Principles: Discretionary Bars and Locus Standi

Academic reaction to the concept of voidability, in relation to the acts of public authorities, has been on the whole unsympathetic. The concept is said to be superfluous in so far as its incidents coincide substantially with the implications of other legal principles. The "metamorphosis of void action into valid action"[139] is achieved by the denial of remedies, for an act bereft of legal consequences at its inception becomes, for all intents and purposes, a valid act in the absence of means of demonstrating its nullity. It is certainly true that use of the nomenclature of "voidable" in this setting involves no benefit to the law.

What is basically misconceived, however, is the suggestion that a pivotal rule of "legal relativity,"[140] if borne in mind, reduces to vanishing point the difference between void and voidable administrative acts. Relativity of consequences permeates the exercise of supervisory

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137. For a discussion of relevant aspects of the *ultra vires* doctrine, see D.C.M. Yardley, *A Source Book of English Administrative Law* (2nd ed., 1970), p. 93; J.F. Garner, *Administrative Law* (5th ed., 1979), pp. 149-153.

138. *R.* v. *Steeves* (1921) 62 D.L.R. 329, 343 (S.C. of N.B.).

139. H. W. R. Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 L.Q.R. 499, 515.

140. *ibid. at p. 516.*

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jurisdiction, in that a decision which is ineffective in relation to one purpose may be valid in respect of another[141] and an order which has no force against one person may be binding on another.[142] But this notion of relativity is not coeval with, and can hardly be invoked as a substitute for, a juristic concept which accommodates degrees of invalidity of administrative action. The policy of the law in a congeries of factual and statutory contexts differing *toto caelo* requires the rejection of an absolute standard of uniformity not only as to the persons in relation to whom, or the purposes for which, administrative power is wielded but in regard to the nature and gravity of the effects of judicial surveillance. Similarly, the withholding of remedies in particular circumstances involving hypothetical voidness of administrative action does not, in itself, ensure the malleability necessary for perceptive discharge of the supervisory judicial function, since the denial of remedies in some situations leaves open the question whether their availability in others entails the unqualified nullity of the action impugned or a sanction which is restricted in scope.

The discretionary bars within the framework of prerogative remedies do not detract from the value of the idea of a "voidable" administrative act. While the element of discretion is an intrinsic attribute of the prerogative remedies, the refusal of relief in the exercise of judicial discretion is governed in modern law by stable rules of well-defined content. To attempt a compartmentalization of the circumstances in which the discretionary bars are applicable goes against the grain of the development of prerogative orders and also of equitable remedies like the declaration and the injunction in the field of public law. Yet it is plain that the grounds on which relief may be withheld as a matter of discretion are reducible to the core elements of fault in the party invoking the court's jurisdiction (subsumed under such doctrines as implied waiver, acquiescence and laches) or the futility and impracticability of judicial intervention in a given situation. The bases of the law regulating the use of discretion do not include considerations like the interposition of the rights of third parties to whom no blame or want of circumspection is imputable. These factors transcend indicia pertaining to some form of culpability in the applicant for relief or to the operation of the principle, *lex non cogit ad inutilia*. The former considerations are not catered for by a body of independent legal principle but call for a mechanism which addresses

141. *R.* v. *Brixton Prison Governor, ex p. Kotronis* [1971] A.C. 250.

142. *Ridge* v. *Baldwin, supra,* at p. 125; *cf. Agricultural, Horticultural and Forestry Industry Training Board* v. *Aylesbury Mushrooms Ltd.* [1972] 1 W.L.R. 190.

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directly the intensity of judicial review and the extent of permissible dislocation of vested rights as the sequel to invalid administrative action. The incidents of a voidable act, then, make good a lacuna which is not necessarily supplied by principles relevant to the exercise of judicial discretion.

It is equally clear that the rules evolved by the courts in regard to *locus standi* do not imply redundancy of the concept of voidability in contemporary administrative law.[143] The question of entitlement to relief *ex debito justitiae* or on the footing of judicial discretion is wholly distinct from the effects of successful invocation of supervisory jurisdiction. A finding as to *locus standi* logically precedes an inquiry directed to the consequences of intervention by a party shown to have sufficient interest to institute and maintain the action. The separate identity of issues in the two areas militates against the use, by extension or analogy, of principles and approaches forged in the former context as aids to the solution of problems arising in the latter.

The Role of Judicial Discretion

A narrow view of the judicial supervisory function is reflected in the attitude that a decision accepting the invalidity of an administrative act does not constitute "an element which produces invalidity in any (act). The (act) is not valid until a court pronounces against it, and thereafter invalid. If it is beyond power it is invalid *ab initio*."[144] The declaratory view, although adopted in Australia as the "authoritative enunciation of the theory of invalidity,"[145] is manifestly at variance with the dimensions of supervisory jurisdiction in modern law.

It is clear that the decision in regard to invalidity of administrative action involves a wide range of options and that a deliberate choice, predicated on value-judgments, requires to be made by the courts. In making the appropriate choice in a specific statutory or factual setting, the courts inevitably have recourse to policy considerations which give them far greater leverage than is provided for by the residue of discretion entrenched in other doctrines which form the basis of the law governing, for instance, standing to sue and the denial of remedies.

143. For a statement of the contrary view, see H. W. R. Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 L.Q.R. 499, 505 *et seq.*

144. *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373, 408, *per* Latham C.J. (H.C.A.).

145. *Re Adams and the Tax Agents' Board* (1976) 12 A.L.R. 239, 243 *ad fin.*, *per* Brennan J. (Adm. App. Trib., Austr.).

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The extended scope of discretion which typifies contemporary developments has been resisted vehemently from the standpoint of principle. An English writer, having pointed out that natural justice has for centuries been enforced as a matter of law,[146] stresses that "The citizen is entitled to resist unlawful action as a matter of right and to live under the rule of law, not the rule of discretion."[147] This outlook finds expression in the comment: "Judicial discretion plays an indisputable part in the law. But it ought not to be allowed to undermine constitutional fundamentals."[148]

It remains true, however, that, as a matter of established usage, the courts have refused for cogent reasons of public policy to withhold all legal effect from administrative acts which, in terms of the empowering legislation, are devoid of legitimacy. Thus, English courts have not invariably dispensed statutory remedies in circumstances where a decision was void.[149] In conflict with a strand of Australian judicial authority which identifies breach of natural justice as an infraction so "fundamental and universal"[150] in character as to deprive the resulting act of all legal consequences,[151] the balance of judicial authority in the Commonwealth today does not rigidly exclude differences of emphasis and degree. Departures from natural justice which are relatively inconsequential in their practical impact[152] or tenuous in causal terms[153] have been held in England and New Zealand not to require treatment of the offending act as a complete nullity. The refusal of relief on the ground of lack of substantial miscarriage of justice despite the violation of natural justice[154] is incompatible with the assumption that "The breach of natural justice is itself the miscarriage of justice which enables the applicant to succeed."[155] The predominance of policy factors which preclude

146. H.W.R. Wade, *Administrative Law* (5th ed., 1982), p. 469.

147. *ibid.* at p. 315.

148. H.W.R. Wade, "Unlawful Administrative Action: Void or Voidable?" (1968) 84 L.Q.R. 95, 110.

149. *Miller* v. *Weymouth and Melcombe Regis Corporation* (1974) 27 P. & C.R. 468,

150. *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379, 382, *per* Barwick C.J. (H.C.A.).

151. *Cf. Krantz* v. *Maynes* (1967) 10 F.L.R. 134, 143, *per* Dunphy, Smithers and Kerr JJ., (F.C.A.).

152. *Cf. Mulloch* v. The Editorial Board of the District of Southland (1913) 33 N.Z.L.R. 198 (N.Z.S.C.); *New Zealand Sheep Farmers' Agency Ltd.* v. *Mosley and Hill* 1932 N.Z.L.R. 949 (N.Z.C.A).

153. *George* v. *Secretary of State for the Environment* (1979) 250 E.G. 339.

154. *Disher* v. *Disher* (1965) p. 31.

155. H.W.R. Wade, *op. cit.* note 49, *supra,* at p.111 *ad fin.*

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immutable application of the principle relating to voidness of action inconsistent with natural justice is exemplified by the unwillingness of the courts, eager to confer on the accused the benefit of the plea of *autrefois acquit,* to strike down as void criminal proceedings in which the tribunal of first instance had displayed bias against the prosecution.[156]

The opportunity for conscious selection of alternative approaches and mechanisms, which represents a hallmark of judicial activism in this area, makes unrealistic the conception of judicial review as solely declaratory in effect. A judicial order regarding the invalidity of an administrative act is "a true annulment,"[157] constitutive in nature. Its character is evident from the need for such an order to resolve finally the efficacy of an administrative act which is subject to challenge. This practical reality is underscored in the observation by the House of Lords: "It leads to confusion to use such terms as 'voidable,' 'voidable *ab initio,*' 'void' or 'a nullity' as descriptions of the status of (an act) alleged to be *ultra vires* for patent or for latent defects before its validity has been pronounced on by a court of competent jurisdiction."[158]

The view has been expressed with firm conviction that "The whole basis of civil liberty is that the acts of public authorities are white or black, lawful or unlawful, valid or void. A large area of grey where no one could be sure of his rights, would be a dangerous innovation indeed."[159] But the clear-cut paradigms of voidness and validity are seen to do less than adequate justice to the different facets of contemporary public policy. Thus, the courts of England,[160] Australia[161] and New Zealand[162] have found it necessary to protect completed transactions and settled expectations by recognizing that a person who has not been appointed to an office in compliance with mandatory legal requirements and is strictly a usurper, is the *de facto* holder of the office. Preoccupation with the consequences of denial of natural justice, to the exclusion of the implications of nullity of administrative action assailed on this ground, indicates a fundamental lack of balance and is myopic in the modern context.

156. *R.* v. *Simpson* (1914) 1 K.B. 66; *cf.* M. B. Akehurst, *loc. cit.* (note 83, *supra,* p. 5.

157. A. Rubinstein, *op. cit.* p. 5, citing H. Kelsen, *General Theory of Law and State* (1946), p. 161.

158. *Hoffmann-La Roche (F.) & Co. A.G.* v. *Secretary of State for Trade and Industry* (1975) A.C. 295, 366, *per* Lord Diplock.

159. H.W.R. Wade, *op. cit.* note 49, *supra,* at p. 113.

160. *Adams* v. *Adams* (1971) p. 188.

161. *R.* v. *Cawthorne, ex p. Public Service Association* (1977) 17 S.A.S.R. 321, 329–335 (S.C. of S.A.).

162. *Re Aldridge* (1893) 15 N.Z.L.R. 361 (N.Z.S.C.).

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The High Court of Australia has aptly remarked that "In some cases the court will be compelled to take account of the public interest in the efficiency of the administrative process and the necessity for reasonably prompt despatch of public business and balance that interest against the countervailing interest of the individual in securing a fair hearing."[163] The relevance of the public interest as a counterpoise has received sustained emphasis in New Zealand.[164]

A modern court can hardly contemplate with indifference the social repercussions of declaring void, for example, a development order which has not been preceded by the consultative process enjoined by the enabling legislation. A landowner who obtains a consent to development from a statutory authority will find himself compelled to demolish a building which he had constructed, and a purchaser who acquires land on the basis of consent to a development application will find it useless for his purpose if a defect relating to prior consultation with a local authority or other tribunal is held necessarily to connote voidness of the consent to development.[165] The injustice of interference with the rights of an indeterminate group of persons who had dealt in good faith with the property subject to the development order before its condemnation by a court suggests the need for a variety of sanctions of distinguishable scope. Moreover, if the administrative order is declared to be wholly destitute of legal effect, it should be incumbent on the court to make such consequential orders, including the award of damages, as may be necessary to mete out justice to persons who had acquired rights in, or otherwise dealt with, the property. The essential objection to the doctrine of absolute voidness of administrative action which offends against the rules of natural justice is that considerations having a bearing on the rights of third parties whose conduct is not exposed to censure are as much an integral component of public policy as the individual's right to natural justice.

The replacement of a definite rule of law by a discretionary principle, even in peripheral contexts, has been thought to imply transfer of the foundations of freedom "from the rock to the sand."[166]

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163. *Twist* v. *Randwick Municipal Council* (1976) 12 A.L.R. 379, 387–388, *per* Mason J. (H.C.A.).

164. *Graham* v. *Attorney-General* (1966) N.Z.L.R. 937, 960, *per* Hardie Boys J. (N.Z.S.C.); *Reckitt and Colman (N.Z.) Ltd* v. *Taxation Board of Review* (1966) N.Z.L.R. 1032, 1037 *ad fin.*, *per* North P. (N.Z.C.A.).

165. *Attorney-General* v. *J. N. Perry Constructions Pty. Ltd* (1961) 79 W.N.(N.S.W.) 235, 239, *per* Myers J. (S.C. of N.S.W.).

166. *Scott* v. *Scott* (1913) A.C. 417, 477, *per* Lord Shaw.

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In similar vein, it has been emphasized that entitlement to natural justice as a matter of right is "a vital part of the rule of law."[167] But the remarkable developments in administrative law during the last decade throughout the Commonwealth belie the fears regarding encroachment by the executive on the substance of liberty in consequence of the rapidly expanding frontiers of judicial discretion. On the contrary, such striking innovations as the refurbishment of rules in respect of standing,[168] relegation of conceptual distinctions pertaining to the classification of powers,[169] the revival[170] and subsequent atrophy[171] of error of law on the face of the record as the result of a greatly distended theory of jurisdiction,[172] remodulation of the content[173] and scope[174] of natural justice and the emergence of procedural fairness as a complement to the traditional rules of natural justice[175] are the product, almost entirely, of judicial creativity buttressed by fragmentary legislative support in England[176] and in some Commonwealth jurisdictions.[177] The quality of the judicial response to problems in sensitive sectors of administrative policy warrants no misgivings as to the aptitude of the courts to synthesize the divergent elements of

167. H.W.R. Wade, *Administrative Law* (5th ed., 1982), p.470.

168. See, *e.g. Thorson* v. *Attorney-General of Canada* (1975) 43 D.L.R. (3d) 1 (S.C.C.).

169. *Cinnamond* v. *British Airports Authority* (1980) 1 W.L.R. 582, 590, *per* Lord Denning M.R.; *Re Provincial Agricultural Land Commission and Pickell* (1980) 109 D.L.R. (3d) 465, 470, *per* Mackinnon J. (S.C. of B.C.).

170. *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* (1952) 1 K.B. 338.

171. H. W. R. Wade, "New Twists in the *Anisminic* Skein" (1980) 96 L.Q.R. 492, 494; D. Oliver, "Void and Voidable in Administrative Law: A Problem of Legal Recognition" (1981) 34 *Current Legal Problems 43, 59.*

172. *Re Racal Communications Ltd* (1980) 2 All E.R. 634, 638-639, *per* Lord Diplock.

173. With regard to the duty to state reasons in support of a conclusion, See *Re Ombudsman Act*(1970) 10 D.L.R. (3d) (S.C. of Alta); *Saskatchewan Teachers' Federation* v. *de Moissac* (1974) 38 D.L.R. (3d) 296, 299, *per* Culliton C.J.S. (Sask.C.A.); but see *Service Employee's International Union, Local 33* v. *Nipawin District Staff Nurses' Association* (1975) 41 D.L.R. (3d) 6, 13, *per* Dickson J. (S.C.C.).

174. *Re Brown and Waterloo Regional Board of Police Commissioners* (1979) 103 D.L.R. (3d) 748, 758 (Ont.H.C.); *Smitty's Industries Ltd* v. *Attorney-General* (1980) 1 N.Z.L.R. 355, 366, *per* Vautier J. (N.Z.S.C.).

175. *Meadowvale Stud Farm Ltd* v. *Stratford County Council* (1979) 1 N.Z.L.R. 342, 348, *per* Mahon J. (N.Z.S.C.); *cf. Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978) 88 D.L.R (3d) 671, 681, *per* Laskin C.J. (S.C.C.).

176. Tribunals and Inquiries Act 1971, s. 12 (5); Supreme Court Act 1981, s. 31.

177. Judicature Amendment Act 1972, s. 5 (N.Z.); Administrative Appeals Tribunal Act 1975, s. 28 (Australia); Administrative Decisions (Judicial Review) Act 1977, s. 5 (Australia).

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modern public policy and to achieve a restrained and discriminating balance among them. A sanguine outlook is encouraged by the reflection that in other areas of law, no less crucial to the freedom of the individual, the courts have shown themselves singularly well equipped for the task.

Conclusion

The notion of a voidable administrative act has been decried as "a hybrid creature"[179] and as "a new animal in the legal bestiary."[179] Nevertheless, the central argument in this chapter is that an intermediate concept between nullity and validty is of distinct value. An English judge who has been responsible in large measure for many refreshing developments connected with legal limitations on executive power has in several decided cases[180] bestowed legitimacy on the idea of voidability in relation to the acts of public authorities. Regrettably, however, in a work published towards the close of his judicial career, he purports to have seen "the error of (his) ways"[181] and retracts the views he had articulated in judicial pronouncements.[182] But modern decisions, although evincing reluctance to "allow linguistics to determine legal rights"[183] and shying away from the adoption of epithets as a step in defining the consequences of juristic acts,[184] are yet alive, on the whole, to the inadequacy of the stark antithesis between void and valid acts as the conceptual framework of judicial review. A neutral terminology refraining from allusion to voidness or nullity, which has gained currency recently in Australia,[185] is foreshadowed in a speech by Lord Wilberforce in the Privy Council.[186] The extensive ramifications of jurisdictional fault in modern law,

178. H. W. R. Wade, *op. cit.* note 54, *supra,* at p. 499.

179. *ibid.*

180. See the cases cited at note 119, *supra.*

181. Lord Denning, *The Discipline of Law* (1979), pp. 77-78; *cf. Firman* v. *Ellis* (1978) Q.B. 886.

182. Lord Denning, *ibid.*

183. *Brooks* v. *Burns Philp Trustee Co. Ltd* (1969) 121 C.L.R. 432, 458, *per* Windeyer J. (H.C.A.).

184. *Re Brian Lawlor Automotive Pty. Ltd and Collector of Customs, N.S.W.* (1978) 1 Adm. L. Decs. (1976-1978), 167, 180, *per* Brennan J. (Adm. App. Trib. of Austr.).

185. *Cains* v. *Jenkins* (1979) 26 A.L.R. 652, 669, *per* Northrop J. (F.C.A., Industr. Div.); *Magner* v. *Fowler* (1979) 26 A.L.R. 671, 697, *per* Keely J. (F.C.A., Industr. Div.); *R.* v. *Cole, ex p. Dixon* (1979) 27 A.L.R. 13 (S.C. of A.C.T.).

186. *Calvin* v. *Carr* (1978) 22 A.L.R. 417, 426, where the words "invalid" and "vitiated" were used in preference to "void".

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combined with the sanction of voidness of all action which infringes the emerging criteria relevant to delineation of *vires*, provide thin gruel indeed for accomplishment of the complex policy objectives which dominate this area. A concept embodying a qualified degree of invalidity, which may be exploited as an instrument for the resolution of central conflicts of policy, supplies the bedrock of a resilient mechanism which represents a worthwhile gain to the law.

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PATENT ERROR OF LAW AND THE BORDERS OF JURISDICTION : THE COMMONWEALTH EXPERIENCE ASSESSED

Introduction

ONE of the dramatic developments in contemporary administrative law is the result of a radical approach to the basis and scope of error of law on the face of the record as a ground of judicial review of administrative decisions. Despite the impeccable antecedents of this rubric of judicial review in English administrative law,[1] courts as well as writers in England have strenuously assailed in recent times the legitimacy of the continued invocation of this head of review. Lord Diplock has suggested that the concept of patent legal error has become redundant in consequence of expansion of the scope of jurisdictional criteria.[2] More emphatically, a leading English writer has asserted that this doctrine "can be consigned to the dustbin of legal history".[3] The *Anisminic* [4] decision has been represented as "the virtual end of error of law on the face of the record."[5] Moreover, the suggested removal of this doctrine from the corpus of administrative law has been welcomed as a salutary development.[6] Against this current, the central theme of this chapter is that judicial review predicated on legal error, far from warranting relegation as an obsolete feature of the evolution of the law, remains within its appropriate limits a viable and indeed essential aspect of the conceptual framework of modern administrative law.

Error of Law within Jurisdiction: Traditional Theory and Contemporary Predilections

Bifurcation of the pivots of judicial review has been recognized in England at the highest level of judicial authority by insistence that there are two distinct, but complementary, fields for the exercise of

1. See the cases cited at footnotes 10-12 *infra*.
2. *Re Racal Communications Ltd* [1980] 2 All ER 634 at 638-639, commenting on *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147.
3. H.W.R. Wade, 'New Twists in the *Anisminic* Skein' (1980) 96 LQR 492 at 494.
4. [1969] 2 AC 147.
5. B.C. Gould, '*Anisminic* and Judicial Review' [1970] PL 358 at 361.
6. D. Oliver, 'Void and Voidable in Administrative Law: A Problem of Legal Recognition' (1981) 34 Current Legal Problems 43 at 59.

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supervisory jurisdiction: "One is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".[7] This structural dichotomy, giving expression to the dual objectives of legal pedigree[8] and sound administration,[9] accords with sustained judicial practice in England. For more than three centuries, the Court of King's Bench, by means of the prerogative writs, exercised surveillance over statutory tribunals,[10] magistrates[11] and arbitrators[12] with the object of controlling manifest errors of law not vitiating jurisdiction. Although English judges have regretted on occasion the exposure of inferior tribunals. to judicial review on the ground of apparent error of law within jurisdiction,[13] the absorption of this principle of review into the applicable body of doctrine is conceded unequivocally by the balance of judicial authority in England.[14]

In contrast with the law of Scotland where the basis of judicial review is solely jurisdictional,[15] sporadic expressions of recalcitrance[16] do not detract from the established trend in England. Dominant lines of authority in the Commonwealth, on the whole, are in harmony with those in England. A tentative preference for an unreservedly jurisdictional criterion, expressed by the courts of Canada,[17] is

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7. *R.* v. *Nat Bell Liquors Ltd* [1922] 2 AC 128 at 156, *per* Lord Sumner.

8. H.W.R. Wade, *Administrative Law* (5th ed 1982), p 16-19.

9. D.J. Galligan, "Judicial Review and the Textbook Writers" (1982) 2 Oxford Journal of Legal Studies 257 at 261.

10. *The Case of Cardiff Bridge* (1699) 1 Salk 146; *Groenwelt* v. *Burvill* (1700) 1 Salk 144; *R.* v. *White* (1883-1884) 11 QBD 309.

11. *R.* v. *Chandler* (1703) 1 Salk 378; *R.* v. *Barnaby* (1704) 1 Salk 181; *R.* v. *Daman* (1819) 1 Chit 147; *R.* v. *Marsh* (1824) 4 D & R 260.

12. *Kent* v. *Elstob* (1802) 3 East 18.

13. *Hodgkinson* v. *Fernie* (1857) 27 LJCP 66 at 68 *per* Williams J; *cf Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. (1923) 92 LJCP 163 at 166, per* Lord Dunedin.

14. *In re Allen and Matthews Arbitration* [1971] 2 QB 518 at 524, *per* Mocatta J.

15. *Leith Police Commissioners* v. *Campbell* (1866) 5 M 247 at 252, *per* Lord Justice-Clerk Inglis: *Sinclair-Lockhart's Trustees* v. *Central Land Board* [1951] SLT 121 at 126, *per* Lord President Cooper; *Watt* v. *Lord Advocate* [1977] SLT 130 at 135, *per* Lord Dunpark.

16. See, for example, *Racecourse Betting Control Board* v. *Secretary of State for Air* [1944] Ch 114 at 120 *per* Lord Greene MR.

17. *Noranda Mines Ltd* v. *R* (1969) DLR (3d) 1 (SCC); *Re Bartolotti and Ministry of Housing* (1977) 76 DLR (3d) 408 (Ont CA).

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incompatible with the consensus of Canadian judicial opinion.[18] The rationale connected with proliferation of statutory tribunals spelt out by the Court of Appeal of England[19] as the impetus for reviving "this well-tried means of control"[20] is reinforced in Canada by a corollary of the federal constitutional structure, in that the power of a provincial legislature to confer judicial functions on an administrative tribunal is curtailed by the constitutional instrument.[21] Canadian judicial pronouncements underscoring the antiquity[22] and decisive entrenchment[23] of judicial review for patent intra-jurisdictional error of law in the context of prohibition[24] and *certiorari*[25] alike, are paralleled by the avenues of development of Australian[26] and New Zealand[27] law.

The initiative of English courts during the last decade has affected crucially the theoretical underpinnings of the law governing judicial control of administrative tribunals. *Anisminic* [28] exemplifies the treatment of an error of law, which did not in reality traverse the limits of jurisdiction, as symptomatic of an excess of jurisdiction. The premise that jurisdiction is determinable on the commencement rather than at the conclusion of an inquiry,[29] espoused in a strand

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18. *Re Gordon Riley Transport Ltd* v. *Board of Industrial Relations of Alberta* (1958) 24 WWR 273 at 283, *per* Egbert J (Alberta SC); *Re Universal Constructors and Engineers Ltd and LRB of New Brunswick* (1960) 27 DLR (2d) 423 at 428, *per* Ritchie JA (SC of NB).

19. *R.* v. *Northamberland Compensation Appeal Tribunal, ex. p. Shaw* [1952] 1 KB 338.

20. At 348, *per* Denning LJ.

21. *R.* v. *Ontario LRB. ex p Trenton Construction Workers Association Local 52* [1963] 2 OR 376 (HC of J. Ont).

22. *R.* v. *Barker, ex p. Warehousemen and Miscellaneous Drivers' Union Local 419* (1968) 68 DLR (2d) 682 at 686, *per* Jessup JA (Ont CA).

23. See the cases cited at footnote 18, *supra;* cf *Re Metropolitan Board of Police Commissioners and Metropolitan Toronto Police Association* (1976) 74 DLR (3d) 465 (Ont HC, Div Ct).

24. *R.* v. *Fodor* (1938) 2 DLR 290 at 302, *per* McGillivray JA (SCAD of Alberta); but see *R. ex rel Fraser* v. *Halpin* (1933) 1 DLR 781 at 789-790 (SCAD of Alberta).

25. See, for instance, the case cited at footnote 22, *supra.*

26. *R.* v. *District Court of the Northern District of Queensland, ex. p. Thompson* (1968) 42 ALJR 173 at 176, *per* Barwick CJ (HCA).

27. *In re Roche* (1888) 7 NZLR 206 (CA); *Hami Paihana* v. *Tokerau District Moari Land Board* [1955] NZLR 314 (SC). It has been suggested in New Zealand that prohibition is confined to situations involving jurisdictional taint; *Re Te Akau Block, Manu Paekau* v. *Mair* (1908) 27 NZLR 1 at 14, *per* Stout CJ (CA).

28. See footnote 4, *supra.*

29. *R.* v. *Bolton* (1841) 1 QB 66 at 74, *per* Lord Denman CJ; cf *The Case of the Marshalsea* (1612) Co Rep 686.

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of Canadian decisions,[30] is repudiated by the reasoning of the House of Lords in the *Anisminic* case which recognizes that jurisdiction, assumed initially with propriety, may be vitiated in the course of the inquiry if the tribunal addresses the wrong question[31] or is influenced by irrelevant considerations.[32] The total range of defects entailing erroneous tests, improper motives and extraneous factors is consistently classified by modern writers as jurisdictional in content.[33]

A cogent criticism of the shaping of the law in the aftermath of *Anisminic* pertains to blurring of the boundaries applicable to distinct bases of review, with consequent distortion of underlying policy objectives. The antithesis between review for error involving transgression of the limits of jurisdiction and review for manifest legal error within the confines of jurisdiction assigned to the inferior tribunal corresponds with the contrast between discrepant postulates of judicial review envisaging respectively the legality and the soundness of administrative adjudication. So long as this antithesis is maintained, deficiencies arising from improper motivation, the use of irrelevant material, the application of unwarranted criteria and the like should, in principle, be regarded as bringing into play judicial review for error within jurisdiction and not as necessarily calling for review on the ground of excess of jurisdiction. The reason is that the policy objective requiring exclusion of improper motives, irrelevant considerations and extraneous criteria from the administrative decision-making process has to do with the goal of ensuring integrity and incorruptibility in the exercise of public power rather than with the demarcation of the ambit of authority. The justification of judicial intervention in these contexts derives from contravention of principles of proper public administration which are themselves independent of rules delineating the purview of functions. The conflation of these categories in the decided cases is injurious to the fabric of administrative law, in so far as it obscures differences of intensity and range appropriate to disparate heads of review.

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30. *R.* v. *Ryan* [1939] 1 WWR 432 (SC of BC); *R.* v. *Dunbar* (1953-1954) 10 WWR (NS) 334 (SC of BC). For a discussion of special considerations applicable to initial lack of jurisdiction. See *Re Jakson and Ontario LRB* (1955) 3 DLR 297 at 304-305, *per* McRuer CJHC (Ont HC).

31. *Anisminic, supra* footnote 4 at 171 *per* Lord Reid.

32. *Anisminic, supra* footnote 4, at 198, *per* Lord Pearce.

33. See, for example, A Rubinstein. *Jurisdiction and Illegality: A study in Public Law* (1965) p 212. S.A. de Smith. *Judicial Review of Administrative Action* (4th edn 1980 by J.M. Evans) p 113.

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However, if *Anisminic* adopted strained reasoning in encompassing within the area of jurisdictional review an error as to subject matter which, in the particular statutory and factual setting, was probably included in the scope of authority conferred on the subordinate tribunal, *Anisminic* itself stopped short of denying the existence of a residuary category of error of law within jurisdiction.

The rejection of this category as a contradiction in terms is the result of *Pearlman*.[34] There the assertion was uncompromisingly made that "No court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends".[35] It was further commented by the Court of Appeal of England: "The distinction between an error which entails absence of jurisdiction and an error made within the jurisdiction is very fine – so fine indeed that it is rapidly being eroded."[36] This approach is the precursor of the total abrogation of judicial review for error of law on the face of the record; for, if all error of law were by definition held to be jurisdictional, the concept of error of law within jurisdiction would be eliminated entirely.

Nevertheless, the wide sweep of this approach is qualified by *Racal*.[37] This ruling adds considerable complexity to the foundations of judicial review by constructing dissimilar principles which regulate supervisory jurisdiction in respect of inferior courts and administrative tribunals. The crux of the contrast is that, while any error of law made by an administrative tribunal as part of its reasoning necessarily deprives it of jurisdiction on account of the wrong question having been addressed,[38] an equivalent principle has no application to courts of law.[39] It follows that, even in keeping with the analysis in *Pearlman*, limited by the interpretation imputed to it in *Racal*, error of law within jurisdiction cannot be discarded as an altogether superfluous concept, for it has vestigial relevance to decisions of inferior courts of law.

From the standpoint of principle, however, intra-jurisdictional error of law should have significantly wider operation. Given the phenomenal enlargement of jurisdictional attributes in modern administrative law,

34. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] 1 All ER 365.
35. *per* Lord Denning MR.
36. 371-372, *per* Lord Denning MR.
37. See footnote 2. *supra.*
38. *Re Racal Communications Ltd, supra* footnote 2, at 638-639 *per* Lord Diplock.
39. *ibid.*

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there yet remains a segment of legal error which does not impinge in any degree on the limits of jurisdiction. Where, for example, the subordinate tribunal considers the proper question in good faith on the basis of adequate and relevant material duly placed before it but, in consequence of an error of law, comes to a conclusion which appears to a superior court to be wrong, the error can hardly be looked upon without palpable artificiality as involving extension of the allocated area of jurisdiction.[40] In these circumstances, where the error inherent in the conclusion reached is in no way intertwined with infraction of rules demarcating the bounds of jurisdiction, supervisory techniques developed in the setting of review for patent legal error are useful and suitable.

A Critique of Policy Foundations of the Law

(a) The expanding frontiers of jurisdiction

Academic reaction to the replacement of patent legal error by a compendious category of jurisdictional taint has been, in the main, enthusiastic. As a sequel to the trends generated by *Anisminic,* this development has been hailed as "not only supported, but actually required, by principle".[41] The technical character of the distinction between errors of law relevant to jurisdiction and errors of law extrinsic to jurisdiction has been stressed by commentators approving of the purported abolition of this distinction.[42]

A seemingly persuasive argument employed in support of equation of the entirety of legal error with jurisdictional excess is that "The courts are no more willing to see injustice done by misapplication of the law than by technical excess of power".[43] However, although the validity of judicial review is demonstrable in both situations, a difference in terms of degree is essential for a variety of purposes linked with social policy. A superficial identity of formulation of the

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40. *Pearlman, supra* footnote 34, at 376 *per* Geoffrey Lane LJ; cf *Racal, supra* footnote 2, at 644 *per Lord Edmund-Davies; South East Asia Fire Bricks Sdn Bhd* v. *Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 All ER 689.

41. B.C. Gould, *supra* footnote 5, at 361.

42. Lord Diplock. 'Administrative Law and Judicial Review Reviewed' (1974) 33 CLJ 233 at 243.

43. H.W.R. Wade, 'Constitutional and Administrative Aspects of the *Anisminic* Case' (1969) 85 LQR 198 at 212.

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criterion of jurisdiction in an all-embracing sense mutes quantitative distinctions which have conceptual cogency and are important in their practical consequences. It is submitted that any approach to judicial review, founded on the equivalence of all error of law with jurisdictional blemish, is to be resisted, since it is profoundly misconceived and provides a potential source of tension that could well impair the stability of principles in which the incidence of supervisory jurisdiction has its roots.

(b) Intra-jurisdictional Error of Law: Nuances and Gradations

The distinction between error of law impugning jurisdiction and error of law within jurisdiction is seen to be pragmatically crucial from several points of view.

(i) This distinction bears directly on the scope of operation of legislative provisions which purport to preclude or restrict judicial review. That immunity from supervisory jurisdiction, by virtue of a preclusive statutory provision, is confined to intra-jurisdictional error and does not straddle defects arising from violation of the doctrine of *ultra vires* in either its substantive[44] or its procedural[45] aspect, is explicitly recognized in Canada,[46] Australia[47] and New Zealand.[48] Privative clauses have not deterred the courts of Canada from granting declaratory relief on the ground of excess of jurisdiction.[49] In Australia it has been pointed out that the validity, as distinguished from the correctness, of administrative adjudication is not made unassailable

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44. *Battaglia* v. *Workmen's Compensation Board* (1960) 24 DLR (2d) 21 (BCCA).

45. *R.* v. *Canada LRB. ex p. Brewster Transport Co Ltd* (1966) 58 DLR (2d) 609 at 615, *per* Riley J (SC of Alberta); cf *Toronto Newspaper Guild* v. *Globe Printing Co* (1953) 3 DLR 561 at 578 *per* Kellock J (SCC).

46. *Re Gianoukakis and Workmen's Compensation Board* (1979) 89 DLR. (3d) 722 (Ont HC Div Ct); *Re Metal Industries Association and Davies Wire Industries Ltd* (1981) 113 DLR (3d) 724 (BCSC). For a qualified privative formulation permitting review for patent error of law within a stipulated period, see *Re Yellow Cab Ltd and Board of Industrial Relations* (1981) 114 DLR (3d) 427 (SCC).

47. *The Australasian Scale Co. Ltd* v. *The Commissioner of Taxes* (Queensland) (1935) 53 CLR 534 at 555, *per* Rich and Dixon JJ (HCA).

48. *Re Collett* (1897) 15 NZLR 425 at 430-431, *per* Prendergast CJ (SC); *New Zealand Waterside Workers Federation Industrial Association of Workers* v. *Frazer* [1924] NZLR 689 (SC); *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers* v. *Court of Arbitration* (1976) NZLR 283 at 295, *per* Richmond J (CA)

49. *Summers* v. *City of Edmonton* (1978) 88 DLR (3d) 204 (SC, AD of Alberta)

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by preclusive provisions.[50] The rationale supporting the distinction is that the purported exercise of administrative authority beyond the limits of jurisdiction, unlike administrative action marred by patent error of law not affecting jurisdiction, is a nullity *ab initio* with the resulting absence of subject matter rendered invulnerable by the preclusive provision.[51]

The jurisdictional criterion, then, provides the courts with a valuable device for reconciling competing aims of policy in circumstances involving legislative restriction of supervisory jurisdiction. A precondition of the utility of this device, however, is a concept of jurisdiction, realistic in content and suitably circumscribed to give due weight to other factors like the legislative will and the imperatives of administrative policy in a specific context. The consequence of incorporating all error of law in the category of jurisdictional excess is to deprive preclusive provisions of force in an area in which they have legitimate application. The conflict which is the likely outcome of an indiscriminate widening of the borders of jurisdiction entails the risk of a legislative response damaging to the vitality of judicial review.

(ii) Judicial review for error going to jurisdiction and scrutiny of error within jurisdiction call for, and in general have evoked, materially different attitudes. In cases of jurisdictional excess the movement of modern English and Commonwealth law is towards scrupulous control. On the other hand, where the irregularity complained of is within jurisdiction, the courts exercise greater restraint and show, for the most part, a preference for detachment to intervention.

In the first place, current judicial practice reflects in relation to error of law within jurisdiction a liberal assessment of the permissible margin of error. In England the order of the tribunal will not be disturbed unless it is "positively wrong in law".[52] In defining the kind of intra-jurisdictional error which warrants interference by a superior court, English judges have postulated a real error of law[53]

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50. See the case cited at footnote 47, *supra*.

51. *Toronto Newspaper Guild* v. *Globe Printing Co.* footnote 45, *supra*.

52. *Edwards* v. *Bairstow* (1956) AC 14 at 38, *per* Lord Radcliffe.

53. *R.* v. *Industrial Injuries Commissioner, ex p. Amalgamated Engineering Union* (No.2) [1966] 2 QB 31; but see *R.* v. *Industrial Disputes Tribunal ex p Kigass* [1953] 1 All ER 593.

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which dispenses with the need for meticulous examination[54] of the tribunal's reasoning. In cases turning on statutory construction, reversal of the decision made by the tribunal has been thought defensible only if it is evident that "No tribunal acquainted with the ordinary use of language could reasonably reach that decision".[55] There is comparable authority in Northern Ireland.[56] Error of law will not be found simply because the court considers some other interpretation more apt, if the tribunal's interpretation is one which the statutory phraseology will plausibly bear.[57]

A similar note of circumspection is characteristic of the Commonwealth authorities. In Australia it has been stressed that a question of law should be really, and not merely colourably, involved.[58] In New Zealand misconception of a point of law[59] giving rise to a mere irregularity[60] evidenced, for instance, by a technically inaccurate formulation of the tribunal's reasons[61] has been considered insufficient to attract judicial review. In Canada an arbitrary,[62] illogical,[63] unreasonable[64] or misleading[65] conclusion does not, *per se,* bring the tribunal within the pale of judicial superintendence. A material defect

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54. *R.* v. *Barnsley Supplementary Benfits Appeal Tribunal, ex p Atkinson* [1976] 1 WLR 1047.

55. *R.* v. *Preston Supplementary Benefits Appeal Tribunal, ex p Moore* [1975] 1 WLR 624.

56. *R John Clark & Co.* v. *Northern Ireland General Health Services Board [1955] NI 41.*

57. *Re Sudbury Mine Mill and Smelter Workers' Union, Local 598 and Industrial Nickel Co. of Canada Ltd* (1962) 35 DLR (2d) 371 (Ont CA); *Re Hudson Bay Mining and Smelting Co Ltd and Flin Flon Base Metal Workers' Federal Union No.172* (1966) 60 DLR (2d) 312 (Man QB).

58. *Hopper* v. *Egg and Egg Pulp Marketing Board (Victoria)* (1939) 61 CLR 665 at 673 (HCA)

59. *New Zealand Sheep Farmers' Agency Ltd* v. *Mosley and Hill* [1932] NZLR 949 at 964, *per* Myers CJ (CA), following *R.* v. *Minister of Health, ex p Glamorgan County Mental Hospital* [1939] 1 KB 232 at 246, *per* Greer LJ.

60. *Winiata Te Wharo* v. *Airini Tonore* (1896) 14 NZLR 209 at 232, *per* Denniston J (CA).

61. *Walton* v. *Holland* [1963] NZLR 729 (CA).

62. *Re Service Employees' International Union, Local 308 and Manitoba Labour Board* (1979) 90 DLR (3d) 255 at 262, *per* Nitikman J (Man.QB).

63. *Re Bell Canada and Challenge Communications Ltd* (1978) 86 DLR (3d) 351 at 361, *per* Heald J (Fed Ct of App).

64. *Re Burgess Transport and Storage Ltd. and Board of Commissioners of Public Utilities for Nova Scotia* (1976) 72 DLR (3d) 231 (Nov Sc SC).

65. *R* v. *Alberta Board of Industrial Relations, ex p. Prudential Steel* (1967) 64 DLR (2d) 164 at 169 (SC of Alberta).

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of law[66] or a manifest injustice[67] transcending any minor or trivial error[68]has been required. A recurring caution which permeates the Canadian authorities is that the tribunal's decision "ought not to be lightly interfered with".[69]

The essence of these observations is the conferment of extensive latitude on the subordinate tribunal.[70] The Supreme Court of Canada has commented: "So long as the [tribunal's] decision can be said to be consonant with a rational appreciation of the situation presented, the court is without power to modify or set it aside."[71] The courts of England and the Commonwealth perceptively acknowledge that, within the spectrum of error of law within jurisdiction, there exists a peripheral area in which judicial intervention is not a salutary remedy.

Secondly, as a means of curtailing further the ambit of operative error of law within jurisdiction for purposes of judicial review, the courts have imposed a gloss concerning essentiality of the matter in respect of which the error was entertained. This refinement which is a salient feature of the law of New Zealand,[72] increases the leverage of the courts in their evaluation of the gravity of the error attributable to the tribunal by adverting specifically to a category of incidental error which bears an inadequately proximate relation to the tribunal's final determination..

Thirdly, again leaning towards preservation of the decision or action of the inferior tribunal, the courts have been prepared to consider, in cases where the reasons stated by the tribunal for its order have been impugned successfully, whether the order is capable of being

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66. *Re Dodd and Chiropractic Review Committee* (1979) 95 DLR (3d) 560 at 564, *per* Pennell J. (Ont HC of J).

67. *Re Al's Towing Service Ltd and Highway Transport Board of Manitoba* (1979) 94 DLR (3d) 697 at 700, *per* Matas JA (Man CA).

68. *Re Poyser and Mills, Arbitration* [1964] 2 QB 467 at 477-478, *per* Megaw J.

69. *Re Schulman and College of Physicians and Surgeons of Ontario* (1980) 111 DLR 689 at 692 *ad fin per* Montgomery J (Ont HC, Div Ct). See also *Re* v. *MacDonald and North York General Hospital* (1976) 59 DLR (3d) 647 at 657, *per* Weatherston J (Ont HC); *Re Westcoast Transmission Co. Ltd and Husky Oil Operations Ltd* (1980) 109 DLR (3d) 698 (CA of Alberta).

70. *Re LRB (Nova Scotia) International Union of Operating Engineers. Local No. 721* v. *Municipal Spraying and Contracting Ltd* (1955) 1 DLR 353 (Nov Sc SC); *Re McCord & Co. and Ottawa LRB* (1956) 4 DLR (2d) 455 (HC of Ont).

71. *LRB (British Columbia) and A-G for the Province of British Columbia* v.*Canada Safeway Ltd* [1953] 2 SCR 46 at 54 *per* Rand J (SCC).

72. *Gould* v. *Wily* [1960] NZLR 960 at 962 *per* Shorland J (SC).

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buttressed by other reasons not spelt out by the tribunal.[73] This suggestion, exposed to the criticism that it engenders an overly timorous attitude to judicial review, has presaged withdrawal by the courts in contentious sectors of administrative policy.

(iii) The difference between error signifying excess of jurisdiction and error within jurisdiction has repercussions in regard to degrees of invalidity of administrative action. A consistent application of the theory of jurisdiction yields the result that a jurisdictional anomaly denudes the tribunal of authority from the outset, while an error of law within jurisdiction has no effect on the exercise of authority by the tribunal until avoidance of the tribunal's order is actually secured by having recourse to judicial remedies. The conceptual difference as to the consequences of error of law in these contexts makes intelligible the application of the terminology[74] of 'void' and 'voidable' to the respective situations.

The distinction betwen void and voidable acts in administrative law has itself been derided as "confusing and unnecessary".[75] It is submitted, however, that the sanction of absolute invalidity of administrative action assailed for jurisdictional deficiency, if coupled with a notion of jurisdiction which embraces all error of law, fails to cater with sufficient sensitivity for the complexities of social policy in the relevant areas. In view of the unsuitability of the black and white character of the central paradigms associated with this structure, the category of error of law within jurisdiction, attracting judicial review and yet not necessarily entailing total voidness of previous action in the event of judicial intervention, provides a bridgehead for judicial review fraught with consequences distinguishable in degree from those of review for excess of jurisdiction, *stricto sensu*. For this reason, among others, it is thought, eradication of the category of intra-jurisdictional legal error will result in a *lacuna* in the law.

(iv) The decided cases furnish some indication that causal criteria may be usefully called in aid to contain the scope of cognizable error of law within jurisdiction, although such criteria are generally excluded

73. *Baldwin & Francis Ltd* v. *Patents Appeal Tribunal* [1959] AC 663 *cf* J.M. Fitzgerald and I.D. Elliot. 'Certiorari; Error of Law on the Face of the Record' (1964) M. University L. Rev 552 at 580-581.

74. See H.W.R. Wade. 'Unlawful Administrative Action: Void or Voidable?' (1967) 83 LQR 499 and (1968) 84 LQR 95; cf M.B. Akehurst, 'Void or Voidable? Natural Justice and Unnatural Meanings' (1968) 31 MLR 2 and 138.

75. H.W.R. Wade, 'Constitutional and Administrative Aspects of the *Anisminic* Case' (1969) 85 LQR 198 at 212.

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from the province of jurisdictional error. There is a strand of authority in Canada suggesting that the quashing of an administrative order on account of error of law within jurisdiction is justifiable only if it is apparent that the decision of the tribunal would have been different if the error had not been made.[76] Judicial intervention has been refused in Canada on the footing that, had the tribunal not erred on the point in question, its conclusion in all probability would still have been the same.[77] The residuary discretion to which the Canadian courts have resorted in this regard is clearly not available once the error is classified as subsuming jurisdiction.

(v) One of the most potent practical implications of the contrast between jurisdictional error and other types of error enabling review has to do with the purview of admissible evidence. Reception of affidavit and other extrinisic evidence is countenanced as a means of exposing error in the former context but not in the latter. This difference in regard to the scope of material on which reliance may be placed by the party invoking the supervisory jurisdiction of the court finds uniform expression in the law of England[78] as well as in that of New Zealand[79] and Canada.[80] The distinction is founded on principle: for it is inherent in the idea of manifest error of law, amenable to *certiorari* even in the absence of jurisdictional taint, that the error emerges unequivocally from the impugned proceedings. In the case of jurisdictional error, by contrast, no analogous limitation governs the mode of proof, so that the evidentiary material which may properly be adduced is fuller in range.

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76. *R.* v. *Alberta Oil and Gas Conservation Board ex p. Mountain Pacific Pipelines Ltd* (1965) 55 DLR (2d) 189 at 192, *per* McDermid JA (Alberta SCAD). *R.* v. *Law Society of Alberta, ex p. Demco* (1967) 64 DLR (2d) 140 at 150 *per* Johnson JA (Alberta SC. AD).

77. *Swist* v. *Alberta Assessment Appeal Board* [1976] 1 WWR 204 at 214 *per* Steer J (Alberta SC).

78. *R.* v. *Bolton* [1841] 1 QB 66; *Re Allen and Mathews' Arbitration* [1971] 2 QB 518 at 524, *per* Mocatta J; but see *R.* v. *Bucks JJ* [1843] 3 QB 800 and *R.* v. *West Sussex Quarter Session, ex p. Johnson Trust Ltd* [1974] QB 24 for the view that affidavits or oral evidence may be admitted to show concealed error of law on a matter within jurisdiction.

79. *Straven Services Ltd* v. *Waimairi County* [1966] NZLR 996 at 999, *per* MacArthur J (SC).

80. *R.* v. *Weatherhill, ex p. Osborne* (1970) 15 DLR (3d) 135 at 140, *per* Lacouriere J (Ont HC); *Woodward Stores (Westmount) Ltd* v. *Alberta Assessment Appeal Board, Div No.1 and City of Edmonton* [1976] 5 WWR 496 (Alberta SC).

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(vi) Of lesser importance, but relevant in an expanding statutory context, is a principle articulated in Canada regarding the effect of a right of appeal available to the aggrieved party on access to supervisory remedies. The effect of an unbroken line of authority in several Canadian jurisdictions, including Ontario,[81] Saskatchewan,[82] Manitoba[83] and British Columbia[84] is that review for patent error of law, but not review for jurisdictional error, is ordinarily barred by the availability of an appeal.

(vii) The intensity and depth of judicial review on the ground of paucity of evidence to support the determination of a subordinate tribunal are affected fundamentally by the distinction between error going to, and error independent of, jurisdiction. Where the alleged error pertains to a point which is not collateral or jurisdictional but is integral to the substantive issue submitted to the inferior tribunal for adjudication, the court in the exercise of its supervisory powers is restricted to determining whether there was or was not any evidence on which the finding of the tribunal could reasonably have been based.[85] However, where it is claimed that error envelops a collateral matter, the supervisory function is appreciably wider in scope, in that the court, far from being limited to a finding as to the existence or lack of evidence, is entitled to assess the available evidence unencumbered by the conclusion of the subordinate tribunal.[86]

(viii) It has been suggested in Australia that the grant of prohibition is warranted solely by jurisdictional deficiencies and that prohibition does not lie to control patent error of law within jurisdiction.[87] Fortunately, inhibitions of this nature deriving from discrepant elements of the prerogative writs are diminishing in importance today in the

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81. *Re Shaw Dairy Co.* (1938) 2 DLR 768 (Ont SC).

82. *R. ex rel Lotochinski* v. *Antonenko* (1961) 129 Can CC 429 (Sask SC); *Re Wilfong, Cathcart* v. *Lowery* (1962) 32 DLR (2d) 477 at 479, *per* Culliton JA (Sask CA).

83. *Paulowitch* v. *Dankochuk* (1940) 2 DLR 106 (Man SC).

84. *R.* v. *Spalding* (1955) 5 DLR 374 (BCCA).

85. *Re United Mine Workers of America Distr No 26* [1960] 23 DLR (2d) 328 (Nov Sc SC).

86. *Parkhill Bedding & Furniture Ltd* v. *International Molders & Foundry Workers Union of North American, Local 174 and Manitoba Labour Board* (1961) 26 DLR (2d) 589 (Man CA).

87. *R.* v. *Evatt, ex p. The Master Builders' Association of New South Wales (No 2)* (1974) 432 CLR 150 (HCA); *R.* v. *Stanley, ex p. Redapple Restaurants Pty Ltd* (1976) 13 SASR 290 (SC of SA).

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wake of legislative trends in England,[88] Australia[89] and Canada[90] directed towards unifying and consolidating the remedies.

(c) Summation

In the light of these nuances which make it substantially meaningful to disentangle jurisdictional error from error of law within jurisdiction, it is refreshing to note that Commonwealth authority, at variance in this respect with innovative developments in England, has resisted[91] the identification of all error of law with error involving jurisdiction.

This trend is reflected in the Canadian case law with moderate consistency. A typical observation is that of the Queen's Bench of Manitoba cautioning against the disposition "to act as though error always goes to jurisdiction instead of rarely".[92] The Court of Appeal of Manitoba has distinguished between a mistake in the interpretation of the law during the course of the proceedings and a mistake in the interpretation of the law purporting to give the tribunal jurisdiction.[93] The Supreme Court of Canada, highlighting this distinction in the context of prohibition, has remarked: "If it be necessary to interpret a statute in order to find out whether the divisional court should decide the rights of the parties at all then, if the divisional court judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie but, if it is necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the divisional court judge may go."[94]

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88. Supreme Court Act 1981, of England and Wales, s 31 codifying RSC Order 53 of 1977 which implemented the recommendations of the Law Commission of England made in the Report on Remedies in Administrative Law, Law Commn. No 73, cmnd 6407 (1976).

89. Administrative Decisions (Judicial Review) Act 1977 (Cwlth of Australia), s 5(1).

90. Federal Court Act 1971 (Canada), s 28.

91. For academic writing adopting a similar point of departure, see R.D. McInnes, 'Judicial Review after *Anisminic*' (1977) 9 Victoria U of Wellington L Rev 37; H.F. Rawlings, 'Judicial Review after *Pearlman*' [1979] Public Law 404.

92. *Creamette Co. of Canada Ltd* v. *Retail Store Employees Local Union 830* (1956) 4 DLR (2d) 78 at 83, *per* Tritschler J (Man QB).

93. *Young* v. *Johnson* (1961) 27 DLR (2d) 402 at 407' *per* Adamson CJM (Man CA).

94. *Segal* v. *Montreal* (1931) 4 DLR 603 at 614, *per* Lamont J (SCC), following *Re Long Point Co.* v. *Anderson* (1891) 18 AR (Ont) 401 (Ont CA) and *Tp of Ameliasburg* v. *Pitcher* (1906) 13 OLR 417 at 420, *per* Riddell JA (Ont CA).

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A judicial approach demonstrating affinity with this trend used to be part of English law.[95] In 1966, an English court felt free to observe: "Whether or not there is evidence to support a particular decision is always a question of law, but it is not a question of jurisdiction."[96] Unfortunately, this approach has since been reversed by incompatible developments in England.[97]

An argument in favour of merging all error of law in an amorphous category of jurisdictional defect is that this would facilitate the construction of a coherent theory of jurisdiction.[98] Indeed, the lack of such a theory has been identified as one of the major shortcomings of English administrative law.[99] But theoretical symmetry and simplicity of structure can be achieved at too high a price. It would seem that these advantages are bought too dearly if they are acquired by jettisoning a concept, entrenched in the common law, which sustains a viable mechanism that has served the courts well. The differing ambiances relevant to dimensions of judicial review for error militating against, and error of law within, jurisdiction are elements of value in the texture of the law. Their removal, by reducing the scope for flexibility and manoeuvre in the judicial control of administrative tribunals, must surely impoverish the remedial law.

The Law-fact Antithesis: Modalities and Techniques

(a) The Underlying Values

The sheet anchor of judicial review predicated on control of errors of law is a preconception regarding the assignment of responsibility. It is a natural assumption embedded in the legal and cultural heritage of England and the Commonwealth that questions of law are matters for courts to resolve "in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity".[100] A basic scale of values is reflected in the comment by an English judge that "The courts jealously uphold and

95. *R.* v. *Minister of Health* (1939) 1 KB 232 at 246, *per* Greer LJ; *R.* v. *Paddington Furnished Houses Rent Tribunal, ex p. Kendal Hotels Ltd* [1947] 1 All ER 448 at 449; cf *R.* v. *Ludlow, ex p. Barnsley Corpn* [1947] KB 634 at 639.

96. *Armah* v. *Government of Ghana* [1966] 3 All ER 177 at 187.

97. *See the text at footnotes 34 et seq. supra.*

98. B.C. Gould, '*Anisminic* and Judicial Review' [1970] PL 358 at 367.

99. *ibid,* at 358.

100. *Re Racal Communications Ltd* [1980] 2 All ER 634 at 638, *per* Lord Diplock.

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safeguard the prima facie privilege of every man to resort to them for the determination and enforcement of his legal rights".[101] Indeed, the exercise or declining of jurisdiction connected with surveillance of errors of law by administrative tribunals has been conceived of by Australian law, following the English legal tradition, in terms of "whether or not the courts are to accept or reject responsibility for performing ordinary judicial functions".[102] The postulate of access to the courts for the purpose of resolving contentious matters of law arising from administrative adjudication has positive merit in that it strengthens public confidence in the legal system.

The antithesis relating to the domains of law and fact has hardened because of the inclination of the courts, unflinchingly safeguarding their jurisdiction in the former area against erosion, towards plentitude of *vires* in administrative agencies in matters concerning the determination of facts. This attitude is conditioned by a variety of policy factors. Judicial deference to the legislative allocation of responsibility,[103] recognition of special expertise possessed by the tribunal in the relevant field,[104] comparative informality of procedure underscoring empirical scrutiny of particular circumstances rather than continuity with the practice of the past,[105] settled expectations of the community based on consistent usage,[106] unsuitability of concomitants of the judicial process such as applicability of evidentiary rules throughout the spectrum of functions discharged by administrative tribunals[107] and the advantage of substantial reduction of expenditure

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101. *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 QB 329 at 354, *per* Romer LJ. quoted in *Harbottle Brown & Co. Pty Ltd* v. *Halstead* (1968) 88 WN (NSW) 421 at 426, *per* Street J (SC of NSW).

102. *McKinnon* v. *Grogan* (1974) 1 NSWLR 295 at 298, *per* Wootten J (SC of NSW); cf *Cameron* v. *Hogan* (1934) 51 CLR 358 (HCA).

103. *R.* v. *Peterborough Supplementary Benefits Appeal Tribunal, ex p. Supplementary Benefits Commission* [1978] 3 All ER 887 at 889, *per* Michael Davies J; cf *Prodexport State Co. for Foreign Trade* v. *E.D. & F. Man Ltd* [1973] QB 389.

104. *Re Rohm & Haas Canada Ltd and Anti-Dumping Tribunal* (1978) 90 DLR (3d) 212 at 216, *per* Jackett CJ (Fed Ct of App).

105. *D. Pearce,* 'Judicial Review of Tribunal Decisions – The Need for Restraint' (1981) 12 Federal Law Review 167.

106. *R.* v. *National Insurance Commissioner, ex p. Stratton* [1979] QB 361 at 369, *per* Lord Denning MR.

107. M. Tushnet. 'Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies' (1979) 57 *Texas L. Rev.* 1307.

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and delay[108] are all pertinent factors. These considerations, which form the bedrock of the distinction between revisionary and appellate jurisdiction and prompt judicial resolve to ensure strict delimitation of the former area,[109] underline the autonomy of administrative tribunals in respect of factual adjudication.

The prevailing law embodies conflicting approaches to proof of error on the part of tribunals.

A narrow conception of the supervisory function emanates from the approach that error, to bring the apparatus of review into play, must be explicitly discoverable[110] and that no inference of error can be drawn from the omission of particulars, allusion to which does not constitute a mandatory legal requirement.[111] The desire to allow administrative tribunals considerable elasticity within the scope of their allotted tasks is evinced by Canadian authority.[112] It has been held in Australia, in the setting of legislation incorporating criteria which a local council is bound to take into account when considering an application for approval of a subdivision of land, that the necessity for consideration of each element is not deducible from the legislative provision.[113] In similar vein, a judge of the Supreme Court of New South Wales has commented: "I cannot accept that the mere fact that a relevant piece of evidence is not expressly mentioned in the tribunal's decision raises the inference that it was not considered at all."[114] This approach is reconcilable with the origins of supervisory jurisdiction for patent error of law in England,[115] but its stringently limited range is unsatisfactory from a policy standpoint.

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108. *Re LRB (Nova Scotia) International Union of Operating Engineers, Local No. 721* v. *Municipal Spraying and Contracting Ltd* (1955) 1 DLR 353 (Nov Sc SC).

109. *Leeson* v. *General Medical Council* (1889) 43 Ch D 366.

110. *Re Labour Relations Act: Pulp and Paper Workers of Canada, Watson Island Local No 4* v. *Celgar Ltd and LRB of British Columbia* (1964) 48 WWR 555 at 562, *per* Aikins J (BCSC); *Roessler Construction Co. Ltd* v. *Thiessen and Manitoba Labour Board (1976) 4 WWR 529 at 539, per* Morse J (Man QB).

111. For Canada, see R. v. *Board of Commissioners of Public Utilities ex p. Halifax Transit Corpn (1971) 15 DLR (3d) 720 at 730, per* Cooper JA (Nov Sc SC). Cf. for Australia, *Paramac Printing Co Pty Ltd* v. *Comr of Taxation for the Commonwealth of Australia* (1964) 111 CLR 529 at 543, *per* Owen J (HCA).

112. *Woolaston* v. *Minister of Manpower and Immigration* (1972) 28 DLR (3d) 489 at 492 *ad fin per* Laskin J (SCC).

113. *Warringah Shire Council* v. *Rippledeen Pty Ltd* (1973) 28 LGRA 214 (SC of NSW).

114. *Willoughby Municipal Council* v. *Manchil Pty Ltd* (1974) 29 LGRA 303 at 310, *per* Samuels J (SC of NSW).

115. E.G. Henderson, *Foundations of English Administrative Law* (1963) P 144-159.

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A countervailing strand of opinion, enabling more lavish resort to judicial remedies, is also in evidence in the Commonwealth. Overt indications of adherence to governing statutory provisions have been required in New Zealand[116] where academic authority appears to favour oblique means of discovery of error.[117] The extended approach to judicial review is epitomized in a comment by the High Court of Australia: "It is not necessary that you should be sure of the precise particular in which (the administrative official) has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law".[118] This trend, consistent with a realistic application of judicial remedies, is confirmed by the observation of the House of Lords that "Even though no evidence is given, nevertheless if [the] error appears from the documents properly before the court, or by legitimate inference therefrom, then *certiorari* may be granted to quash the decision".[119]

A distinct danger attendant on stretching the jurisdictional criterion to the extent suggested by recent developments in England is that the courts, conscious of the drastic consequences of treating an error by a subordinate tribunal as an error of law, may endeavour in appropriate contexts to contain the ambit of jurisdictional taint indirectly at the point of classification of the error imputed to the tribunal. This would entail disingenuous reasoning, in that an error which ostensibly has all the elements of an error of law may well be regarded by an artificial contrivance as an error of fact because the structural framework of the law leaves no room for a resilient device enabling the courts to control the consequences of inclusion of defects in the category of errors of law. The likelihood of a policy of insidious withdrawal on the part of the courts on account of uncertainty as to the extent of their commitment is itself, it would seem, a compelling argument against the identification of all error of law as invariably jurisdictional in scope.

(b) The Content of Error of Law

In keeping with the current trend in England, it has been suggested that "Every error of law by a tribunal is to be an excess of

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116. *Williams* v. *Crimes Compensation Tribunal* [1968] NZLR 711 (SC).

117. D.E. Patterson, *An Introduction to Administrative Law in New Zealand* (1967) p 162.

118. *Avon Downs Pty Ltd* v. *Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360, *per* Dixon J (HCA).

119. *Baldwin & Francis Ltd* v. *Patents Appeal Tribunal* [1959] AC 663 at 695, *per* Lord Denning.

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jurisdiction".[120] However, since error of fact would remain jurisdictional or not according to the circumstances, the effect of this view is that different rules would apply to error of law and error of fact.[121] But the practical utility of the category of error of law within jurisdiction justifies recognition of a concept of jurisdictional law corresponding with that of jurisdictional fact embedded in English law.[122]

The genesis of supervisory jurisdiction in England furnishes no indication of eagerness on the part of the courts to distance themselves as a matter of necessity from processes of factual adjudication. Indeed, it is evident that the Court of King's Bench, in its superintendence of justices of the peace in criminal matters, was not loath to set aside convictions on account of errors of fact.[123] Nevertheless, a different point of departure, entailing a drastic reduction of the degree of control, typifies the subsequent development of judicial review. The courts of England[124] and the Commonwealth[125] have been consistently wary of extending the principles of review to the realm of controverted facts. The rigidly controlled grounds of interference in these contexts emerge from the approach of the Australian courts that a finding of fact by an administrative tribunal can be disturbed only if there is no evidence to support its inferences or if the facts inferred by it and supported by the evidence are incapable of justifying the finding of fact which purports to be based on those inferences.[126]

The decided cases in Commonwealth jurisdictions contain tentative guidelines as aids to differentiating between error of law and error of fact. The basic criterion would appear to be that "The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact" [127] The principle has been applied uniformly in England[128] and

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120. H.W.R. Wade, 'New Twists in the *Anisminic* Skein' (1980) 96 LQR 492 at 496.
121. *ibid.*
122. *R.* v. *West Sussex Quarter Sessions, ex p. Johnson Trust Ltd* [1974] QB 24.
123. See E.G. Henderson, *op cit.* footnote 115 *supra.*
124. *R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal* [1951] 2 KB 694 at 699 *per* Devlin J.
125. *Gould* v. *Wily* [1960] NZLR 960 at 963, *per* Shorland J (SC).
126. *The Australian Gas Light Co.* v. *The Valuer-General* (1940) 40 SR (NSW) 126 at 138, *per* Jordon CJ (SC of NSW); cf *Colonial Mutual Life Assurance Society Ltd* v. *Federal Comr of Taxation* (1931) 49 CLR 171 at 175-176 (HCA).
127. *Wali Mohammad* v. *Mohammad Bakhsh* (1929) LR 57 Ind App 86 at 92.
128. *Farmer* v. *Cotton's Trustees* [1915] AC 922 at 932 *per* Lord Parker of Waddington.

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in Australia[129] that "Where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only".[130] Conversely, a usual feature of a question of fact is the absence of presumptions and rules which require that the question be resolved in any particular way.[131]

Judicial intervention on grounds embracing jurisdiction is implicit in the subjection of agencies wielding executive power to the principles of legality and accountability which crystallize fundamental values of English public law. Infringement of either of the rules of natural justice clearly exemplifies a vice pertaining to jurisdiction. Thus, failure to allow the parties to adduce relevant evidence,[132] acting on evidence obtained in the absence of the parties or their representatives,[133] denial of cross-examination[134] and the improper refusal of an adjournment[135] have all been treated as instances of jurisdictional taint. Equally, bias in the subordinate tribunal vitiates its determination absolutely.[136] In accordance with the case law, defective constitution of the tribunal,[137] advertence to the wrong question[138] or failure to address the right question,[139] refusal to

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129. *Comr of Taxation* v. *Miller* (1946) 73 CLR 93 at 97, *per* Latham CJ (HCA); *Hayes* v. *Federal Comr of Taxation* (1956) 98 CLR 47 (HCA); *Ipec Insurance Ltd* v. *Federal Commr of Taxation* (1975) 6 ALR 136 at 147-148, *per* Zelling J (SC of SA).

130. See the case cited at footnote 128, *supra.*

131. *Commr of Taxation of the Commonwealth of Australia* v. *Mitchum* (1965) 113 CLR 401 at 407 *per* Barwick CJ (HCA).

132. *Re Ottawa Newspaper Guild Local 205 and the Ottawa Citizen* (1966) 55 DLR (2d) 26 (Ont HC); cf *LRB of New Brunswick* v. *Eastern Bakeries Ltd* (1961) 26 DLR (2d) 332 at 339, *per* Abbott J (SCC).

133. *Gosford Shire County Council* v. *Anthony George Pty Ltd* (1969) 89 WN (NSW) (Pt 1) 300 at 356, *per* Hardie J. (Land and Valuation Ct of NSW).

134. *Toronto Newspaper Guild* v. *Globe Printing Co.* (1953) 3 DLR 561 at 578, *per* Kellock J (SCC).

135. *Jim Patrick Ltd* v. *United Store & Allied Products Workers of America, Local 189 and LRB* (1959) 21 DLR (2d) 189.

136. *R.* v. *Board of Arbitration, ex p. Cumberland Railway Co* (1968) 67 DLR (2d) 135 (SC AD of Nov Sc).

137. *Re British Columbia Government Employees' Union and Public Service Commission* (1979) 46 DLR (3d) 86 (BCSC).

138. *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers* [1970] SCR 425 at 435 (SCC).

139. See the case cited at footnote 134, *supra.*

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consider material evidence[140] or reliance on irrelevant evidence,[141] allusion to extraneous factors[142] or exclusion of relevant factors,[143] nonfulfilment of a condition precedent for the exercise of statutory power,[144] enlargement of the ambit of authority in a manner not referable to its legal source[145] (whether by extending the criteria regulating the use of power[146] or by purporting to make an order of a kind not provided for by the empowering legislation[147]) and unauthorized delegation of authority[148] provide further examples of error involving jurisdiction. The rationale of judicial intervention throughout this area is that the administrative tribunal has travelled beyond the limits of the power conferred on it.[149]

Apart from this category of error of law going to jurisdiction, there is room for an extensive notion of legal error not necessarily affecting the basis of jurisdiction. Misconstruction of the enabling statute[150] or of delegated legislation,[151] erroneous application of the

140. *Jeffs* v. *New Zealand Dairy Production Marketing Board* [1967] NZLR 1057 at 1665-1667, *per* Viscount Dilhorne (PC) cf *Wisland* v. *Medical Practitioners' Disciplinary Committee* [1974] 1 NZLR 29 at 42, *per* Speight J (SC).

141. *Re Civic Employees' Union No 43 and Municipality of Metropolitan Toronto* (1962) 34 DLR (2d) 711 at 720, *per* Aylesworth JA (Ont CA); *R.* v. *Barber, ex Warehousemen and Miscellaneous Drivers' Union, Local 419* (1968) 68 DLR (2d) 682 at 689-690, *per* Jessup JA (Ont CA).

142. *R.* v. *Baker* (1923) 2 DLR 523 (CA of Alberta); *Perron* v. *The Commissioner of Taxation of the Commonwealth of Australia* (1972) 128 CLR 595 at 601, *per* Stephen J (HCA); *Morin and Sunbridge Investments Ltd* v. *Provincial Planning Board* [1974] 6 WWR 291 at 303, *per* McDonald J (SC of Alberta).

143. *Re Newhall and Reimer* (1969) 2 DLR (3d) 498 at 503, *per* Dickson JA (Man CA).

144. *Westburne Industrial Enterprises Ltd* v. *LRB* [1974] 1 WWR 572 (BCCA); cf *Re Lodum Holdings Ltd and Retail Food Union, Local 1518* (1968) 3 DLR (2d) 41 (BCSC).

145. *Port Arthur Shipbuilding Co.* v. *Arthurs* (1968) 70 DLR (2d) 693 at 702 *per* Judson J (SSC)

146. *Holroyd Municipal Council* v. *Allis Spares & Equipment Pty. Ltd* (1968) 16 LRGA 265 (Land and Valuation Ct of NSW).

147. *Blackwoods Beverages Ltd* v. *Dairy Employees, Truck Drivers and Warehousemen, Local No 834 (No 1)* (1956) 3 DLR (2d) 529 at 535 (Sask CA).

148. *Peverley Place Pty Ltd* v. *Mittagong Shire Council* (1973) 28 LGRA 191 (SC of NSW).

149. *Ex p. Bankstown Municipal Council; Re Tully Investments Pty Ltd* (1964) 9 LGRA 144 at 147, *per* Else-Mitchell J (Land and Valuation Ct of NSW).

150. *Federal Commissioner of Taxation* v. *Broken Hill South Ltd* (1941) 65 CLR 150 at 154, *per* Rich ACJ (HCA); *South Australian Comr for Prices and Consumer Affairs* v. *Charles Moore (Australia) Ltd* (1955) 12 SASR 214 at 221, *per* Bray J (SC of SA); *Municipal District of Sturgeon No 90* v. *Alberta Assessment Appeal Board* [1971] 4 WWR 584 at 585-586, *per* Johnson JA (Alberta SC AD).

151. *R.* v. *Westminister Compensation Appeal Tribunal* [1953] 1 WLR 506; *R.* v.

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law to the situation in hand,[152] an unsupportable interpretation of contractual stipulations[153] and misapprehension of general principles of law[154] including rules of procedure and evidence[155] such as those regulating the burden of proof[156] have been characterized as errors of law. This category of error also encompasses mistaken classification of the subject matter of the adjudication.[157] By a process of extension, error of law has been held in Commonwealth jurisdictions to subsume faulty reasoning,[158] disregard by the tribunal of a statutory obligation to state the findings of fact on which its conclusions are based[159] and an opinion formed fancifully,[160] capriciously[161] or *mala fide*[162] and culminating in the use of executive discretion on the basis of illusory or misconceived facts.[163] A suggestion made in the Canadian case law that, in arbitration matters, a distinction is proper between a case where a question of law arises incidentally in the course of a dispute referred to an arbitrator and a case in which a specific question of law is submitted to the arbitrator as the central question for decision,[164] and that judicial review should be confined to the former case,[165] does not represent the prevailing view.[166] Consistently

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Medical Appeal Tribunal at London, ex p. Burpitt [1957] 2 QB 584; *R.* v. *Medical Appeal Tribunal for South Wales District ex p. Griffiths* [1958] 1 WLR 517.

152. *Bell* v. *Ontario Human Rights Commission* (1971) 18 DLR (3d) 1 (SCC); cf *Re E.W. Bickle Ltd and Minister of National Revenue* (1980) 100 DLR (3d) 55 at 62, *per* Jackett CJ (Fed Ct of App).

153. *Marshall* v. *Whittaker's Building Supply Co.* (1963) 109 CLR 210 at 213 (HCA).

154. *Royal Trust Co.* v. *City of Montreal* (1918) 57 SCR 352 at 357-358, *per* Davies J (SCC).

155. *Re Johnston's Appeal* (1960) 9 FLR 31 at 49 (Cts Martial App Trib). For the underlying rationale, see *Mraz* v. *R.* (1955) 93 CLR 493 at 514, *per* Fullagar J (HCA).

156. *Donald* v. *Federal Comr of Taxation* (1975) 6 ALR 53 (SC of NSW).

157. *Re Mitchell and Employment Standards Division, Department of Labour* (1977) 78 DLR (3d) 631 (Man QB).

158. *R.* v. *Minister of Housing and Local Government, ex p. Chichester RDC* [1960] 1 WLR 587.

159. *Re Rafuse and Stewart* (1980) 111 DLR 266 at 272, *per* McIntosh J (SC of Nov Sc).

160. *Giris Pty Ltd* v. *The Comr of Taxation of the Commonwealth of Australia* (1968) 119 CLR 365 at 374, *per* Barwick CJ (HCA).

161. *Denver Chemical Manufacturing Co* v. *The Comr of Taxation* (NSW) (1949) 79 CLR 296 at 317, *per* Williams J (HCA).

162. *Fraser & Co. Ltd* v. *Minister of National Revenue* (1949) AC 24 at 36, *per* Lord Macmillan (PC).

163. *Re T.E. Quinn Truck Lines Ltd and Snow* (1982) 129 DLR (3d) 513 (SCC).

164. *Faubert and Watts* v. *Temagami Mining Co. Ltd* (1960) 22 DLR (2d) 220 at 225, *per* Kerwin CJC (SCC).

165. *ibid.*

166. *R.* v. *Barber, ex p. Warehousemen and Miscellaneous Drivers' Union, Local*

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with the criteria set out in the decided cases, it has been held, within the framework of Australian tax legislation, that such questions as whether money or property received in particular circumstances constitutes assessable income,[167] whether a surplus in any given year is to be treated as taxable income,[168] whether the profit accruing from alienation of property is part of assessable income,[169] whether funds from specific sources qualify to be treated as exempt income[170] and the extent of permissible deductions from assesable income[171] are matters of law. On the other hand, a conclusion as to the source of income,[172] a finding in regard to residence[173] and the question whether the plaintiff was wholly dependent for support upon the deceased within the meaning of a statutory provision[174] are properly conceived of as questions of fact.

There is a marked cleavage of judicial opinion in the Commonwealth regarding the question whether the reception of inadmissible evidence or the exclusion of admissible evidence may be considered an error of law so as to allow scope for judicial review. A strand of English authorities[175] suggests an affirmative answer, while the opposite view has been expressed in Ontario[176] and in Ireland.[177] An intermediate

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419 (1968) 68 DLR (2d) 682 at 689-690, *per* Jessup JA (Ont CA).

167. *Hayes* v. *Federal Comr of Taxation* (1956) 96 CLR 47 (HCA).

168. *The Social Credit Savings and Loans Society Ltd* v. *The Comr of Taxation of the Commonwealth of Australia* (1971) 125 CLR 560 at 577, *per* Gibbs J (HCA).

169. *Annalong Pty. Ltd* v. *The Comr of Taxation of the Commonwealth of Australia* (1972) 127 CLR 174 (HCA).

170. *Federal Comr of Taxation* v. *Hall* (1975) 6 ALR 457 (SC of NSW).

171. *The Comr of Taxation of the Commonwealth of Australia* v. *Broken Hill Pty. Co. Ltd* (1968) 120 CLR 240 (HCA).

172. *The Comr of Taxation of the Commonwealth of Australia* v. *Mitchem* (1965) 113 CLR 401 (HCA).

173. *Commr of Taxation* v. *Miller* (1946) 73 CLR 93 at 97, *per* Lathan CJ (HCA); cf *Inland Revenue Comrs* v. *Lysaght* [1928] AC 234 at 249.

174. *Aafjes* v. *Kearney* (1976) 50 ALJR 454 (HCA).

175. *Re Arbitration between Walford, Baker & Co. and Macfie & Sons* (1915) 113 LT 180 at 183, *per* Lush J; *Government of Kelantan* v. *Duff Development Co. Ltd* [1923] AC 395 at 409, *per* Viscount Cave LC; *R.* v. *Industrial Injuries Comr ex p. Ward* [1965] 2 QB 112.

176. *Re Metropolitan Toronto Board of Comrs of Police and Ontario Human Rights Commission* (1980) 105 DLR (3d) 108 (Ont HC of J).

177. *R.* v. *Murphy* [1921] 2 IR 190 at 226.

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approach is reflected in some Canadian[178] and Australian[179] decisions. The dominant view in Alberta[180] and Manitoba,[181] that the unwarranted admission or rejection of evidence provides a legitimate ground of judicial review only in circumstances where a rudimentary principle of justice is contravened, is of little value because of the intrinsic vagueness of the test proposed. More specific criteria emerge from the Australian authorities. It has been aptly pointed out by the Court of Appeal of New South Wales that a deliberate or even inadvertent disregard of the law by taking account of evidence from witnesses not sworn or not properly heard in court is distinguishable from an erroneous reliance on evidence which is technically inadmissible.[182] A refusal to receive evidence because the tribunal is of opinion that particular facts could not affect the exercise of its discretion, it has been conceded by the High Court of Australia, involves no question of law unless the tribunal demonstrates some misconception of the scope of discretion or of the grounds on which its exercise should proceed.[183]

A controversial area of Commonwealth law concerns the applicability of judicial review on the ground of lack of evidence or inadequate evidence supporting the conclusions reached by an administrative tribunal. Three major strands of opinion may be disentangled in the decided cases and in academic writing.

(i) In a group of Canadian authorities,[184] the assertion has been made uncompromisingly that an administrative determination based on evidence "so palpably insufficient and inadequate as to be valueless"[185] is defective in so fundamental a sense as to be equivalent to a decision made without jurisdiction. However, an opposing line of Canadian authority,[186] coinciding with English judicial

178. See the cases cited at footnotes 180 and 181, *infra*.

179. See the cases cited at footnotes 182 and 183, *infra*.

180. *R.* v. *Pearson* (1957) 117 Can CC 249 at 259, *per* MacDonald JA (Alberta SC, AD).

181. *Young* v. *Johnson* (1961) 27 DLR (2d) 402 (Man CA).

182. *Ex p. Kelly; Re Teece* (1966) 85 WN (NSW) 151 at 158 (CA of NSW).

183. *Ward* v. *Williams* (1954-1955) 92 CLR 496 (HCA).

184. *R.* v. *Nelson* (1935) OWN 562 at 564, *per* McTague J (HC of Ont); *Rubin* v. *Ontario College of Pharmacy* (1961) 27 DLR (2d) 690 at 696, *per* Modern JA (Ont CA); *R.* v. *The Council of the Pharmaceutical Association of British Columbia, ex p. Windt* (1968) 65 DLR (2d) 132 (BCSC).

185. *R.* v. *Steeves* (1921) 62 DLR 329 at 343 (SC of New B).

186. *Re Bland* (1934) 1 DLR 546 (BCSC); *Ex p. Hodgins* (1944) 17 MPR 323 (SC AD of New B.); *R.* v. *Dunbar* (1953) 10 WWR 334 (BCSC) Cf D.W.Elliott, 'No Evidence; A Ground of Judicial Review in Canadian Administrative Law?' (1972-1973) 37 Sask LR 48.

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pronouncements at the turn of the century,[187] is equally emphatic in its insistence that "The idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle".[188]

(ii) An alternative approach is that absence or insufficiency of evidence, although not approximating to jurisdictional deficiency, attracts judicial review on the basis of error of law. This attitude, which has found favour with the courts of England,[189] Canada,[190] Australia[191] and New Zealand,[192] is consistent with a recent recommendation by the Law Reform Commission of Canada[193] and is substantially similar to the position in American law where it is a statutory requirement that the findings of administrative tribunals should be supported by adequate evidence on the record.[194]

(iii) At the other end of the spectrum, the propriety of judicial review on this ground has been denied altogether in England,[195] Australia[196] and New Zealand.[197] The rationale suggested by the High Court of Australia is that questions connected with the adequacy of evidence are "matters for the decision of the [tribunal] in the course of its proceedings and do not involve questions of law".[198]

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187. *Haggard* v. *Pelicier Freres* [1892] AC 61; *Hooper* v. *Hill* (1894) 1 QB 659.

188. *Canadian Transport (UK) Ltd* v. *Alsbury and A-G of British Columbia* (1952) 7 WWR (NS) 49 at 73, *per* Sidney Smith JA (BCCA).

189. *R.* v. *Birmingham Compensation Appeal Tribunal* [1952] 2 All ER 100, cf *R.* v. *National Insurance Comr. ex p. Michael* [1977] 1 WLR 109 at 116, *per* Roskill LJ.

190. *LRB of British Columbia* v. *Canada Safeway Ltd* (1953) 3 DLR 641 at 643, *per* Kerwin J; at 646, *per* Tascherau J; at 652, *per* Estey and Cartwright JJ. See also *Re Ontario LRB* v. *Bradley and Canadian General Electric Co.* (1957) 8 DLR (2d) 65 (Ont CA).

191. *The Comr of Taxation of the Commonwealth of Australia* v. *Brian Hatch Timber Co. (Sales) Pty Ltd* (1971) 128 CLR 28 at 45, *per* Barwick CJ (HCA).

192. *Walton* v. *Holland* [1963] NZLR 729 at 734, *per* Leicester J (SC); cf *Law* v. *Wellington Working Men's Club and Literary Institute* (1911) 30 NZLR 1198 (SC).

193. *Independent Administrative Agencies*, Working Paper 25 of 1980, p 151-152.

194. Administrative Procedure Act 1946, s.10(e).

195. *R.* v. *Nat Bell Liquors Ltd* [1922] 2 AC 128.

196. See the case cited at footnote 198, *infra.*

197. *Young* v. *Doyle* [1923] NZLR 68 at 71, *per* Salmond J (SC), *Hami Paihana* v. *Tokerau District Maori Land Board* [1955] NZLR 314 at 321, *per* Adams J (SC).

198. *Mobil Oil Australia Pty Ltd* v. *The Comr of Taxation* (1962-1963) 113 CLR 475 at 494, *per* McTiernan and Taylor JJ (HCA).

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The cardinal merit of the 'no evidence' ground is that it provides a vehicle for judicial review over an extensive area of factual adjudication which could otherwise be brought within the parameters of supervisory jurisdiction only by the use of tortuous reasoning. If the substratum of evidence on which an administrative decision rests is so tenuous that a court is impelled to intervene, it is better that the court should have at its disposal a mechanism which enables the infirmities of the impugned decision to be addressed directly than that principles moulded with different objectives in view should be extended unconvincingly by analogy. In an evaluation of the competing approaches, it is submitted for this reason that paucity of evidence should be viewed as an instance of error of law, remediable as such within the limits prescribed, rather than be incorporated in jurisdictional criteria which have to be distorted to some extent to accommodate the 'no evidence' ground. Separation of the latter basis of review from tests relevant to jurisdiction has the advantage that a conceptual device, useful in residuary situations, is available to the courts *ceteris paribus* but yields to paramount policy factors like the legislative will expressed in valid preclusive provisions.

(c) *Assessment*

Notwithstanding efforts by the courts to spell out the distinguishing characteristics of error of law, as a class of error,[199] it is clear that the distinction between error of law and error of fact in this area involves, essentially, questions of perspective and degree. This has been recognized in a comment by the Supreme Court of New South Wales: "If the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law ... If, however, the facts so inferred are capable of being regarded as either within or without the description, according to the relative significance attached to them, a decision either way by a tribunal of fact cannot be disturbed by a superior court which can determine only questions of law."[200] The Supreme Court of Victoria has approved[201] of an observation by a court in Northern

199. See, for example, the cases cited at footnotes 127-131, *supra*.

200. *The Australian Gas Light Co.* v. *The Valuer-General* (1940) 40 SR (NSW) 126 at 138, *per* Jordan CJ (SC of NSW); cf *Benmax* v. *Austin Motor Co. Ltd* [1955] AC 370; *Federal Comr of Taxation* v. *Lister Blackstone Pty Ltd* (1975) 6 ALR 423 at 432, *per* Shippard J (SC of NSW).

201. *Re Industrial Appeals Court, ex p. Henry Berry & Co. (Australia) Ltd* [1955] VLR 156 at 165 *per* Hudson J (SC of Vict).

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Ireland that "If an inference of fact can be drawn either way, a superior court is not at liberty to prefer what it may consider to be the more probable, or even the much more probable, inference so as to vitiate the order, but there may be an inference so unreasonable that to draw it on the slender evidence available would amount to an error of law".[202]

A rigid dichotomy between questions of law and questions of fact is bound to impart to the law a scholastic and unreal quality.[203] English and Commonwealth courts acknowledge that the hybrid category of "questions of mixed fact and law"[204] should be regarded as questions of law for purposes of judicial review.

While there is no doubt that the flexibility of the principles applicable allows the fullest scope for judicial creativity, some current trends seem to indicate excessive boldness in broadening the frontiers of review.[205] This has been done by stretching the limits of the concept of error of law as a means of subjecting to judicial scrutiny a subordinate tribunal's conclusions of fact predicated in reality on the exercise of judgment and on assessment of the weight of evidence adduced before it. Illustrative of this tendency is the treatment of the lack of a firm basis for a conclusion,[206] a decision made in apparent conflict with the evidence available,[207] uncertainty in the terms of an award,[208] failure to reach a conclusion which is considered 'the only proper conclusion',[209] and the attachment of undue weight to any evidentiary factor[210] as instances of error of law. Indeed, the

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202. *R. (Hanna)* v. *Ministry of Health and Local Government* [1966] NI 52 at 66 *per* Lowry J.

203. *Cf Da Costa* v. *R.* (1968) 118 CLR 186 at 194-195, *per* Windeyer J (HCA).

204. *Hoddinott* v. *Newton Chambers & Co. Ltd* [1901] AC 49 at 56.

205. However a restrained approach to the definition of error of law is reflected in some recent Australian decisions: see *Blackwood Hodge (Australia) Pty Ltd* v. *Collector of Customs NSW (No 2)* (1980) 3 ALR 38; *Board of Control of Michigan Technological University* v. *Deputy Comr of Patents* (1981) 34 ALR 529.

206. *Re Ottawa Newspaper Guild, Local 205 and the Ottawa Citizen* (1966) 55 DLR (2d) 26 at 28, *per* Gale CJHC (Ont HC).

207. *Canada Safeway Ltd* v. *LRB* (1953) 1 DLR 48 (BCCA); cf *Scown* v. *Haworth* (1898) 24 VLR 313 (SC of Vict); *Hill* v. *Ziymack* (1906) 3 CLR 726 (HCA).

208. *Scotia Construction Co. Ltd* v. *City of Halifax* (1935) 1 DLR 316 at 318, *per* Duff CJC (SCC); *Re City of Regina and Amalgamated Transit Union, Division No. 588* (1976) 67 DLR (3d) 533 at 535-536, *per* Culliton CJS (CA of Sask).

209. *Strahan* v. *Taree Municipal Council* [1963] NSWR 59 (Land and Valuation Ct of NSW).

210. *Comr of Taxation (Commonwealth)* v. *Utah Development Co.* (1976) 50 ALJR 678 (HCA).

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scope of error of law has been extended very considerably by characterizing inferences from facts[211] and the omission to give proper effect to these inferences[212] as involving questions of law.

Uncontrolled malleability in the use of these techniques is open to criticism in terms of policy.[213] Apart from the cynical comment that "There has been a strong tendency, arising from the infirmities of human nature, in a judge to say, if he agrees with the decision ... that the question is one of fact, and if he disagrees ... that it is one of law, in order that he may express his own opinion the opposite way,"[214] an extravagant concept of supervisory jurisdiction obscures the perception that the role of regular courts and of administrative tribunals, in the setting of modern social welfare legislation, should be viewed as complementary rather than as antagonistic. Furthermore, such a concept could unwittingly relegate the importance of extra-judicial sanctions which are operative, in a variety of contexts, as potent instruments for the control of administrative action today.

The Content and Scope of the Record

(a) The Historical Rationale

Restriction of the supervisory power of the courts in respect of errors of law to the record of the subordinate tribunal is due, historically, to the difficulty of ascertaining the content of oral or written statements not formally incorporated in the record.[215] The rationale underlying this limitation has been indicated by the Privy Council: "That the superior court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in doing so it would itself, in turn, transgress the limits within which its own jurisdiction of supervision ... is confined."[216] In New

211. *Ex p. Parker; Re Brotherson* (1956) 57 SR (NSW) 326 at 328, *per* Owen J (SC of NSW).

212. *Wajnberg* v. *Raynor & Melbourne and Metropolitan Board of Works* [1971] VR 665 (SC of Vict).

213. Cf J. Dickinson, *Administrative Justice and the Supremacy of Law* (1927) p 55; K.C. Davis. *Administrative Law Treatise* (1958) vol 4, ch 29; L. Jaffe, *Judicial Control of Administrative Action* (1965), ch 15; H. Whitmore and M. Aronson, *Review of Administration Action* (1978), p 273.

214. *Currie* v. *Comrs of Inland Revenue* [1921] 2 KB 332 at 339, *per* Scrutton LJ approved in *Dennis* v. *Watt* (1942) 43 SR (NSW) 32 at 33, *per* Jorden CJ (SC of NSW).

215. D.E. Paterson, *Op cit.* p 157.

216. *R.* v. *Nat Bell Liquors* [1922] 2 AC 128 at 155-156, *per* Lord Sumner.

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Zealand it has been stressed that "The court is concerned only with what purports to have been done and the power which the tribunal purports to have exercised on the face of the record".[217]

The effect of emphasis on the record is that the evident[218] or ostensible character of the error becomes the cornerstone of judicial review. The crucial element is not the gravity of the error but its discoverability without meticulous examination of the evidence. Thus, the essence of 'speaking orders'[219] is that they tell their own story[220] or set out the facts, the findings thereon and the grounds of decision.[221] The concept of the record is not integral to the substantive law but pertains solely to the means available for exposure of error. It has been aptly observed by a Canadian court that "Where no duty is imposed upon the tribunal to keep a stenographic or tape-recorded transcription of its proceedings, the exercise by the court of its prerogative supervisory power is disarmed".[222]

(b) Dimensions of the Record: the Expanding Canvas

The orthodox formulation is that "The record must contain at least the document which initiates the proceedings, if any, and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them".[223] During the incipient stages of the development of supervisory jurisdiction, it would seem that not only the *loquela* – the document by which the proceedings commenced in the inferior tribunal – but all matters relating thereto[224] formed part of the record.[225] The charge,[226] the documents on which the

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217. *Morgan* v. *Licensing Control Comr* [1959] NZLR 1148 at 1157, *per* McGregor J (SC); cf *Newman Bros Ltd* v. *Allum, S.O.S. Motors Ltd (in Liquidation)* [1934] NZLR 694 at 703, *per* Myers CJ (SC).

218. *R.* v. *Moddie ex p. Emery* (1981) 34 ALR 481 (HCA).

219. The term seems to have originated in *Walsall Overseers* v. *London & NW Railway* (1878) 4 AC 30.

220. *ibid.* at 40 *per* Lord Cairns LC.

221. *R.* v. *Logan, ex p. McAllister* (1947) 4 DLR 676 (SC of NB).

222. *Woodward Stores (Westmount) Ltd* v. *Alberta Assessment Appeal Board Div No 1 and City of Edmonton* [1976] 5 WWR 496 at 512-513, *per* McDonald J (SC of Alberta).

223. See the *Northumberland* case, *supra* footnote 19, *supra.*

224. *Cum Omnibus ea tangentibus;* Lily's Practical Register (2nd edn. 1735), vol 1, p 363.

225. *R.* v. *St. Edmundsbury (Chancellor)* [1947] 2 ASll ER 170 at 176, *per* Wrottesley LJ.

226. *R.* v. *Council of the Pharmaceutical Association of British Columbia, ex p. Windt* (1968) 65 DLR (2d) 132 at 134, *per* McIntyre J (BCSC).

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adjudication is based,[227] conclusions relating to the distinct issues and the reasons for these conclusions[228] including a statement of reasons contained in an informal document prepared after the making of the order,[229] an explanation of a decision attached to the tribunal's order[230] and a document delivered by the tribunal contemporaneously with its award[231] have been held in modern law to constitute part of the record,[232] but not the transcript of the evidence adduced before the tribunal,[233] the terms of a collective bargaining agreement constituting the subject matter of the inquiry,[234] allegations of fact set out in a reply to the charge,[235] the marginal notes made by a member[236] and, *a fortiori*, by a dissenting member[237] of the tribunal, the contents of a minute book maintained by the tribunal[238] or the grounds on which its order is based.[239] The question whether spoken words can be part of the record has been answered affirmatively[240] and negatively[241] in conflicting decisions, but the effect of legislation in England is to incorporate an oral statement of reasons in the record.[242] A broad approach to the scope of the record is reflected in the willingness of modern courts to look at documents which

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227. *Battaglia* v. *Workmen's Compensation Board*, footnote 44, *supra*.

228. *R.* v. *The District Court of the Metropolitan District Holden at Sydney, ex p. White* (1966) 116 CLR 644 at 657-658, *per* Windeyer J (HCA).

229. *R.* v. *Supplementary Benefits Commission, ex p. Singer* [1973] 1 WLR 713.

230. *R.* v. *Paddington North and St. Marylebone Rent Tribunal, ex p. Perry* [1956] 1 QB 229.

231. *Kent* v. *Elstob* (1802) 3 East 18.

232. See, generally, A.S. Abel 'Materials Proper for Consideration in Certiorari to Tribunals; 1' (1963-1964) 15 U of Toronto LJ 102.

233. *Clark* v. *Wellington Rent Appeal Board* [1975] 2 NZLR 24 at 31, *per* O'Regan J (SC); cf *Farrell* v. *Workmen's Compensation Board* (1960) 26 DLR (2d) 185 at 188, *per* Des Brisay CJBC (BCCA).

234. *Pulp and Paper Workers of Canada. Watson Island Local No 4* v. *Celgar Ltd and LRB of British Columbia* (1964) 48 WWR 555 at 561, *per* Aikins J (BCSC).

235. *Re LRB (Nova Scotia) International Union of Operating Engineers, Local No 721* v. *Municipal Spraying and Contracting Ltd* (1955) 1 DLR 353 at 363, *per* Ilsley CJ (SC of Nov Sc).

236. *Eli Lilly & Co.* v. *S & U Chemicals Ltd* (1976) 67 DLR (3d) 342 at 349, *per* Dickson J (SCC).

237. *Re Walker and West Hants Municipal School Board* (1973) 42 DLR (3d) 105 (SC of Nov Sc).

238. *Hami Paihana* v. *Tokerau District Maori Land Board* (1955) NZLR 314 at 321, *per* Adams J (SC).

239. *A-G* v. *Tipae* (1888) 6 NZLR 157 at 174, *per* Ward J (CA).

240. *R.* v. *Chertsey JJ, ex p. Franks* [1961] 2 QB 152.

241. *R.* v. *Newington Licensing JJ* [1948] 1 KB 681.

242. Tribunals and Inquiries Act 1971, s 12(5), replacing Tribunals and Inquiries Act 1958. s 12(3).

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appear from the record to be the basis of the decision,[243] even if the documents are replete with expressions of a technical nature.[244] In harmony with this trend, Commonwealth courts have recognized a category of documents "so closely connected with [the award] that they must be regarded as part of the award".[245]

Extension of the limits of the record has been facilitated greatly by the doctrine relating to incorporation by reference. The basis of this doctrine is that "Just as a pleading is taken to incorporate every document referred to in it, so also does an adjudication".[246] The Supreme Court of New Zealand has adopted the principle that "Where any document forming part of the record contains a specific reference to another document, the full text of the latter document is also included in the record".[247] Thus, the effect of quoting an extract from a specialist's report in the award is to make the whole report a part of the record.[248] However, it is a question of construction whether there has or has not been a sufficient degree of incorporation.[249] For example, a general reference to a contract in that part of the award dealing with the consequences of a finding of fact, without any mention of the contractual provisions from which the finding flowed, is inadequate to incorporate the contract in the award.[250]

Judicial attitudes to matters connected with the record have been instrumental in enlarging the ambit of review. In contrast with the stark refusal to recognize a duty in the inferior tribunal to maintain a record, much less to prepare a transcript of it for submission to the court,[251] it has been held in Canada that the right of an applicant

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243. *Landbauer* v. *Asser* [1905] 2 KB 184 at 191; cf *D.S. Blaiker & Co. Ltd* v. *Leopold Newborne (London) Ltd* [1953] 2 Lloyd's Rep 427.

244. *Baldwin & Francis Ltd* v. *Patents Appeal Tribunal* [1959] AC 663 at p 679, *per* Lord Moxton of Henryton.

245. *A-G of Manitoba* v. *Kelly* [1922] AC 268 at 281, *per* Lord Parmoor (PC).

246. *R.* v. *Medical Appeal Tribunal ex p. Gilmore* [1957] 1 QB 574 at 582, *per* Denning LJ.

247. *Straven Services Ltd* v. *Waimairi County* [1966] NZLR 996 at 999, *per* MacArthur J (SC).

248. D.C.M. Yardley, 'The Grounds for Certiorari and Prohibition' (1959) 37 Canadian Bar Review 294 at 334.

249. Cf *Duthie* v. *Fernie Memorial Hospital Society* (1964) 43 DLR (2d) 477 at 481, *per* Davey JA (BCCA); *Re Alberta Labour Act; ITT Canada Ltd* v. *Board of Industrial Relations* (1967) 60 WWR 172 at 176, *per* Kirby J (SC of Alberta).

250. *Giacomo Costa Fu Andrea* v. *British Italian Trading Co. Ltd* [1963] 1 QB 201 at 210 *per* Diplock LJ.

251. *Re United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the US and Canada, Local 488 and Reynolds* (1976) 68 DLR (3d) 81 at 86, *per* Cavanagh J (Alberta SC Trial Div).

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cannot be abridged by the failure of the tribunal to keep a record of its proceedings[252] and that the applicant is entitled to have the notes kept by the tribunal produced and transcribed at his expense for use at the hearing.[253] The absence of a proper record has itself been identified as a ground of judicial review.[254] Moreover, it has been recognized that a superior court has power to order the tribunal to complete its record,[255] in which event the tribunal is obliged to refer, at least in outline, to the principal evidence on which it relies in reaching the relevant findings of fact.[256] Legislation in Ontario imposes on tribunals governed by the statute an imperative obligation to compile a record of their proceedings.[257] In New Zealand, the court is statutorily empowered to direct that the record of the proceedings in which the decision was made, or any part of the record, be filed in an office of the court..[258]

One of the least satisfactory aspects of the common law relating to the record is the principle that the reasons of the tribunal constitute part of the record only if the tribunal chooses to incorporate them.[259] In relation to a conviction by magistrates for a non-indictable offence, the Privy Council observed: "If justices state more than they are bound to state, it may, so to speak, be used against them, out of their own mouths they may be condemned."[260] The balance of judicial authority in England[261] and the Commonwealth[262] is that voluntary

252. *Road and Sea Transport Ltd* v. *Gold Line Transport Ltd* (1976) 13 NBR (2d) 700 at 701 *per* Hughes CJNB (NBSC, AD).

253. *Merrill C. Blagdon* v. *The Public Service Commission Appeals Board and A.R. Barrie* [1976] 1 FC 615 at 619-620, *per* Thurlow J (CA).

254. *Hnatchuk* v. *Workmen's Compensation Board* [1972] 3 WWR 395 at p 397, *per* Culliton CJS (Sask CA).

255. *Iveagh* v. *Minister of Housing and Local Government* [1964] 1 QB 395 at 410, *per* Lord Denning MR .In the alternative the tribunal's order may be quashed: *Givaundan & Co. Ltd* v. *Minister of Housing and Local Government* [1967] 1 WLR 250.

256. *Re Britford Common* [1977] 1 WLR 39 at 45, *per Slade J.*

257. Statutory Powers Procedure Act 1971 (Ont). s 20.

258. Judicature Amendment Act No 130 of 1972 (NZ), s 10.

259. For an explicit statement of this principle see *R.* v. *Canada LRB, ex p. Brewster Transport Co. Ltd* (1966) 58 DLR (2d) 609 at 620, *per* Riley J (Alberta SC).

260. *R.* v. *Nat Bell Liquors* [1922] 2 AC 128 at 155, *per* Lord Sumner.

261. *Ricelip Parish* v. *Henden Parish* (1698) 5 Mod 416.

262. For Canada, see *Re Universal Contructors and Engineering Ltd and LRB of New Brunswick* (1960) 27 DLR (2d) 423 at 427, *per* Ritchie JA (SC of NB); *R.* v. *LRB (Nova Scotia)* (1961) 29 DLR (2d) 449 at 452, *per* MacDonald J (SC of Nov Sc); *Shumiatcher* v. *A-G of Saskatchewan* (1964) 47 WWR 57 (Sask CA); *R.* v. *Hubbard* [1976] 3 WWR 152 at 157, *per* Bouck J (BCSC); *Re Miljohns and Board of Education for the Borough of Scarborough* (1981) 112 DLR (3d) 552 (Ont HC. Div Ct). For New Zealand, cf *Gould* v. *Wily* [1960] NZLR 960 at 962, *per* Shorland J (SC).

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embodiment in the record of particulars which the tribunal is not compelled to state justifies the treatment of these matters as integral to the record. However, the point has been left open expressly in some decisions,[263] and the stricter view has been taken in other cases,[264] that the test of incorporation in the record is the legal requirement that the matters in question be dealt with in the award.

The capricious nature of the governing principle and the large element of coincidence characteristic of the common law have been rectified by legislative provisions in England,[265] Australia[266] and Alberta[267] which confer on a person affected by an administrative decision the right to be informed of the reasons for the decision and to have these reasons deemed part of the record and so made examinable by the courts for error of law. In recommending this change in the law, the Attorney-General of Australia pointed out that 'No longer will it be possible for the decision maker to hide behind silence'.[268] This development, suggested in England by the Franks Committee[269] and in Australia by the Kerr[270] and Ellicott[271] Committees, is desirable from two points of view. It enables the court to ascertain whether the matter has been dealt with according to law;[272] and it gives the party affected access to material which would satisfy him that justice has been done.[273] In circumstances where a duty to state reasons is imposed by the law,[274] the reasons given must be proper, adequate and intelligible,[275] and they must cover the substantial points raised in the case.[276] A bald statement

263. See, for example, *ex p. Godkin; Re Fitzmaurice* (1969) 90 WN (Pt 1) (NSW) 159 at 162, *per* Wallace P (CA of NSW).

264. *R.* v. *District Court of the Northern District of Queensland; ex p. Thompson* (1968) 42 ALJR 173 at 176, *per* Barwick CJ (HCA).

265. Tribunals and Inquiries Act 1971, s 12.

266. Administrative Decisions (Judicial Review) Act 1977 (Cwlth), s 13(1); cf Administrative Appeals Tribunal Act 1975 (Cwlth), s 28(1).

267. Administrative Procedures Act, RSA 1970, c2, s 8.

268. Parl Debates, HR, 1 June 1977, p 1396.

269. Cmnd 218 (1957), para 40.

270. Report of August 1971.

271. Report of May 1973.

272. *Fiordland Venison Ltd* v. *Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 at 350, *per* Cooke J (CA).

273. *Re Poyser and Mills' Arbitration* [1964] 2 QB 467.

274. See, for example, Planning Act 1977 (Alberta), c 89, s 83 (2)(b); cf *Re Green, Michaels and Associates Ltd and Public Utilities Board* (1979) 94 DLR (3d) 641 (Alberta SC); *P. Couillard and City of Edmonton* (1980) 103 DLR (3d) 312 (Alberta CA).

275. *Dome Petroleum Ltd* v. *Public Utilities Board (Alberta)* [1977] 2 SCR 822 (SCC); cf *Re Hannley and City of Edmonton* (1978) 91 DLR (3d) 758 (Alberta SC, AD).

276. See the case cited at footnote 273, *supra.*

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of conclusions, which does not disclose the reasoning process, does not represent an adequate compliance with the law.[277]

The expansion and contraction of the record throughout the development of the law have been influenced by policy factors. The effect of English legislation in the middle of the last century,[278] emulated in Canada,[279] was that a recapitulation of the evidence was expunged from the record of summary convictions. Measures such as this, which had the practical consequence of rendering a large segment of error immune from judicial scrutiny, expressed a legislative reaction to the unrestrained use of supervisory techniques. In recent times, however, the legislative trend, especially in Canada, has been in the opposite direction. Statutory provisions enacted in Ontario[280] and in British Columbia[281] and Civil Procedure Rules in force in Nova Scotia[282] have included in the record several categories of matters not encompassed by the principles of the common law. These provisions have enhanced significantly the value of supervisory procedures by making available to the court fuller material bearing upon the impugned decision.

Imaginative shaping of the purview of the record, as a specific factual or statutory context may require, is a striking feature of the common law. Commonwealth authority clearly construes the record in a much wider sense in the setting of appellate jurisdiction than in that of supervisory jurisdiction,[283] the premise being that the power to correct errors of law should be ampler in the former context. The component elements of the record were far less exacting in relation to civil matters than in respect of convictions by magistrates in

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277. *Re Northwestern Utilities Ltd and City of Edmonton* (1978) 89 DLR (3d) 161 at 176, *per* Estey J (SCC).

278. Summary Jurisdiction Act 1848 (UK), 11-12 Vict c 43, commonly known as Jervis's Act.

279. Magistrates' Act, RSPEI 1951, c 89, s 7.

280. The statutory Powers Procedure Act 1971 of Ontario, s 20, provides that the record shall include (a) any application, complaint, reference or other document, if any, by which the proceedings were commenced; (b) the notice of any hearing; (c) any intermediate orders made by the tribunal; (d) all documentary evidence filed with the tribunal; (e) the transcript, if any, of the oral evidence given at the hearing; and (f) the decision of the tribunal and the reasons therefor.

281. The Judicial Review Procedure Act 1976 of British Columbia, s 1, defines the record as including items (a) to (c) set out in the Ontario legislation, footnote 280, *supra.*

282. Nova Scotia Civil Procedure Rules 1972, s 56, 07(1) and (2).

283. *Re Brad's Transport and Douglas Bros. & Jones Inc.* (1972) 29 DLR (3d) 555 (SC of PEI); *Re Bulk Carriers (Prince Edward Island) Ltd* (1974) 44 DLR (3d) 291 (SC of PEI).

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summary proceedings under Acts of Parliament.[284] The diversity of contextual factors has impeded the formulation of a uniform approach.[285] The vagaries and permutations of the record, as conceived of by the common law, have given way in some Commonwealth jurisdictions[286] to the comparative stability of statutory prescriptions which have generally been of wider scope.

(c) Evaluation

The chief weaknesses of the common law are its casuistry and an imbalance in relation to priorities. The structural framework of the law governing review for patent legal error has been conducive to emphasis on defects of form and not of substance.[287] The common law, moreover, has placed a premium on reticence and so encouraged opaque modes of administrative adjudication. The focus in this area of the law should be on the causal effectiveness of error rather than on the means of demonstrating its incidence. An acceptable point of departure for the modern law is that an error of law causally linked with the outcome warrants review, whether the error appears *ex facie* the record or not. Conversely, an error of law, notwithstanding its patent quality, should not require quashing of an administrative order or decision if the error consists merely of a technical irregularity which has not led to a substantial miscarriage of justice.

The anomalies of the common law are to a considerable extent redeemed, and the suggested objectives of policy accomplished, by legislation currently in force in Australia[288] and New Zealand.[289]

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284. See the *Northumberland* case, footnote 19 *supra*, at 349.

285. R.F. Reid and H. David, *Administrative Law and Practice* (2nd edn, 1978), p 387.

286. See footnotes 280 and 281, *supra*, and footnotes 288 and 289 *infra*.

287. *R.* v. *Darlington County Borough Juvenile Court, ex p. West Hartlepool Corpn* [1957] 1 WLR 363; cf G. Sawer, 'Error of Law on the Face of an Administrative Record' (1954-1956) 3 U of Western Australia LR 24 at 33; J.F. Garner, *Administrative Law* (5th 1979), p 166-167).

288. Administrative Decisions (Judicial Review) Act 1977 (Cwlth of Australia), s 5(1)(f) which recognizes as a ground of review that the decision involves an error of law, whether or not the error appears on the face of the decision.

289. Judicature Amendment Act. No 130 of 1972 (NZ), s 5 which declares that, on an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and, where the decision has already been made, may make an order validating the decision, notwithstanding the defect or irregularity, from such time and on such terms as the court thinks fit.

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These statutory innovations, and a recent recommendation by the Law Reform Commission of Canada,[290] are consistent with reformulation of the crucial distinction as involving material and inconsequential error of law rather than patent and latent error of law. Contemporary legislation in England,[291] while codifying the rules of the Supreme Court in regard to forms of relief, does not affect the principles of the common law relating to the manifest quality of the error. A recent suggestion[292] that abolition of the distinction between error of law within and outside jurisdiction, emerging from the English authorities, is to be welcomed as a means of doing away with perplexities attendant on the record, is unconvincing. The Commonwealth experience valuably illustrates that a legislative solution, addressed specifically to the latter problem, could leave intact a distinction embedded in the substantive law which has intrinsic usefulness.

Conclusion

Judicial review of executive action on the ground of lack of excess of power and judicial control of restricted categories of error of law within the scope of authority conferred on administrative tribunals are contrapuntal themes relating to public administration under the rule of law. Nevertheless, the streams of authority relevant to these rubrics of review are historically and contextually distinct, and there can be no confluence without serious distortion of the law. Overreach of the jurisdictional criterion has been detrimental in its impact on contemporary administrative law. The greatly extended contours of the jurisdictional text, combined with the drastic consequences of an error held to vitiate jurisdiction, provide a slender base for accomplishment of the complex objectives of modern social policy. The traditional law, containing elements no more inscrutable than those encountered in other branches of administrative law, has a functional justification. There are circumstances in which the exercise of judicial review on a basis independent of jurisdictional fault has practical value. Erosion of the concept of error of law within jurisdiction stultifies convenient mediating techniques. Indefinite extension of the effects of judicial intervention, which this development entails aggravates tensions that could place in jeopardy the very survival of mechanisms of judicial review in sensitive areas of the law.

290. *Independent Administrative Agencies,* Working Paper No 25 of 1980 of the Law Reform Commission of Canada, p 151-152.

291. See footnote 88, *supra.*

292. Lord Diplock, 'Administrative Law and Judicial Review Reviewed' (1974) 33 CLJ 233 at 243.

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CODIFICATION OF GROUNDS OF REVIEW: THE AUSTRALIAN EXPERIENCE

Introduction

THE PERCEIVED inadequacies of the common law prompted the Australian legislature, a decade ago, to revamp the framework of administrative law to accord with new needs and priorities. The comprehensive statutory regime now in force has introduced far-reaching changes which have evoked interest throughout the Commonwealth. The Administrative Appeals Tribunal Act[1] has brought into existence, in the comparatively limited area in which jurisdiction to entertain appeals from subordinate administrative bodies established by particular statutes has been specifically conferred on the Tribunal, a meticulous mechanism the intensity of which far transcends the borders of supervisory jurisdiction. The Administrative Review Council, created by this Act, has responsibility for keeping the processes of review under constant surveillance and making appropriate recommendations. The Administrative Decisions (Judicial Review) Act[2] extends the scope of judicial review to investigate functions and other conduct engaged in for the purpose of making a decision, and codifies the grounds of judicial review. The effect of this legislation is to confer on the Federal Court of Australia a jurisdiction to review federal administrative action which was previously exercised by the High Court of Australia and the Supreme Courts of the different states. The creation of the office of Commonwealth Ombudsman[3] provides further machinery to secure redress for administrative grievances. The purpose of this chapter is to assess, in the overall context of these reforms, the value of the Australian experiment relating to statutory incorporation of the grounds of judicial review.

Scope of The Legislation

The Australian legislation governing judicial review applies to any "decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General."[4]

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1. 91 of 1975 (Cwth).
2. 59 of 1977 (Cwth).
3. The Ombudsman Act 181 of 1976 (Cwth).
4. The Administrative Decisions (Judicial Review) Act 59 of 1977 (Cwth) s 3(1).

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Decision

The "making of a decision" embraces a wide category of situations which include making an order, giving an approval, issuing an authority, imposing a condition, making a declaration, retaining an article or doing or refusing to do any act or thing.[5] The adoption of an inclusionary method of definition prevents these circumstances from being treated as exhaustive. Australian courts have characterized the word "decision" in this context, as having indefinite and wide,[6] indeterminate[7] and aoristic[8] import.

The essence of a decision is that it must "amount to something of significance which is reasonably definite, which is final and conclusive for immediate purposes at least, which is manifested in some way, which emanates from an authoritative or responsible source and which materially affects another person or persons".[9] While a decision is ordinarily preceded by some thought or consideration on the part of the decision maker, it embodies the end product of that thought and consideration and the conclusion to which they lead in some announced or published ruling.[10] Accordingly, a "decision" connotes an ultimate or operative determination rather than a reference to the adjudication of issues which arise in the course of making such an ultimate or operative determination.[11]

In keeping with these criteria, the conclusion of a Parole Board that the evidence adduced before it did not warrant the grant of parole is not a "decision", since the board's willingness to continue hearing the applicant indicated that the matter was still receiving consideration.[12] Clearly, an interim ruling expressing a tentative view formed of an argument is not a "decision".[13] Where the applicant

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5. *id.* s 3(2).

6. *Director-General of Social Services* v. *Hales* (1983) 47 ALR 281 at 305 *per* Lockhart J.

7. *Director-General of Social Services* v. *Chaney* (1980) 31 ALR 571 at 590 *per* Deane J.

8. *Riordan* v. *Parole Board of the Australian Capital Territory* (1981) 34 ALR 322 at 326-327 *per* Lockhart J.

9. *Evans* v. *Friemann* (1981) 3 ALD 326 *per* Fox J.

10. *Legal Aid Commission of Western Australia* v. *Edwards* (1982) 42 ALR 154 at 157 *per* Tookey J.

11. *Riodan* v. *Parole Board of the Australian Capital Territory* (1981) 34 ALR 322 at 331 *per* Lockhart J.

12. *ibid.*

13. *Roberts* v. *Garrett* (1982) 40 ALR 311.

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was employed in a temporary capacity, and it was a condition of his contract that his employment would not continue after a specified date, the resolution of his employer not to seek the approval of the Public Services Board for a further period of employment does not involve a "decision", since this was an incident of contract.[14] Similarly, where engagement in a transferable service involved an undertaking to comply with statutory requirements and regulations, the making of a transfer is not a "decision" but an order pursuant to employment.[15] On the other hand, the ruling by a minister on reconsideration of a matter remitted to him by the Administrative Appeals Tribunal is a "decision", for the purpose of applicability of judicial review, since the minister's opinion signifies conclusion of the review process and necessarily results in either the affirmation or the revocation of the order subject to reconsideration.[16] The refusal to make an order[17] or to issue a certificate[18] and a determination that there is lack of statutory power to make the order[19] constitute "decisions", for this purpose.

The scope of judicial review encompasses not only decisions which have already been made, but decisions which are likely to be made in the future, whether they are discretionary in character or not.[20]

Administrative character

The legislation controlling judicial review applies to decisions "of an administrative character".[21] The framework of the statute probably implies survival of the "trichotomy" of legislative, judicial and administrative decisions,[22] but the purview of "administrative" decisions has been construed liberally. A decision, to be reviewable, is not required to be "purely" or "solely" administrative in character, so that judicial review may properly be exercised in respect of an order by a committing magistrate holding that a *prima facie* case exists.[23]

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14. *Fowell* v. *Ioannou* (1982) 45 ALR 491 at 503 *per* Bowen CJ and Northrop J.
15. *Sellers* v. *Woods* (1982) 45 ALR 113 at 122.
16. *Barbaro* v. *McPhee* (1982) 42 ALR 147.
17. *Tooheys Ltd* v. *Minister for Business and Consumer Affairs* (1981) 4 ALD 277.
18. *Re Federal Commissioner of Taxation, ex p, Bayford Wholesale Pty Ltd* (1983) 48 ALR 477 at 481.
19. *Graham* v. *Commissioner for Superannuation* (1981) 2 ALN 52.
20. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 3(1).
21. *ibid.*
22. *Evans* v. *Friemann* (1981) 3 ALD 326.
23. *Moss* v. *Brown* (1983) 47 ALR 217.

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The refusal of an application to a minister for a determination that a certain item does not attract liability for duty under customs legislation, involves an administrative function.[24] The refusal by the deputy registrar of a family court to accept notice for the filing of a request for taxation of a bill of costs for legal aid falls on the administrative, rather than the judicial, side of the line.[25] By contrast, the issue of a search warrant, being a judicial and not an administrative act, is not reviewable.[26] The mechanism of the statute does not enable review of judicial decisions or of delegated legislation,[27] but the courts have been reluctant to exclude from the ambit of "administrative" decisions, functions which were previously amenable to review by the instrumentality of the prerogative writs.[28] The refusal to make a determination applying a customs tariff to a particular class of goods has been considered a decision of an administrative, and not a legislative, character.[29] It has been suggested, however, that decisions with a predominant "policy" content cannot be treated as administrative decisions.[30]

Under an Enactment

A further restrictive feature of the definition of a "decision" is that it should have been made "under an enactment".[31] The word "under" connotes "in pursuance of" or "under the authority of".[32] An "enactment" means an Act other than the Commonwealth Places (Application of Laws) Act 1970, an Ordinance of a Territory or an instrument (including rules, regulations or by-laws) made under such an Act or Ordinance.[33]

A decision made under the terms of letters patent, themselves authorized by Australian Commonwealth legislation, is within the scope of judicial review legislation.[34] A decision by a Commission

24. *Minister for Industry and Commerce* v. *Tooheys Ltd* (1982) 42 ALR 260.
25. *Legal Aid Commission of Western Australia* v. *Edwards* (1982) 42 ALR 154.
26. *Baker* v. *Campbell* (1982) 44 ALR 431.
27. *Trimboli* v. *Onley* (1981) 3 ALN 100.
28. *Hamblin* v. *Duffy* (1981) 3 ALD 153.
29. *Tooheys Ltd* v. *Minister for Business and Consumer Affairs* (1981) 36 ALR 64.
30. Report of the Committee of Review of Prerogative Writ Procedures, Parliamentary Paper 56 of 1972 para 22.
31. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 3(1).
32. *Australian National University* v. *Burns* (1982) 43 ALR 25 at 31.
33. See n 31, *supra*.
34. *Huston* v. *Castigan* (1982) 45 ALR 559.

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of Inquiry to summon witnesses and to examine them, pursuant to powers accorded to the Commission under the Royal Commissions Act 1902, is a decision made under an enactment.[35] The contention that, in making an involuntary termination of a professor's appointment, a university acts merely on the basis of a contractual arrangement and not also under its basic statutes, has been rejected as unattractive in terms of policy, since the erosion of academic freedom is likely to be encouraged by such an approach.[36] A decision made under regulations "convenient for carrying out or giving effect to" the cardinal principles of a statute is within the ambit of judicial review.[37] A similar view has been taken in regard to administrative decisions made in accordance with the general scheme of legislation.[38] However, a recommendation by a selection panel, not established by statute and not functioning under the aegis of a legislative instrument, is not susceptible of judicial review.[39]

Recommendations of Commissions of Inquiry

There is a strand of authority in the common law that "An investigator or board who does not have the power to adjudicate in the sense of having the power to make a decision which will directly determine and affect the rights and obligations of parties, but rather has only the duty or power to investigate and make a report, exercises an administrative function and not a quasi-judicial function",[40] with the consequence that judicial review is excluded. The basis of this view is the crucial importance attaching to the impact on accrued legal rights *proprio vigore*. Where recommendations made pursuant to a statutory duty imposed cannot have any independent effect without some other person or body making a decision with regard to the carrying out of such recommendations, the duty to recommend has been seen as an administrative duty not subject to judicial review.[41]

This line of authority adverts, overtly or inferentially, to a series of indispensable attributes of a decision in respect of which judicial

35. *Ross* v. *Castigan* (1982) 41 ALR 319.
36. *Burns* v. *Australian National University* (1982) 40 ALR 707 at 717-718 *per* Ellicott J.
37. *Spence* v. *Teece* (1982) 41 ALR 648.
38. *Parks Rural Distribution Pty Ltd* v. *Glasson* (1983) 48 ALR 601 at 609.
39. *Excell* v. *Harris* (1983) 51 ALR 137.
40. *Re Nanticoke Ratepayers' Association and Environmental Assessment Board* (1978) 83 DLR (3d) 722 at 729.
41. *Bell* v. *Ontario Human Rights Commission* (1971) 18 DLR (3d) 1 at 6.

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review may be exercised. (i) A *lis inter partes* has been identified as an essential prerequisite.[42] (ii) An adjudication affecting "the extinguishment or modification of parties' rights or interests"[43] has been insisted upon as an element of the decision. Some Australian decisions have formulated the principle uncompromisingly that "legal consequences",[44] in the sense of "a direct effect upon legal rights",[45] must be shown to arise from a report before the prerogative writs could be granted.[46] The essential element is a "new jeopardy",[47] understood in this narrow sense. (iii) It is necessary that the proceeding before the board or tribunal should be "a required original step leading to adverse action against the parties".[48] The determination by the board must be an integral aspect of the statutory scheme which envisages action culminating in jeopardy to the rights or interests of the petitioner.

On the other hand, the fact that the report is not self-executing or that the discretion of the executive is interposed between it and any actual consequences to the person affected, the High Court of Australia has recognized in a countervailing current of authority, does not necessarily preclude the issue of *certiorari* or prohibition.[49] This view, significantly extending the scope of judicial review, has been adopted by contemporary Australian legislation which provides explicitly that, where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another enactment, the making of such a report or recommendation is itself deemed to be the making of a decision.[50]

The preferable construction of this provision, it is submitted, is that its applicability is not confined to circumstances in which a decision is based on the report. Furthermore, the statute permits

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42. *Campbell Soup Co. Ltd* v. *Farm Products Marketing Board* (1975) 63 DLR (3d) 401 at 438.

43. *F.F. Ayriss & Co.* v. *Board of Industrial Relations of Alberta* (1960) 23 DLR (2d) 584 at 586.

44. *McGuinness* v. *Attorney-General for Victoria* (1940) 63 CLR 73 at 102 *per* Dixon J.

45. *R.* v. *Coppal ex p, Viney Industries Pty Ltd* (1962) VR 630.

46. *R.* v. *Collins ex p, ACTU – Solo Enterprises Pty Ltd* (1976) 50 ALJR 471.

47. *Testro Brothers Pty Ltd* v. *Tait* (1963) 109 CLR 353 at 369 *per* Kitto J.

48. *R.* v. *Ontario Labour Relations Board ex p, Kitchener Food Market Ltd* (1966) 57 DLR (2d) 521 at 530.

49. *Brettingham-Moore* v. *St Leonards Municipality* (1969) 121 CLR 509 at 522 *per* Barwick CJ.

50. The Administrative Decisions (Judicial Review) Act 59 of 1977 s 3(3).

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judicial review, on grounds identical with those applicable to a decision, [51] of conduct engaged in for the purpose of making a decision,[52] and such conduct is defined as including the doing of any act or thing preparatory to the making of the decision and the taking of evidence or the holding of an inquiry or investigation.[53] The notion of conduct engaged in for the purpose of making a decision is of wide scope, since it is not a requirement of judicial review that such conduct is compulsorily required by the empowering legislation .[54] Moreover, there is no implied limitation which restricts the class of decision which may be reviewed under this head to decisions which finally determine rights or obligations.[55] Consequently, a magistrate's opinion that a *prima facie* case had been established and his resolution to proceed with committal proceedings constitutes a type of decision which is reviewable.[56]

The Grounds of Review

Although the law reform agencies whose work preceded enactment of the legislation took for granted that the proposed grounds of review which were to be given statutory expression, overlapped substantially with the heads of review developed by the common law,[57] it was apparently intended by the Ellicott Committee that the grounds of review contemplated were in some cases, and may be in other cases, more extensive than those on which relief could be obtained under the existing law.[58] It will be seen, however, that the statutory grounds, while expanding the common law appreciably in some respects, actually restrict the scope of relief in others. The confidence entertained by the Kerr Committee, that all existing grounds of review were accommodated by the proposed statutory provisions, [59] would appear not to be altogether warranted.

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51. *id.* s 5.
52. *id.* s 6.
53. *id.* s 3(5).
54. *Cf Gourgaud* v. *Lawton* (1982) 42 ALR 117.
55. *Lamb* v. *Moss* (1983) 49 ALR 533.
56. *ibid.*
57. Report of the Committee of Review of Prerogative Writ Procedures, Parliamentary Paper 56 of 1973 para 40.
58. *id.* para 19.
59. Report of the Commonwealth Administrative Review Committee, Parliamentary Paper 144 of 1971 n 1 and 13.

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Improper Exercise of Power

Australian legislation, largely consolidating the common law, recognizes as a ground of review that "the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made."[60]

A special feature of the legislation is the attempt to spell out the different forms of improper exercise of a statutory power.[61] The effort to reduce to statutory form an elusive concept of the common law which has served the courts well, is of interest, although the wisdom of this course, especially at a time when innovative trends in the common law have yet to reach their fruition, may be doubted.

The difficulty of the attempt at codification is mitigated to some extent by the adoption of an inclusionary and open-ended method of definition, the flexibility of which is strengthened by a limb encompassing "any other exercise of a power in a way that constitutes abuse of the power."[62]

The component elements of the statutory definition correspond in large part to the common law, although several modifications, some of which are important in their practical consequences, are apparent.

Relevant and Irrelevant Considerations

Taking an irrelevant consideration into account[63] or failing to advert to a relevant consideration [64] in the exercise of a power is regarded as tantamount to improper exercise of the power.

The premise that jurisdiction is determinable on the commencement rather than at the conclusion of an inquiry[65] is repudiated by subsequent decisions which recognize that jurisdiction assumed initially with propriety may be vitiated in the course of the inquiry if the tribunal addresses the wrong question[66] or is influenced by irrelevant considerations.[67] The total range of defects entailing erroneous tests and extraneous factors is consistently classified by modern writers as

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60. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5(1)(e).
61. *id.* s 5 (2).
62. *id.* s 5 (2) (j).
63. *id.* s 5 (2) (a).
64. *id.* s 5 (2) (b).
65. *R.* v. *Ryan* (1939) 1 WWR 432.
66. *Anisminic Ltd* v. *Foreign Compensation Commission* (1969) 2 AC 147 at 171 *per* Lord Reid.
67. *Id* at 198 *per* Lord Pearce.

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jurisdictional in content.[68] These developments confirm, and extend, the traditional view that "If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the exercise of their discretion, then in the eye of the law they have not exercised their discretion."[69] The formulation adopted in Australian legislation impliedly disentangles extraneous considerations and improper motivation from jurisdictional attributes and makes the former group of defects justiciable independently.

Judicial interpretation of the statutory regime is marked by continuity with the common law tradition. The courts have not been slow to recognize that, even though discretion is conferred on the tribunal official in exceedingly wide terms, this does not imply that the discretion cannot be exercised wrongly or that there should be no judicial intervention in the event of wrongful exercise of power.[70] Where the empowering legislation does not specify the criteria to be observed or the matters to be taken into account by the tribunal in the exercise of its power, the discretion is unconfined only in so far as it is not affected by limitations to be derived from the subject matter, context, scope and purpose of the statute.[71]

However, while asserting with vigour the unreservedly broad parameters for the review of discretionary executive power, Australian courts, in applying the codified system, have been at pains in practice to curtail their initiative in this regard. This mood of restraint has manifested itself in several ways.

The absence of explicit reference in the decision to a relevant consideration emerging from the evidence has not led the courts inexorably to the conclusion that this factor was not taken into account by the tribunal. The courts have thought it proper in these circumstances to embark on a thorough examination of the reasons for the decision to ascertain whether, in fact, the relevant consideration was wholly disregarded by the tribunal.[72]

It has been recognized as well that, in statutory contexts where the relevant grounds are not specified, it is largely for the decision

68. See, for example, A Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (1965) 212; S.A. de Smith, *Judicial Review of Administrative Action* (4 ed 1980 by J.M. Evans) 113.

69. *R.* v. *St Pancras Vestry* (1980) 24 QBD 371 at 375.

70. *Nashua Australia Pty. Ltd* v. *Channon* (1981) 36 ALR 215 at 225.

71. *Re Australian Broadcasting Tribunal, ex p, 2 HD Pty Ltd* (1979) 27 ALR 321; but see *Barton* v. *R.* (1980) 32 ALR 449 for an instance of denial of judicial review because of the width of the discretion conferred.

72. *Turner* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388.

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maker, in the light of matters placed before him by the parties to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.[73] Judicial superintendence in these cases must have a compelling justification.

More importantly, the courts, in their interpretation of Australian judicial review legislation, have imposed on the rubric of exclusion of relevant considerations a limitation, potentially decisive in some contexts, which has no counterpart in the common law. The prevailing view is that the ground of failure to take into account a relevant consideration is made good only if it is shown that the decision maker has failed to refer to a consideration which he was, in the circumstances, not merely entitled but bound to advert to; for there to be a valid exercise of the power to decide.[74] Judicial intervention has been denied on the basis that the matters relied upon by the applicant in support of his contention that the decision maker had failed to take a material consideration into account were merely matters which he could properly have referred to, had he chosen to do so.[75] This fetter on the exercise of supervisory jurisdiction forms no part of the common law.[76]

The courts, moreover, have strenuously resisted suggestions which, in the last resort, call for the supplanting of discretion exercised by the tribunal to which it is assigned by parliament, by a countervailing discretion which the superior court exercises on its own initiative. The Federal Court of Australia has made the comment: "Lengthy and detailed submissions were made to the court by counsel for the applicant, but in reality they were directed more to persuading the court itself to exercise a discretion conferred by the Ordinance on the (tribunal). That is the very thing the court should not do."[77] This is in line with the common law. Dealing with a charge of neglect or refusal by the Commissioner of Police to investigate drug trafficking and to bring offenders to justice, the Supreme Court of the Northern Territories expressed the view that, in regard to performance of statutory duties by the Commissioner of Police, so long as he acts in accordance with executive instructions within the law and in the

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73. *Sean Investments Pty Ltd* v. *MacKellar* (1981) 38 ALR 363 at 375 *per* Deane J.

74. *ibid.*

75. *Clarke and Kann* v. *Deputy Commissioner of Taxation* (1983) 50 ALR 351; *Aygun* v. *Minister for Immigration and Ethnic Affairs* (1983) 5 ALN 150.

76. *cf Yorkshire Copper Works Ltd* v. *Registrar of Trade Marks* (1954) 1 WLR 554: *Meravale Builders Ltd* v. *Secretary of State for the Environment* (1978) P & CR 87.

77. *Sordini* v. *Wilcox* (1982) 42 ALR 245 at 258 *per* Northrop J.

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interest of the community he serves, a court should not attempt to interfere with his discretion.[78] *A fortiori*, the weight to be given to a relevant consideration is a matter within the discretion of the subordinate tribunal.[79]

Within these limits Australian courts have made perceptive use of the statutory ground relating to reference to irrelevant considerations and disregard of relevant considerations. A decision by the Deputy Commissioner of Taxation not to allow a taxpayer an extension of time to make payment was squashed on the ground of the respondent's failure to take into account such matter as the fact that notices of objection, although lodged, had not yet been disposed of, the relative strength of the taxpayer's case and the magnitude of the liability imposed by the notice.[80] It has been held that, in exercising statutory power to approve a substituted scale of fees for an approved nursing home, the minister was under a duty to have regard to the rental obligation as a factual element in the cost structure of the enterprise and that failure on his part to do so represented a negation of his statutory duty to determine the current level of fees in the light of prevailing costs.[81] Similarly, in the context of deportation proceedings, where there is material suggesting that the applicant has during some relevant period become a member of the Australian community, it is incumbent on the executive to investigate the matter;[82] and, where the applicant purports to have entered into a marriage in Australia, the circumstances surrounding the marriage warrant examination prior to deciding whether the deportation order ought to be carried out.[83]

The specific statutory grounds relating to consideration of irrelevant factors and exclusion of relevant factors have received an extended interpretation so as to accommodate allied levers for review, linked with wrong questions posed and erroneous tests applied. Thus, disregard of crucial circumstances in respect of an application for the increase of fees at an approved nursing home, in the setting of national health legislation, may lead to misapprehension of the statutory function in a fundamental way.[84] The application of an

78. *R.* v. *McAulay ex p, Fardell* (1979) 2 NTR 22.

79. See the case cited at n 73 *supra.*

80. *Ahern* v. *Deputy Commissioner of Taxation of Queensland* (1983) 50 ALR 177 at 190 *per* Sheppard J.

81. *Croft* v. *Minister for Health* (1983) 45 ALR 449 at 457 *per* Smithers J.

82. *Kuswardena* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186.

83. *Ungulec* v. *Minister for Immigration and Ethnic Affairs* (1982) 43 ALR 569 at 575 *per* Lockhart J.

84. *R.* v. *Hunt, ex p, Sean Investments Pty Ltd* (1979) 25 ALR 497.

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unacceptable standard by the minister for determining the "normal value" of goods, for the purpose of imposing a tariff, has been held to vitiate the decision.[85] Where the "normal value" of goods imported from Spain was computed on the basis of the cost of production in the United States, which was identified as "the most efficient" producer, the court concluded that costs in the United States had no necessary relationship with the circumstances of a producer in Spain and, therefore, were inapplicable as a basis for determination of value.[86] On an extended interpretation of the statutory ground, the unwarranted assimilation was held to be subsumed in advertence to an irrelevant factor. The wide scope of this ground is evident from the attitude of the courts that, even where a discretionary power is not subject to compliance with the rules of natural justice, exercise of the power is vitiated if an irrelevant consideration is shown to have been taken into account.[87]

Ulterior Purpose

An instance of improper use of statutory power is the "exercise of a power for a purpose other than a purpose for which the power is conferred".[88] This provision incorporates familiar common law doctrine but does not address complexities in regard to which a variety of options deriving from common law approaches continues to be available to Australian courts.

A problem which persistently vexed judges administering the common law concerned plural motivation in circumstances where the motives underlying administrative action were partly within, and partly outside, the objectives contemplated by the empowering legislation. The balance of judicial authority adopts the criterion of the true,[89] real[90] or dominant[91] purpose, ostensible propriety clearly being insufficient.[92] The phraseology employed in the Australian legislation[93] seems consistent with the stricter view, preferred in an isolated decision

85. *McDowell and Partners Pty Ltd* v. *Button* (1983) 50 ALR 647 at 663-664 *per* Beaumont J.
86. *ibid.*
87. *Arslan* v. *Durrell* (1983) 48 ALR 577.
88. *The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (2) (c).*
89. *R.* v. *Governor of Brixton Prison ex p, Soblen* (1963) 2 QB 243.
90. *Utter* v. *Cameron* (1974) 2 NSWLR 50.
91. *R.* v. *Immigration Appeals Adjudicator ex p, Khan* (1972) 1 WLR 1058.
92. *CC Auto Port Pty Ltd* v. *Minister of Works* (1965) 113 CLR 365.
93. See n 88 *supra.*

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under the common law, that any unauthorized purpose, albeit intermingled with legitimate purposes, vitiates the legality of exercise of a statutory power.[94] In the result, however, a greater degree of resilience and empiricism has been found to typify judicial interpretation of the legislative provision. Substantially in line with the common law test which construes as the central element the question whether the statutory power would have been exercised at all if it had not been possible to accomplish the improper purpose,[95] the High Court of Australia, in a case involving challenge against the acquisition of land by a statutory board, suggested that the ulterior purpose actuating the board would constitute an abuse of its statutory powers if the ulterior purpose was the overriding purpose, in the sense that no attempt would have been made to acquire the land, had it not been desired to achieve the unauthorized purpose.[96] The substantive analysis and terminology used by the court are strongly reminiscent of common law attitudes which would appear to have survived the emergence of the code.

Improper purpose, within the framework of the statutory regime, envisages not a wrong or incorrect purpose but a purpose which, for some reason known to the law, cannot be regarded as bringing about a legitimate exercise of the power conferred by statute.[97]

The fundamental importance attaching to propriety of purpose as a factor governing the legality of invocation of statutory public power is indicated by judicial willingness to apply this principle of control even to statutory powers conferred on the crown.[98] The view acted upon by the High Court of Australia is that, since such a power, available to institutions other than the crown, may be exercised only for the purpose for which it is granted, it is anomalous to circumscribe this principle, and the authority of the courts to inquire whether there has been a proper exercise of power, by giving the crown, acting as it does on the advice of ministers, a special immunity.[99]

The practical usefulness of grounds of review based on ulterior motivation and unauthorized purpose, it is clear, is greatly increased by supportive statutory provisions which expand, far beyond common law confines, the obligation devolving on decision making tribunals

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94. *Sadler* v. *Sheffield Corporation* (1924) 1 Ch 483.

95. *Thompson* v. *Roadwick Corporation* (1950) 81 CLR 87.

96. *Samrein Pty Ltd* v. *Metropolitan Water Sewerage and Drainage Board* (1982) 41 ALR 467 at 468-469.

97. *Barkovic* v. *Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186.

98. *Re Toohey ex p, Northern Land Council* (1981) 38 ALR 439.

99. *ibid.*

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with regard to the statement of reasons. The Australian judicial review legislation not only makes provision for disclosure of findings of fact, the evidentiary material on which such findings are based and the reasons for decision to any person entitled to apply for review of the decision, whether he has in fact done so or not,[100] but empowers the court to order elaboration of the reasons if the statement of reasons previously supplied is incomplete or inadequate.[101] The opaque quality of administrative processes attributable to the overwhelming difficulty of ascertaining with precision the reasons for decision is extenuated considerably by the provision of machinery, vitally important in practice, to compel disclosure of the tribunal's reasoning which can then be tested in the light of established criteria pertaining to legitimacy of purpose.

Mala fides

A further ground of impropriety, justifying resort to judicial remedies for the control of administrative action, is the "exercise of a discretionary power in bad faith".[102]

Mala fides, constituting an acknowledged common law ground for the review of statutory executive power,[103] is exceedingly difficult to establish in practice,[104] but fulfils a significant function in situations where other grounds of review are not readily applicable because the conditions regulating exercise of the power are left to the untrammelled discretion of the tribunal or because the investigation of motive is, in the circumstances, speculative or intractable. It is to be regretted, for this reason, that the terms of the Australian statutory formulation cover only a segment of the equivalent common law principle, in that the statutory ground of intervention is limited to bad faith in the exercise of discretionary powers. The explanation, probably, is that the provision relating to *mala fides* has a residual character, since it is intended to be used exclusively in contexts where the provisions dealing with extraneous motives and improper purposes, couched in wider terms, cannot be called in aid. Nevertheless, the limitation lacks a convincing rationale and impairs, in part, the effectiveness of review based on bad faith.

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100. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 13(1).
101. *id.* s 13(7).
102. The Administrative Decisions (Judicial Review) Act 59 of 1977 s 5(2)(d).
103. *Breen* v. *Amalgamated Engineering Union* (1971) 2 QB 175.
104. *Smith* v. *East Elloe RDC* (1956) AC 736.

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External Dictation

The "exercise of a personal discretionary power at the direction or behest of another person"[105] attracts judicial review. This method of formulation marks, perhaps unwittingly, a departure from the common law.

The initiative of the external agency in interfering with the exercise of a personal discretion is an integral feature of the Australian statutory provision. The common law doctrine, on the other hand, emphasizes not the external identity of the source from which the pressure emanates but the failure of the repository of a personal discretion, on account of a misconception engendered in his own mind or induced by external circumstances, to bring his own independent judgment to bear on the particular case. The essential difference between the two approaches concerns the area of self-induced error which is catered for by common law authority but not by the statutory regime. Where the minister to whom a statutory discretion had been assigned inflexibly followed the practice of refusing planning permission in all cases where the application was unacceptable to another minister, an English court was prepared to strike down the ostensible exercise of discretion by the former, even though the course he adopted was in no way prompted, directly or indirectly, by the latter.[106] Similarly, judicial intervention was thought proper in a case where a local authority, in quantifying compensation for deprivation of office, considered itself bound by a practice which had been followed consistently by the treasury.[107]

The circumstances of these cases, exceptional though they are, illustrate the true basis of judicial review on this ground: abdication or surrender of a discretion, unwarranted by the terms of its grant in the enabling legislation, contains as its core failure to address the issues personally rather than proof that the tribunal entrusted with discretion succumbed to dictation by an external agency. The present law entails the disadvantage that, in some circumstances where relief was available under the previous system,[108] recourse to judicial review may now prove futile in accordance with the code.

While the Australian codified system, in this respect, does not offer, in case of failure to exercie a personal discretion, protection of an amplitude comparable with that ensured by the common law,

105. The Administrative Decisions (Judicial Review) Act 59 of 1977 s 5 (2)(e).

106. *Lavender & Son Ltd* v. *Minister for Housing and Local Government* (1970) 1 WLR 1231.

107. *R.* v. *Stepney Corporation* (1902) 1 KB 317.

108. *Evans* v. *Donaldson* (1909) 9 CLR 140.

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the statutory provision, in a distinct respect, imparts to the law a degree of rigidity which contemporary avenues of development of the common law have attempted strenuously to mitigate. The premise of the Australian code is that direction by a third party with regard to the exercise of a personal discretion is necessarily a vitiating factor. But the inevitability of this result has been challenged by recent common law attitudes which concede that there are narrowly demarcated circumstances in which it may well be proper, in exercising a personal discretionary power, to accede to the wishes of another person.[109] Thus, according to the majority of the High Court of Australia, the Director-General of Civil Aviation, in using a personal discretion, may apply with justification government policy, as it is conveyed to him authoritatively.[110] The removal of this qualification, reflecting as it does realities of modern public administration resulting from the principle of political accountability, suppresses a useful safety valve.

Inflexible Policy

Judicial review under the aegis of the statute now in force in Australia envelop the use of a discretionary power "in accordance with a rule or policy without regard to the merits of the particular case".[111] The inelasticity of the principle, expressed in this form, contrasts unfavourably with the malleability of the common law which, as it has recently evolved, ceases to look askance at the inclination of an administrative tribunal, confronted with an unwieldy number of similar applications, to dispose of these applications by resorting to a definite policy spelt out *a priori*, provided that the tribunal is not unresponsive to argument designed to preclude application of the general policy in a specific context.[112]

This has proved a convenient instrument for the control of arbitrary executive action. Where the minister acted wrongly on the impression that he had no power to countenance the applicant's continued stay in Australia because she did not possess a current entry permit, and where the minister consequently failed to give any consideration to

109. *Cf* DC Pearce, "Courts, Tribunals and Government Policy" (1980) 11 *Federal Law Review* 203.

110. *R.* v. *Anderson ex p, Ipec-Air Pty Ltd* (1965) 113 CLR 177; *Ansett Transport Industries Operations Pty Ltd* v. *Commonwealth of Australia* (1977) 17 ALR 513.

111. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (2)(f).

112. *British Oxygen Co. Ltd* v. *Minister of Technology* (1971) AC 610.

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the hardship which may be caused to her if she was deported, the discretionary power was considered not to have been properly exercised.[113] A comparable attitude has been adopted, in the area of national health legislation, in construing departmental guidelines for determining new scales of fees in respect of approved nursing homes. Since the legislation envisaged the continuance of private nursing homes, although discouraging the making of exorbitant profits, rigid adherence to departmental guidelines in such a way that the enterprise could not longer be viable financially was characterized as an improper exercise of discretion.[114]

The scope of judicial activism in this regard has been contained by a series of restraining principles which the courts have developed in recent years. In the first place, judges have declined to examine with undue assiduity the words used in an administrative decision in order to discover indiscriminate commitment to predetermined policy.[115] Secondly, although a tribunal established to determine industrial disputes is under a duty to resolve each matter and may not prescribe a system of industrial legislation, it is not impermissible for the tribunal, in the course of adjudicating upon particular disputes, to formulate a principle and to apply it uniformly to cases falling within its ambit.[116] Thirdly, the preceding principle may be reinforced by recognition, *ceteris paribus*, of the desirability of consistency and predictability in decision making processes.[117]

Unreasonableness

Judicial review is legitimate in respect of the "exercise of a power that is so unreasonable that no reasonable person could have so exercised the power."[118]

The stringency of the test spelt out by this provision is the antithesis of bolder approaches which have begun to emerge in the common law. A cautious line of authority in the common law does, indeed, coincide with the effect of the statutory test. According to this strand of opinion, jurisdictional review is supportable only if the decision

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113. *Tagle* v. *Minister for Immigration and Ethnic Affairs* (1983) 46 ALR 379.
114. *Nagrad Nominees Pty Ltd* v. *Howells* (1981) 38 ALR 145.
115. *Tagle* v. *Minister for Immigration and Ethnic Affairs n* 113 *supra*.
116. *Re Clarkson ex p, Australian Telephone and Phonogram Officers' Association* (1982) 39 ALR 1.
117. *Nevistic* v. *Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639.
118. The Administrative Decisions (Judicial Review) Act 59 of 1977 s 5 (2)(g).

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is so wrong,[119] arbitrary,[120] capricious and vexatious[121] or unreasonable[122] as to be perverse,[123] "something so absurd that no reasonable person could ever dream that it lay within the powers of the authority".[124] The taint must approximate to "manifest arbitrariness, injustice or partiality",[125] reflected in a decision "so unfair or oppressive as to be upon any fair construction an abuse of statutory power."[126]

The severely restricted purview of judicial intervention compatible with this interpretation of unreasonableness, it cannot be denied, leads itself to justification in pragmatic terms. The implied injunction that judges should comport themselves in this area with "prudence and some modesty"[127] is founded on the premise that "administrative morality"[128] is not a matter for the courts. Unbridled judicial interference involves the danger of reversal of an administrative decision simply on the basis of preference of one view of the facts to another. It is inherent in the concept of administrative discretion that two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right to be regarded as reasonable.[129] It is of the essence of the exacting standard of unreasonableness embedded in the Australian legislative provision that "not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable."[130]

This view which leans in favour of a "fair, large and liberal interpretation"[131] of the grant of statutory power, firmly withholds from the courts the right to question the honest exercise of discretion

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119. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* (1977) AC 1014.

120. *Weinberger* v. *Inglis* (1919) AC 606.

121. *R.* v. *Barnet and Camden Rent Tribunal ex p, Frey Investments Ltd* (1972) 2 QB 342.

122. *Demetriades* v. *Glasgow Corporation* (1951) 1 All ER 457.

123. *id* at 463 *per* Lord Reid.

124. *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* (1948) 1 KB 223 at 229.

125. *Mixnam's Properties Ltd* v. *Chertsey UDC* (1964) 1 QB 214 at 237 *per* Diplock LJ.

126. *City of Montreal* v. *Beauvais* (1910) 42 SCR 211 at 216 *per* Duff J.

127. *Lord Diplock*, "The Protection of the Law"(1978) *West Indian Law Journal* 12 at 14.

128. J.F. Garner, *Administrative Law* (5 ed 1979) 152; *cf* J.A.G. Griffith, *The Politics of the Judiciary* (1978) 115.

129. *Re W (An Infant)* (1971) AC 682 at 700 *per* Lord Hailsham.

130. *ibid.*

131. *Bacon* v. *Ontario Flue-Cured Tobacco Growers Marketing Board* (1959) OWN 256 at 247 *per* Schatz J.

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within its legitimate bounds.[132] The principle underlying the strand of common law authority which finds expression in the Australian code is that the court is concerned solely with the demarcation of statutory power,[133] while the wisdom or expediency of its application is a matter for the delegate.[134] Consequently, the case for intervention on the ground of unreasonableness is required to be "overwhelming".[135]

Nevertheless, these faltering approaches have given way progressively to more robust common law attitudes to judicial review.[136] In contrast with the point of departure characteristic of Australian legislation, modern English courts have shown increasingly less inhibition in striking down, in the context of legislative instruments, conditions not tainted by unreasonableness of a degree symptomatic of excess of power.[137] There has been greater willingness to regard unreasonableness as a matter of degree and to take into account lesser gradations of unreasonableness in appropriate circumstances as an index to the legality of performance of statutory functions;[138] for instance, the balance of public convenience has been applied as a criterion of reasonableness.[139]

This trend, signifying distension of the ambit of justiciable unreasonableness by the use of more amorphous criteria intertwined with motive and purpose, has injected new vigour into judicial review. Thus, improper motivation,[140] disregard of the policy contained in the enabling legislation,[141] manifest bad faith,[142] inconsistency with the empowering law,[143] uniform treatment of disparate situations[144]

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132. *Boutilier* v. *Cape Breton Development Corporation* (1972) 34 DLR (3d) 374 at 373 *per* Gillis J.

133. *Williams* v. *Melbourne Corporation* (1933) 49 CLR 142 at 149-150; *cf Widgee Shire Council* v. *Bonney* (1907) 4 CLR 977 at 982.

134. *Paul* v. *Munday* (1976) 9 ALR 245 at 252.

135. *Luby* v. *Newcastle-upon-Lyme Corporation* (1964) 2 QB 64 at 72.

136. *Cf* P. Robertshaw, "Unreasonableness and Judicial Control of Administrative Discretion"(1975) *Public Law* 113.

137. *Allnatt London Properties Ltd* v. *Middlesex County Council* (1964) 62 LGR 304; *Hartnell* v. *Minister of Housing and Local Government* (1965) AC 1134.

138. *Kingston-upon-Thames London Borough Council* v. *Secretary of State for the Environment* (1973) 1 WLR 1549.

139. *Jamieson's Food Ltd* v. *Ontario Food Terminal Board* (1961) 27 DLR (2d) 112.

140. *HTV Ltd* v. *Price Commission* 1976 ICR 170.

141. *Padfield* v. *Minister of Agriculture, Fisheries and Food* 1968 AC 997.

142. *Proud* v. *City of Box Hill 1949 VLR 208.*

143. Congreve v. *Home Office* 1976 QU 629.

144. *Elliott* v. *Brighton Borough Council* (1980) 79 LGR 506.

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and unwarranted discrimination[145] involving oppression of a group of persons[146] have been held to support an inference of unreasonableness. A similar view has been taken in regard to restraints on the activities of persons beyond the limits implicit in or ancillary to the objectives of the legislation,[147] especially when these restraints impinge on the liberty of the citizen.[148] Unnecessary differentiation between senior and junior officers of an integrated service[149] has been considered to contravene the postulate of equitable treatment[150] and, therefore, to be unreasonable. Action which is neither essential nor expedient for the purposes of the governing legislation and is incapable of being related to them, has been deemed unreasonable.[151]

In keeping with these lines of authority it has been suggested that an improper purpose which, *per se,* is not sufficiently dominant to invalidate the decision, may operate indirectly to render the decision vulnerable on the ground of unreasonableness.[152] To this extent, the latter concept may serve to augment the effectiveness of other criteria controlling legality of the exercise of discretionary powers. In cases where the unreasonableness alleged does not extend to the point of absurdity, English and Commonwealth courts have been prepared to review administrative decisions within a grey area by adopting a balancing test which attempts to assess the disadvantages stemming from the impugned action and to weigh them against the corresponding benefits,[153] and a comparison test which considers the nature and effect of action taken by other officials or tribunals in comparable circumstances.[154]

These challenging vistas which have opened for common law doctrine by judicial adaptability and imagination provide occasion to regret the markedly narrow test of unreasonableness entrenched in modern Australian law. There is, as well, another respect in which the codified system departs from the common law approach. In the

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145. *Re Stilling* (1961) 28 DLR (2d) 102 at 109 *per* Mclnnes J.

146. *Remis* v. *Fontaine* (1951) 2 DLR 461 at 464 *per* Dysart JA.

147. *Re College of Dental Surgeons of British Columbia and Eggars* (1968) 68 DLR (2d) 93 at 95 *per* McFarlane JA.

148. *Rithola* v. *Manitoba Optometric Society* (1959) 18 DLR (2d) 514 at 522 *per* Monnin J.

149. *Maynard* v. *Osmond* (1977) QC 240 at 258-259.

150. *Hanna* v. *Auckland City Corporation* (1945) NZLR 622.

151. *Transport Ministry* v. *Alexander* (1978) 1 NZLR 306

152. D.E. Paterson, *An Introduction to Administrative Law in New Zealand* (1967) 57-58.

153. *Thompson* v. *Wellington City Corporation* 1957 NZLR 84 at 87-89.

154. *Wellington Harbour Board* v. *Samuels and Kelly Ltd* 1944 NZLR 335.

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ultimate analysis, administrative action or subordinate legislation is vitiated on the basis of unreasonableness because the delegate has transgressed the limits of statutory power. "With the question whether a particular policy is wise or foolish, the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."[155] Accordingly, action transcending the bounds of legal reasonableness is, of necessity, *ultra vires*.[156] Against the major currents of authority in the common law which look upon unreasonableness not as a distinct ground of review but as an aspect of the *ultra vires* doctrine and, indeed, in defiance of criticism of the terminology of unreasonableness by the House of Lords as "not at all an apt description of action in excess of power",[157] the Australian legislation incorporates unreasonableness as a specific instance of improper exercise of statutory power. This approach, coupled with the strikingly narrow perspective of the statutory definition of unreasonableness, deprives the texture of the code of a considerable part of the healthy resilience which common law mechanisms have done much to develop.

Uncertainty

Another ground of judicial review, predicated on improper use of statutory power, is that the power has been exercised "in such a way that the result of the exercise of the power is uncertain".[158]

The statute is stricter than the common law, in so far as the former regards uncertainty in the sense defined as inevitably vitiating exercise of the power, while the common law adopts a much less unequivocal stance. This derives from the character of common law principles highlighting the requirement of certainty as one arrived at by implication, in the general setting of the tribunal's *vires*. It has been emphasized at common law that the restriction, being an implied one, will be invoked by the courts only subject to overriding considerations connected with legislative will and factual context.[159] Indeed, modern trends of judicial reasoning contain the criticism that

155. *Short* v. *Poole Corporation* (1926) Ch 66 at 91 *per* Warrington LJ.
156. H.W.R. Wade, *Administrative Law* (5 ed 1982) 312.
157. *Westminister Bank Ltd* v. *Minister of Housing and Local Government* 1971 AC 508 at 530 *per* Lord Reid.
158. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (2)(h).
159. *Mayor of Auckland* v. *Davidson* (1905) 25 NZLR 497.

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the implied bar against uncertainty has on occasion been applied by the courts with excessive stringency, especially in regard to the reservation of matters for subsequent determination.[160]

The fluidity of the common law principle is eroded in crucial respects by the manner in which the applicable rule is stated in the Australian code. The conclusion has been expressed with much force in English[161] as well as in Australian[162] decisions that certainty is not an independent test of validity because, if it were so, there would emerge a very indefinite standard having the practical effect of conferring on the courts an unacceptably wide controlling power to disallow executive action or delegated legislation even though it is within power and otherwise unobjectionable. The existence of a general principle requiring certainty as a condition of legality has been denied uncompromisingly by the High Court of Australia[163]: "Uncertainty, as a test of validity, arose from the nature of the power; on this footing, in the end, the question came back to *ultra vires*."[164] The requirement of certainty, according to the common law approach, is inherent in the exercise of statutory power in such a way that its effects are capable of being apprehended objectively by the citizen and by the courts.[165] In direct opposition to the view expressed by the Court of Appeal of New Zealand that there is, in theory, no separate ground of uncertainty "as distinct from ordinary *ultra vires*",[166] the Australian legislative provision virtually eliminates judicial latitude by incorporating an independent ground of uncertainty which inescapably culminates in legal invalidity.

Yet, curiously enough, the Australian statutory regime confines these drastic consequences to uncertainty of result, as distinguished from uncertainty of meaning or expression,[167] truncating a principle the integrity of which is recognized by dominant lines of authority in the common law. The willingness shown by the courts to exercise supervisory jurisdiction in cases involving "linguistic ambiguity or uncertainty in meaning"[168] or equivocation and obscurity which make

160. *Chandler & Co. Ltd* v. *Onchunga Borough* (1966) NZLR 397.

161. *Fawcett Properties Ltd* v. *Buckingham County Council* 1961 AC 636.

162. *Pearse* v. *City of South Perth* 1968 WAR 130 at 132 *per* D'Arcy J.

163. *Kind Gee Clothing Co. Proprietary Ltd* v. *Commonwealth* (1945) 71 CLR 184.

164. At 195 *per* Dixon J.

165. H.Whitmore, *Principles of Australian Administrative Law* (5 ed 1980) 102; *cf Television Corporation Ltd Commonwealth* (1963) 109 CLR 59 at 71 *per* Kitto J.

166. *Transport Ministry* v. *Alexander* (1978) 1 NZLR 306 at 311 *per* Cooke J; *cf McEldowney* v. *Forde* 1971 AC 632 at 665 *per* Lord Diplock.

167. The Administrative [illegible]sions (Judicial Review) Act 59 of 1977, s 5 (2)(h).

168. *Bizony* v. *Secretary* [illegible]*te for the Environment* (1976) 239 EG 281 at 284.

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it impossible to ascertain the intended meaning[169] would appear to indicate that the common law ground of intervention is far wider in scope than that embodied in the codified system. The clear-cut distinction drawn by that system between uncertainty of meaning and uncertainty of result seems anomalous in the light of severity of the sanctions which are deemed appropriate in the latter area.

Abuse of Power

The impracticability of an exhaustive definition of improper exercise of statutory power is acknowledged by the incorporation of a residuary limb referring to "any other exercise of a power in a way that constitutes abuse of the power".[170]

The diversity of situations in which judicial superintendence of executive power is called for, has prompted the common law to accommodate a similar residuary ground. Judicial review has been exercised in Canada on the basis of "extreme abuse of jurisdiction"[171] on the part of the subordinate tribunal. It is unfortunate that the latitude available to judges to develop the common law perceptively to combat the vagaries of executive caprice has been stultified by the attempted codification of grounds of review, even in the open-ended manner which has been preferred in Australia. A cogent consideration in this regard is the risk of application of the principle *expressio unius est exclusio alterius* with the result of restricting the operation of the residuary provision in areas catered for by other substantive rules.

If this approach were adopted, it would not be difficult to identify several heads of review which, notwithstanding their antecedents in the common law, cannot be reconciled convincingly with the statutory regime. Thus, the well-known principle of the common law which precludes the recipient of a discretionary power from binding himself in advance to use the power in a particular way[172] finds no convenient niche in the codified system. But common law authorities dignified by impressive antiquity decline to permit public tribunals to renounce "a part of their statutory birthright"[173] by means of contract or grant. These cases have been drawn together compendiously under the rubric of "sterilization"[174] of a statutory discretion. Moreover, the

169. *Cann's Proprietory Ltd* v. *Commonwealth* (1946) 71 CLR 210 at 229 *per* Dixon J.

170. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (2)(j).

171. *R.* v. *Archer and White* (1956) 1 DLR (2d) 305 at 309.

172. *South Australia* v. *Commonwealth of Australia* (1962) 108 CLR 130.

173. *Ayr Harbour Trustees* v. *Oswald* (1883) 8 AC 623 explained in *Birkdale District Electric Supply Co.* v. *Southport Corporation* (1926) AC 355 at 371-372.

174. *ibid.*

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principle militating against sub-delegation of discretionary powers, expressed in the maximum *delegatus non potest delegare,* is accorded special sanctity in institutional texts which expound the common law.[175] So great is the tenacity with which the common law has upheld the principle against unauthorized delegation that a vigorous presumption, hostile to the validity of sub-delegation, has been applied consistently in construing the terms of legislation conferring discretionary power on the delegate.[176] The rigidity of this principle is referable to legislative intent contemplating the exercise of judgment and discretion personally by the repository of the discretion[177]; and yet, the compatibility of this principle with the form of the definition adopted in Australia is open to doubt.

Of far greater importance, in the contemporary context, is the *hiatus* apparent in Australian legislation with regard to judicial surveillance of administrative policies, as opposed to decisions. One of the striking innovations of the common law is the extension, into the area of control of executive policy, of mechanisms of review forged as instruments for the supervision of administrative decisions. In a typically provocative comment which extends the frontiers of supervisory jurisdiction to the periphery of political controversy, Lord Denning has suggested that an administrative policy, to be secure against judicial intervention, must be "a reasonable policy which it is fair and just to apply".[178] It is disappointing that the contemporary Australian system adopts, *sub silentio,* a far more diffident outlook upon review of administrative policies which cannot but deter the development of aggressive judicial attitudes in this rapidly moving area of the law. Indicative of this trend is the approach by the Federal Court of Australia, in a deportation case, that the question for the court was whether the minister acted in accordance with government policy without regard to the merits of the particular case, "the policy itself not being open to review".[179]

Error of Law

Judicial review of an administrative decision is available on the ground that "the decision involved an error of law, whether or not the error appears on the record of the decision".[180]

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175. Coke, *Institutes* vol ii 597.

176. *R.* v. *Lampe ex p, Maddolozzo* 1966 ALR 144.

177. *Candle* v. *Seymour* (1841) 1 QB 889.

178. *Sagnata Investments Ltd* v. *Norwich Corporation* (1971) 2 All ER 1441 at 1447.

179. *Turner* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 at 391 *per* Tookey J.

180. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(f).

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The concept of legal error is a valuable instrument of judicial policy in exercising review of the decisions of administrative tribunals. The essential quality of the notion is its amorphous content which makes the demarcation between questions of law and questions of fact predominantly one of policy. It is difficult to deny that, in practice, the nomenclature of 'law' and 'fact' is used by the courts as an index to the intensity of review which is considered appropriate in a particular context.[181] During the five years which have elapsed since the adoption of the Australian codified system, the classification of goods in terms of a customs tariff,[182] the proper construction of the phrase 'movable personal property' in the context of customs legislation[183] and the question of whether the applicant for relief was a prohibited immigrant for the purpose of making a deportation order[184] have been held to involve matters of law. A decision of the Minister for Immigration and Ethnic Affairs refusing the applicant resident status was characterized as wrong in law, since it was based on the erroneous belief that the sole power to grant resident status derived from the Migration Act.[185]

Apart from matters of this nature typified by a relatively high degree of specificity, the core concept of error of law enables the review of value-judgments in a very extensive category of circumstances. Thus, the question of whether a tribunal could not, as distinct from should not, be satisfied beyond reasonable doubt that there were insufficient grounds for granting a claim has been treated as a question of law;[186] and, by the use of a potent lever for extending the frontiers of judicial review, an administrative decision lacking a durable evidentiary foundation[187] and a conclusion tainted by unreasonableness[188] have been thought to be subsumed in error of law.

The danger inherent in too great a distension of the category of legal error is that the legitimate autonomy of administrative tribunals is liable to be whittled down with slender justification, inadequate attention being paid to factors like the special expertise possessed

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181. *Cf* S.A. de Smith, *Judicial Review of Administrative Action* (4 ed 1980 by J.M. Evans) 134.

182. *Peacock* v. *Zyfert* (1983) 48 ALR 549.

183. *Vichers* v. *Minister for Business and Consumer Affairs* (1982) 43 ALR 389.

184. *Naumovska* v. *Minister for Immigration and Ethnic Affairs* (1982) 41 ALR 635.

185. *Haj-Ismail* v. *Minister for Immigration and Ethnic Affairs* (1981) 36 ALR 516.

186. *Law* v. *Repatriation Commission* (1980) 29 ALR 64.

187. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* (1971) 1 WLR 433.

188. *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* (1948) 1 KB 223.

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by the tribunal, legislative allocation of responsibility and the justiciability of specific issues.[189] This danger is certainly aggravated by theoretical approaches to the delineation of legal error which dominate the common law. The *vires* of administrative tribunals are determined, in keeping with current judicial practice, on the basis of a presumption that parliament did not intend to confer power on an administrative body to decide questions of law as well as questions of fact or administrative policy.[190]Emerging attitudes in the common law are predicated on a clear dichotomy between inferior courts of law and administrative tribunals, in so far as this presumption is inapplicable with rigour to the former.[191] The vulnerability of administrative tribunals, as distinguished from inferior courts, in this respect is heightened by the view, which finds support in the balance of authority in the common law, that all inferences from primary facts are to be classified as questions of law.[192] The scarcely limited opportunity for interference with factual adjudication which this approach, combined with recent trends bringing about the relegation of error of law within jurisdiction,[193] makes possible, belies the assertion by the House of Lords sixteen years ago that "We have reached a stage in our administrative law when we can view the question (of which issues have to be decided by courts of law) quite objectively, without any necessary predisposition towards one, that questions of law, or questions of construction, are necessarily for the courts".[194]

A growing awareness of the adverse consequences which the established approach portends for the vigour and vitality of administrative tribunals has induced, in recent years, liberal invocation of the discretionary bars in respect of prerogative relief as a framework within which restraint in the exercise of judicial review may be engendered systematically. Illustrative of this trend is the contemporary inclination of English courts, recognizing the special competence of the tribunal in relation to the subject matter,[195] to decline intervention

189. *CRE* v. *Associated Newspaper Group* (1978) 1 WLR 905; *Woods* v. *W.M. Car Services (Peterborough) Ltd* (1982) 1 RLR 413.

190. *Re Racal Communications Ltd* 1981 AC 374.

191. *R.* v. *Surrey Coroner ex p, Campbell* (1982) 2 WLR 626 at 637.

192. E. Murenich, "The Application of Rules: Law or Fact?" (1982) 98 LQR 587; *cf Birmingham Corporation* v. *Habiz Ullah* (1964) 1 QB 178; *A.C.T. Construction Ltd* v. *Commissioners of Customs and Excise* (1981) 1 All ER 324 at 328.

193. *Pearlman* v. *Governors of Harrow School* 1979 QB 56 at 70.

194. *Anisminic Ltd* v. *Foreign Compensation Commission* (1969) 2 AC 147 at 209 *per* Lord Wilberforce.

195. *Dowty Boulton Paul Ltd* v. *Wolverhampton (No 2)*(1976) Ch 13 at 26-27.

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on the ground of an error of law in circumstances where no consideration of general importance and no significant conflict of authority is involved,[196] or where a compelling need for review does not exist because of the availability of appellate jurisdiction.[197] Against the background of these cumulative trends, it is refreshing to note the circumspection typifying the ruling by the Federal Court of Australia that the weight to be attached to evidence does not, as a rule, represent a question of law.[198]

There is one respect in which the Australian formulation appears to countenance review founded on legal error on an ampler footing than is advocated even by one of the most aggressive protagonists of judicial review in England. Lord Denning has postulated a decisive limitation, in that judicial review for error of law, according to his analysis, is confined to a misconception upon which the decision depended.[199] This causal element, however, forms no part of the Australian formulation which requires merely that an error of law be "involved" in the decision.[200] Despite the seemingly broad scope of this criterion, Australian judges interpreting the fledgling code are likely to find the pragmatic approach to demarcation of legal error, pervading an impressive line of authority in the common law, useful. The gist of this approach is that an inference from a primary fact is regarded as a question of "fact and degree" in a limited area, within which a court exercising supervisory jurisdiction will stay its hand but that, outside the bounds of "reasonableness", an inference by the subordinate administrative tribunal is exposed to judicial review.[201] This point of departure, which provides a mediating technique of value for the resolution of policy conflicts,[202] contains suitably the concept of legal error by enabling a tribunal's action in interpreting a statutory provision or other rule of law "in a broad, sensible way"[203] to be left impregnable by the apparatus of judicial review for error of law. In the light of the English experience, it would

196. *R.* v. *Insurance Commissioner ex p Michael* (1977) 1 WLR 109 at 112.

197. *R.* v. *Chief Immigration Officer Gatwick Aikrport ex p, Kharrazi* (1980) 1 WLR 1396 at 1403.

198. *Neal* v. *Secretary, Department of Transport* (1980) 29 ALR 350.

199. *Pearlman* v. *Governors of Harrow School* n 193 *supra.*

200. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(f).

201. *Edwards* v. *Bairstow* (1956) AC 14 at 36 *per* Lord Radcliffe; *O'Reilly* v. *Mackman* 1982 3 All ER 1124 at 1132 *per* Lord Diplock; *Cocks* v. *Thanet District Council* (1982) 3 All ER 1135 at 1138 *per* Lord Bridge.

202. *Cf R.* v. *Secretary of State for the Environment ex p, Ostler* (1977) QB 122.

203. *R.* v. *Preston Supplementary Benefits Appeals Board ex p, Moore* (1975) 1 WLR 624.

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seem that Australian courts could well benefit from this perceptive and discriminating approach to "typical questions of mixed law, fact and degree."[204]

The central feature of the Australian statutory formulation is the abolition of the distinction between patent and latent error of law. Review for patent intra-jurisdictional error of law, resuscitated by the English courts three decades ago,[205] has had a chequered career in the common law. Disillusionment with visibility of the legal error on the face of the record, as the applicable criterion, is attributable to a variety of factors. Chief among these, perhaps, is the distortion of priorities resulting from the focus on the discoverability, rather than the intrinsic significance, of the error – an approach which, unfortunately, has encouraged emphasis on form at the expense of substance. Moreover, the attitude of the common law that voluntary embodiment in the record of particulars which the tribunal is under no obligation to state justifies the treatment of these matters as integral to the record,[206] increases the capricious nature of the governing principle and the large element of coincidence characteristic of the common law. These idiosyncrasies supplied the stimulus for extension of judicial review for error of law by abrogating the requirement of discoverability *ex facie* the record. The potential of this development can be realized all the more fully by virtue of greatly facilitated access to reasons underlying the decision[207] and, consequently, the availability of an ampler volume of material on the basis of which error of law is demonstrable.

It does not follow, however, that the contemporary Australian code necessarily does away with the distinction between error of law going to the root of jurisdiction and error of law within jurisdiction. Although the survival of "these subtle distinctions"[208] would appear to be confined in modern English law to inferior courts of law,[209] as distinct from administrative tribunals in relation to which all errors of law material to the decision involve jurisdictional blemish,[210] the Privy Council[211] as well as Australian judicial authority at the state

204. *Re Racal Communications Ltd* 1981 AC 374 at 383.

205. *R.* v. *Northumberland Compensation Appeal Tribunal ex p, Shaw* (1952) 1 KB 338.

206. *R.* v. *Hubbard* (1976) 3 WWR 152 at 157; *Re Miljohns and Board of Education for the Borough of Scarborough* (1981) 112 DLR (3d) 552.

207. The Administrative Decisions (Judicial Review) Act 59 of 1977, s 31(1).

208. *Re Racal Communications Ltd* 1981 AC 374 at 383 *per* Lord Diplock.

209. *ibid.*

210. *ibid.*

211. *South East Asia Fire Bricks Sdn Bdn* v. *Non-Metallic Mineral Products Manufacturing Employees Union* 1981 AC 363.

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tier,[212] even after the dramatic developments transforming English law, have resolutely asserted the existence of a category of error of law within jurisdiction.

The conclusion, in relation to administrative tribunals, that "Any error of law that could be shown to have been made by them in the course of reaching their decision on matters of fact or administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity"[213] is resisted by a powerful current of authority in contemporary Australian law. The courts of the Northern Territory[214] and of Queensland[215] have held, respectively, that a conclusion totally unsupported by evidentiary material and an error as to the reception of evidence constitute lapses within jurisdiction rather than error signifying excess of jurisdiction. Reasoning from a standpoint which hardly bears comparison with dominant trends in the common law, the High Court of Australia has suggested that reference to an extraneous consideration in the course of exercise of a discretionary power amounts to no more than an error within jurisdiction.[216] In a decision which stringently curtails the ambit of error impinging on jurisdiction, the High Court of Australia seems to have taken the view, by implication, in the context of a decision by an inferior court, that conviction for an offence not known to the law does not entail jurisdictional error.[217] The High Court of Australia, moreover, has had no hesitation in declaring that non-jurisdictional error of law is made invulnerable by a privative clause, duly enacted.[218] Although this judicial tradition, much in evidence in Australia, is probably weakened by the adoption of the codified system, the recognition of a category of error of law within jurisdiction is not necessarily inconsistent with the statutory formulation and is sustained by cogent considerations of legal policy connected with the tribunal's power to err within its *vires* as an inalienable aspect of autonomy with regard to matters entrusted to it for decision by the legislature.

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21. ?. v. *Small Claims Tribunal, ex p, Barwiner Nominees Ltd* 1975 VLR 831.
213 ee the case cited at n 208 *supra.*
214. ... v. *Galvin, ex p, Bowditch* (1979) 2 NTR 9.
215. *R.* v. *Bjelke – Peterson ex p, Plunkett* 1978 Qd R 305.
216. *Re Shaw ex p, Shaw* (1981) 55 ALJR 12.
217. *Re Cooke ex p, Tunigg* (1980) 54 ALJR 515.
218. *Honssein* v. *Under Secretary Department of Industrial Relations and Technology* (1982) 56 ALJR 217.

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In any event, judicial circumspection seeking to weigh the advantages of finality, simplicity and expedition against "correctness" of decision in matters with regard to which the tribunal's expertise and equipment are incomparably superior to the court's is an overriding need in the field of review for legal error. The premise that judicial review is invariably proper, once an error of law is shown to have been made, no matter how inconsequential the error may be,[219] spells disaster by exacerbating tensions within the organs of government.

Breach of Natural Justice and Procedural Requirements

An administrative decision is exposed to judicial review on the ground that "a breach of the rules of natural justice occurred in connexion with the making of the decision".[220] The frontiers of natural justice are, on the whole, generously demarcated by judicial trends in Australia.

The width of discretionary power conferred on the tribunal does not preclude the applicability of rules of natural justice.[221] The grant of statutory power to a tribunal under liquor licensing legislation "to determine the manner"[222] in which its business is to be conducted, preserves intact the licensee's entitlement to a clear opportunity to adduce relevant evidence and to present his case adequately.[223] Natural justice has been declared to control administrative contexts including those which involve the exercise of "purely" administrative or executive powers.[224] The revocation of authority, for example, to enter, or to remain upon, an aboriginal reserve in the Northern Territory should be preceded by a full hearing.[225] The rules of natural justice apply to investigative functions such as those of a fact finding commission,[226] so that the persons or bodies involved in the inquiry have the right to be supplied with particulars relating to the circumstances which

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219. *R.* v. *Marks ex p, Building Construction Employees and Builders Labourers Federation* (1981) 35 ALR 241.

220. Administrative Review (Judicial Decisions) Act 59 of 1977, s 5 (1)(a).

221. *Vip Insurance Ltd* v. *Attorney-General of New South Wales* (1983) 5 ALN 101.

222. *Liquor Act 1979, s 126 (NT).*

223. *R.* v. *Liquor Commission of the Northern Territory ex p, Hinton* (1980) 52 FLR 475.

224. *Nashua Australia Pty Ltd* v. *Channon* (1981) 36 ALR 215 at 225.

225. *Gillespie* v. *Ford and Commonwealth of Australia* (1978) 19 ALR 102.

226. *News Corporation* v. *National Companies and Securities Commission* (1983) 49 ALR 719.

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caused the inquiry to be initiated, to intervene when necessary and generally to participate in the proceedings. [227]

In the light of the presumption that the legislature intended the rules of natural justice to apply to trubunals,[228] clear language is usually necessary to warrant a departure from these requirements,[229] mere silence being equivocal.[230] In exceptional contexts the right to a hearing may be withheld legitimately as a matter of implicit legislative intent, on the basis of the principle *expressio unius est exclusio alterius.*[231] The exclusion of natural justice may also be a matter of legal policy. There is no compulsory requirement that a public officer should be heard prior to suspension pending determination of a charge, since the object of such action is related not to the imposition of a penalty but to the maintenance of high standards of integrity and the preservation of morale in the public service.[232]

The structural framework of the law, incorporating the ideas of natural justice and procedural fairness, amply provides four nuances and gradations necessitated by contextual factors. [233] Allowance has to be made for matters of security and for the protection of sources of information.[234] Disclosure of particulars in sufficient detail to enable a party to meet the case against him does not always make it necessary to reveal the identity of the persons responsible for the allegations.[235] The determination by the court of proper standards to be observed in administrative decision making involves balancing the requirement of fairplay to the citizen against inroads into effective administration.[236] In regard to the functions of an investigative body the presentation of witnesses and the making of formal submission are not necessarily required by natural justice[237] although, in the

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227. At 733-734.

228. *Schmohl* v. *Commonwealth* (1983) 49 ACTR 24.

229. *Toy Centre Agencies Pty Ltd* v. *Spencer* (1983) 46 ALR 351.

230. *R.* v. *Wilson ex p, Donaldson* (1977) 19 ALR 235.

231. *R.* v. *Cole ex p, Dixon* (1979) 27 ACTR 13.

232. At 33 *per* Lockhart J, applying *Lewis* v. *Heffer* (1978) 1 WLR 1061 at 1072-1073 *per* Lord Denning.

233. *Finch* v. *Goldstein* (1981) 36 ALR 287.

234. *Haj-Ismail* v. *Minister for Immigration and Ethnic Affairs* (1981) 36 ALR 516 at 538 *per* Ellicott J.

235. *Hamblin* v. *Duffy* (No 2) (1981) 37 ALR 297.

236. See the case cited at n 229 *supra.*

237. See the case cited at n 226 *supra.*

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context of all administrative decisions which entail potential jeopardy to accrued rights, access to particulars of allegations is essential.[238]

There is no general requirement that a party before a statutory tribunal should have the opportunity to cross-examine witnesses,[239] even where livelihood is at stake,[240] and the desirability of adversarial proceedings depends on a variety of matters including the nature, constitution and powers of the tribunal, its institutional framework, the extent to which governing legislation assimilates the tribunal's powers with those of a court, established practice in the particular type of case, the scope of the tribunal's discretion and the impact of its decision on the complainant's rights and those of others.[241] There may be situations in which the tribunal's deliberate refusal to tender a hostile witness for cross-examination is indicative of bias.[242] Adversarial proceedings, in any event, are inappropriate if the tribunal is not bound by the rules of evidence.[243]

The reception of irrelevant and prejudicial material including previous convictions, contravenes natural justice,[244] as does an unexpected departure from previous practice which takes a party by surprise and causes him detriment in the conduct of his defence.[245] Natural justice includes the right of legal representation in cases where a party is ill-equipped to deal with the complexity of the relevant issues[246] and the right to an adjournment if this is necessary for the effective presentation of his case.[247] Prejudgment of controverted issues and reversal of the burden of proof constitute a denial of natural justice.[248] Different tests of bias are applied in modern Australian law to tribunals, depending on whether they are statutory or consensual in origin; in the former case the applicable test is that of reasonable suspicion while, in the latter, actual bias needs to be established.[249]

The central issue is whether the rules of natural justice are necessarily applicable to "a decision of an administrative character

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238. *Cunningham* v. *Cole* (1982) 44 ALR 334 at 341 *per* Ellicott J.
239. *Ansell* v. *Wells* (1982) 43 ALR 41.
240. *Cains* v. *Jenkins* (1979) 29 ALR 219.
241. *Hurt* v. *Rosall* (1982) 43 ALR 252.
242. *Barrier Reef Broadcasting Pty Ltd* v. *Minister for Post and Telecommunication* (1978) 19 ALR 425 at 442 *per* Aickin J.
243. See the case cited at n 241 *supra.*
244. *Hercules* v. *Jacobs* (1982) 60 FLR 82.
245. *White* v. *Trotting Authority of New South Wales* (1983) 5 ALN 108.
246. *R.* v. *Commissioner of Police ex p, Edwards* (1977) 17 ALR 445.
247. *R.* v. *Moodie ex p, Mithen* (1977) 17 ALR 219.
248. *Cleworth* v. *Barrow* (1978) 20 ALR 359.
249. *Cains* v. *Jenkins* (1979) 29 ALR 219.

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made, proposed to be made or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment"[250] or whether the Australian code permits judicial review for breach of natural justice only in circumstances where compliance with natural justice was required under the common law.

The latter view has been preferred consistently in judicial decisions construing the code. The view has been expressed unequivocally that the legislative provision was not intended to create fresh obligations in regard to natural justice where none existed previously.[251] Australian courts have felt no doubt that the applicability of natural justice has to be shown "apart from that provision."[252] Thus, there would appear to be no duty to observe the rules of natural justice before a deportation order is signed,[253] while the operation of natural justice prior to execution of a deportation order[254] depends on the criterion of "legitimate expectation,"[255] there being no justiciable right. The standard of "legitimate expectation" has been applied in contemporary Australian law as the basis of natural justice in other contexts as well, including renewal of approval for workmen's compensation insurance[256] and the provision of social security benefits.[257]

Australian courts have shown reluctance to apply natural justice to executive decisions with a large "policy" content. A distinction has been drawn between an act which directly affects a person individually, and one which affects him simply as a member of the public or a class of the public, with a view to suggesting that an administrative decision of the latter kind is truly a "policy" decision not subject to judicial review on the ground of violation of natural justice.[258] The High Court of Australia has recognized that a hearing for all groups of interests may be impracticable before executive action is taken to determine the price of essential commodities.

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250. Administrative Decisions (Judicial Review) Act 59 of 1977, s 3(1) defining "decision to which this Act applies."

251. *Safadi* v. *Minister for Immigration and Ethnic Affairs* (1981) 38 ALR 399.

252. *Arslan* v. *Durrell* (1983) 48 ALR 577 at 592 *per* Beaumont J.

253. *R.* v. *MacKellar ex p Gaunt* (1978) 20 ALR 119.

254. *Ceskovic* v. *Minister for Immigration and Ethnic Affairs* (1979) 27 ALR 423.

255. See the case cited at n 234 *supra; cf Simsek* v. *Minister for Immigration and Ethnic Affairs* (1982) 40 ALR 61.

256. *Fai Insurance Ltd* v. *Winneke* (1982) 41 ALR 1.

257. *Director-General of Social Services* v. *Chaney* (1980) 31 ALR 571.

258. *Salemi* v. *Mckellar (No.2)* (1977) 137 CLR 396 at 452 *per* Jacob J.

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Consequently, an administrative body is not bound to afford manufacturers of bread a hearing in relation to the proposed fixing of the price of hamburger buns, since this is merely a marginal incident in a major revision of the price framework covering the entire range of bread products.[259]

However, in contexts falling outside the purview of natural justice in the common law, the ensuing gap may be diminished by the availability of a qualified degree of protection. The formula embedded in current Australian legislation enables accommodation of current judicial trends in England and the Commonwealth. Salient among these is the concept of procedural fairness, the practical effect of which, in the emerging law, is to provide an intermediate standard between the plenary protection assured by traditional natural justice and untrammelled discretion, bereft of any procedural safeguard, however rudimentary in content, which had been associated with some sectors of administrative decision making. The apprehension that a sheet anchor of judicial review, developed over the centuries by the common law, may be eroded insidiously by a doctrine confounded by formidable difficulties of definition and application is allayed at least in part by the modern attitude that, far from traditional natural justice being superseded by the innovative concept,[260] the two notions are capable of effective co-existence in distinct contexts.[261] The better view, in the setting of the codified Australian system, is that the principles of natural justice remain intact, and procedural fairness represents a viable standard solely in circumstances in respect of which a *lacuna* exists.[262] The residual complexion of procedural fairness has been acknowledged by the courts of Australian jurisdictions including New South Wales.[263]

In substance, the concept of procedural fairness "involving something less than the procedural protection of natural justice",[264] embodies

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259. *Bread Manufacturers of New South Wales* v. *Evans* (1981) 38 ALR 93 at 103-104 *per* Gibbs CJ.

260. M. Loughlin, "Procedural Fairness; A study of the Crisis in Administrative Law Theory" (1978) 28 *University of Toronto Law Journal* 215.

261. R.A. McDonald, "Judicial Review and Procedural Fairness in Administrative Law" (1980) 26 *McGill Law Journal* 1.

262. H.W. Arthurs, "Jonah and the Whale; The Appearance, Disappearance and Reappearance of Administrative Law" (1980) 30 *University of Toronto Law Journal* 225.

263. *Dunlop* v. *Woollahra Municipal Council* (1975) 2 NSWLR 446 at 470-471 *per* Wootten J.

264. *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671 at 680 *per* Laskin CJ.

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a response to the vulnerability of individual rights aggravated by social and economic movements in our civilization. "It is of the essence of the common law that it develops with the times to the extent necessary to see that justice is maintained in a developing and increasingly complex society."[265] Nevertheless, a counterpoise to this aspiration is the public interest in ensuring that administrative tribunals which seek to regulate such fields of activity as the distribution of resources and facilities, price and quality control of essential commodities and the provision of opportunity for recreation and cultural pursuits are not hampered by restraints which may not be altogether suited to the situation in question.[266] The dangers attendant on stringent control of administrative action by having recourse to judicial remedies are perennially present to the minds of judges today.[267]

The excessive judicial self-restraint which induced the view, taken by the courts of England several decades ago,[268] that the "superadded" element of "a duty to act judicially" was a prerequisite of judicial review, had a pervasive influence throughout the Commonwealth. Once the assumption was made that violation of the rules of natural justice is a basis of complaint only within the confines of judicial and quasi-judicial functions,[269] an extensive area of arbitrary administrative action was inevitably made immune from judicial control. A virile and cohesive system of judicial review calls for a residual principle which, over at least a part of the gamut of administrative powers, would achieve the function of which the rules of natural justice, drastically circumscribed in purview, were incapable. In keeping with the Australian legislative provision the conclusion can be supported that, in situations where a procedural standard lesser than natural justice is applicable, departure from that standard affords good ground for judicial review.

There is an important respect in which conceptions of natural justice are invigorated by the Australian statutory regime. The codified system has been interpreted as entailing the premise that a breach of natural justice, *per se,* warrants judicial review, irrespective of the extent to which the breach was causally linked with the eventual

265. *Re Harvie and Calgary Regional Planning Commission* (1974) 94 DLR 49 at 67 *per* Clement JA.

266. *Cf Mcinnes* v. *Onslow Fane* (1978) 3 All ER 211 at 217 *per* Megarry V–C.

267. *CF Meadowvale Stud Farm Ltd* v. *Stratford County Council* (1979) 1 NZLR 342 at 348 *per* Mahon J.

268. *R.* v. *Legislative Committee of the Church Assembly ex p, Haynes-Smith* (1928) 1 KB 411 at 415; *Nakkuda Ali* v. *Jayaratne* (1951).

269. *Calgary Power Ltd and Halmrast* v. *Copithorne* (1958) 16 DLR (2d) 241.

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result.[270] It has been declared that "If the applicable rules or standards are not observed, it is not relevant to inquire whether the decision reached was the correct one".[271] This explicit view removes doubts which lingered in the common law.

Apart from transgression of the rules of natural justice, it is a ground of judicial review that "procedures that were required by law to be observed in connection with the making of the decision were not observed".[272] This provision gives judges considerable scope for determining whether procedural requirements are binding or not by having recourse, for example, to the distinction between mandatory and directory conditions.[273] The violation of a requirement relating to a quorum[274] and the omission to serve prescribed statutory notices[275] are examples of lapses which attract this ground of review.

The 'No Evidence' Ground

In marked contrast with Australian legislation which explicitly provides for judicial review of an administrative decision on the ground that "there was no evidence or other material to justify the making of the decision",[276] common law approaches to the availability of this ground of review were characterized by a high degree of ambivalence.

Common Law Attitudes

At the turn of the century Australian judicial decisions at the state tier confidently asserted the preponderance of authority against review for no evidence,[277] but the firmness of this approach has been eroded by subsequent currents of judicial authority. However, as recently as 1968, a law reform agency in a Canadian province was able to conclude categorically, although with regret, that the complete lack of any evidence whatsoever to support a factual ingredient essential to a decision was insufficient, in keeping with common law attitudes,

270. *Hamblin* v. *Duffy* (No 2) (1981) 37 ALR 297.

271. *Dixon* v. *Commonwealth of Australia* (1981) 3 ALD 289 at 294-295 *per* Bowen CJ and Deane J.

272. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(f).

273. *Cf Graham* v. *Attorney-General* 1966 NZLR 937 at 953-961.

274. *R.* v. *Murray* ex p. *Proctor* (1949) 77 CLR 387 at 402.

275. *McPherson* v. *Andrew Lees Ltd* 1926 NZLR 523.

276. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(h).

277. *Purcell* v. *Pt Co. Ltd* (1894) 15 NSWR 385; *Ex p, Jordan* (1898) 19 NSWR 25: *Cf Ex p Cohen* (1890) 7 WN 5.

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to invalidate the decision.[278] This spirit of withdrawal is amenable to justification in principle on the basis that, although the judiciary has an aggressive role in protecting the citizen against "the vagaries of executive decision",[279] judicial review is supervisory rather than appellate in character[280] and that the investigation of matters pertaining to evidentiary support for conclusions reached by an administrative tribunal transcends the legitimate limits of this supervisory function. On the plane of precedent the declining of judicial review on the ground of lack of evidence is powerfully influenced by a decision of high authority which adopts, as the basis of its approach to jurisdiction, the premise that once a tribunal has properly assumed jurisdiction, a subsequent error, however far-reaching, is identifiable as an erroneous exercise of the allotted jurisdiction and not as the usurpation of a non-existent jurisdiction.[281] Consequently, a finding of fact unsubstantiated by evidence represents, at most, an error within jurisdiction – an area in respect of which the expansion of judicial intervention is discouraged by legislative trends.[282]

Juxtaposed with the note of caution reflected in this strand of opinion is a competing approach which enjoins upon the decision making authority the duty to act on "evidentiary material of probative value".[283] The 'no evidence' ground has contemporary judicial support,[284] even though its strength is perhaps diminished by the lack of explicit discussion,[285] by the restrictive terms of the empowering statutory provision which makes the legality of administrative action conditional upon reasonable conviction as to the existence of a state of facts[286] and by the use of the 'no evidence' ground specifically in the setting of *habeas corpus* proceedings.[287] Limited recourse to this head of review is not incompatible with binding authority, in so far as the courts, while looking askance at the meticulous examination

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278. Royal Commission of Inquiry into Civil Rights (Ontario 1968) Report 1 Vol 1 261.
279. *Corporate Affairs Commission* v. *Bradley* (1974) 24 FLR 44 at 54-55.
280. *R.* v. *Herrod ex p. Leeds City District Council* (1976) 1 All ER 273.
281. *R.* v. *Nat Bell Liquors* 1922 2 AC 128; *cf R.* v. *Dunbar* (1953) 10 WWR 334.
282. Summary Jurisdiction Act 1848.
283. *Attorney-General* v. *Ryan* 1980 AC 718.
284. *British Dredging (Services) Ltd* v. *Secretary of State for Wales and Monmouthshire* (1975) 1 WLR 687.
285. *R.* v. *Home Secretary ex p, Zamir* 1980 AC 930; *R.* v. *Hillingdon LBC ex p Islam* (1981) 3 WLR 942.
286. *Coleen Properties Ltd* v. *Minister of Housing and Local Government* (1971) 1 WLR 433 at 440.
287. *R.* v. *Board of Control ex p, Rutty* (1956) 2 QB 109 at 124.

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of evidence in support of a finding which is ostensibly regular, are not precluded from recognizing the lack of evidence as symptomatic of an error of law which may be a ground for vitiating the order if the error is apparent on the face of the record.[288]

Judges who are not disposed to reject altogether the want of evidence as a rubric of review are not always of the same mind with regard to the permissible dimensions of review on this footing. A controlled approach, sound in terms of preserving the autonomy of administrative tribunals within the purview of their assigned jurisdiction, is predicated on the distinction between total absence of evidence and sufficiency of evidence adduced before the tribunal.[289] The requirement that the finding of a tribunal should be based on evidence has been interpreted as involving no more than the need for material which tends logically to demonstrate the existence or non-existence of facts relevant to the issue to be determined;[290] if there is evidence capable of having any probative value, the weight to be attached to it falls within the responsibility of the tribunal.[291] The limited parameters of supervisory jurisdiction, reflecting commitment to the legislative allocation of responsibility, has inhibited inquiry into gradations and nuances relevant to the adequacy of evidentiary support.[292]

However, a less apologetic judicial attitude to the score of the 'no evidence' ground is also in evidence in England and the Commonwealth. The sufficiency of evidence to buttress a particular finding of fact has been treated as justiciable in supervisory proceedings through the mechanism of control of errors of law.[293] This approach, which has found adherents among Commonwealth judges,[294] is exemplified by judicial investigation of the amplitude or paucity of the evidentiary material on which a conclusion of fact is founded.[295] The weighing of conflicting evidence, as opposed to ascertaining the existence of a factual basis, however slender, for the finding arrived at,[296] is

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288. *R.* v. *Long Wing* 1923 1 DLR 942 Interpreting *R.* v. *Nat Bell Liquors* n 281 *supra.*

289. *Re Workmen's Compensation Act Re Carter* (1933) 1 DLR 666; *R.* v. *Australian Stevedoring Industry Board* (1953) 88 CLR 100 at 119-120.

290. *R.* v. *Deputy Industrial Inquiries Commissioner ex p, Moore* (1965) 1 QB 456 at 488 *per* Diplock LJ.

291. *ibid.*

292. *R.* v. *Aubin* (1923) 1 WWR 270; *Re Robinson* (1948) OR 487.

293. *Governor of Brixton Prison ex p Armah* 1968 AC 192 at 231 *per* Lord Reid.

294. *R.* v. *Metropolitan Fair Rents Board ex p, Camestral* 1961 VR 89 at 93.

295. *Labour Relations Board for British Columbia* v. *Canada Safeway Ltd* (1953) 3 DLR 641 at 646 *per* Tascherau J; *Labour Relations Board and Attorney-General for British Columbia* v. *Traders' Service Ltd* (1959) 15 DLR (2d) 305.

296. *Sinclair* v. *Mining Warden at Maryborough* (1975) 49 ALJR 166.

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favoured by the assumption that the requirement of "some evidence" envisages not merely the availability of material having a bearing on the issue before the tribunal[297] but the justification of the decision taken in the light of the evidence led before the tribunal.

In sharp contrast with current American usage, the inclination of English and Commonwealth judges exercising supervisory jurisdiction to distance themselves from areas of factual adjudication has prompted oblique recognition of the 'no evidence' ground *via* established channels of juridical review.

(i) Findings of fact unwarranted by the available evidence have been considered reviewable on grounds predicated on the absence[299] or excess[300] of jurisdiction, although the equation of lack of evidence with jurisdiction taint has been challenged with vigour, especially in Canada[301] and in New Zealand.[302] There is a marked cleavage of judicial views in this area of the law. Departing pointedly from the assertion by the Supreme Court of British Columbia that "No evidence is an error of law going to jurisdiction,"[303] the Supreme Court of New Brunswick has entertained no doubt that "The alleged absence of evidence does not deprive (the tribunal) of jurisdiction."[304] Nevertheless, in the current legal literature as well as in decided cases there are reliable antecedents for bringing unsupportable findings of fact within the pale of judicial review on the basis of excess of *vires,* and abuse of power.[305]

(ii) Compatibility of the findings with the evidence received is sometimes sought to be required as a matter of natural,[306] essential[307]

297. *City of Vancouver* v. *Henderson* (1960) 23 DLR (2d) 161.

298. *R.* v. *Ontario Racing Commission ex p, Taylor* 1971 OR 400.

299. *Evans* v. *Thomas* (1866) 1 SALSR 82; *Overgaard* v. *Licensing Magistrates of the Murray District* (1906) 9 WALR 31; *Woods* v. *Waterman* (1908) 10 WALR 75.

300. R.L. Towner, "No Evidence and excess of Jurisdiction in Administrative Law" 1978 *New Zealand Law Journal* 48 at 56.

301. *Woodward Stores (Westmont) Ltd* v. *Alberta Assessment Appeal Board Division No 1* (1976) 5 WWR 496.

302. *In re Collett* (1897) 17 NZLR 425; *Van der Water* v. *Bailey and Russell* 1921 NZLR 122.

303. *Westburne Industrial Enterprises Ltd* v. *Labour Relations Board* (1973) 6 WWR 451.

304. *Re New Brunswick Registered Nursing Assistants* (1971)3 NBR (2d) 532 at 540 *per* Hughes JA; *cf* for a similar view, *Ex p, Hodgins* (1944) 17 MPR 323.

305. *The Richstone Bakeries Case* 1963 CS 648 at 657; *cf* D.J. Galligan, "The Nature and Function of Policies within Discretionary Power" 1976 *Public Law 332 at 343.*

306. R. v. *White* (1962) 39 WWR 425 at 429.

307. *Children's Aid Society of the Catholic Archdiocese of Vancouver* v. *Salmon Arm* (1941) 1 DLR 532 at 534.

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or fundamental[308] justice. The Privy Council has declared: "What fundamental rules of natural justice do require is that there should be material... that is logically probative."[309] The pith and substance of this view is that the obligation of a decision maker to act on material of some probative cogency is subsumed in the *audi alteram partem* rule.[310]

(iii) A fetter on the grant of statutory power, arising by implication of law, has been suggested as the basis of judicial review in this context. The suggestion is that the legislative conferment of power is made on the implied condition that the tribunal's conclusion is substantiated by material having probative force.[311] The blemish would thus appear to be the absence of any foundation in fact for the fulfilment of the conditions upon which, in point of law, the existence of the power conferred depends.[312]

(iv) A finding unsupported by evidence has been regarded as one reached on erroneous legal grounds,[313] so as to attract judicial review on the basis of error of law.

(v) The reaching of a conclusion which cannot be reconciled with the evidence has been treated as capricious or unreasonable action on the part of a tribunal of limited jurisdiction, impeachable specifically on that ground.[314] A conclusion which is not fortified in any degree by the evidence available may well be looked upon as one to which the tribunal could not reasonably have come.[315]

(vi) Further removed from direct application of the "no evidence" ground, as such, a decision wholly lacking evidentiary support has been considered indicative of the existence of an improper purpose[316] or the use of an unacceptable test.

Although a variety of approaches to the foundation of judicial review exercised on the ground of lack of evidence in support of a

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308. *Ong Ah Chuan* v. *Public Prosecutor* 1981 AC 648.

309. At 671 *per* Lord Diplock.

310. *Barwoods (Caterers) Ltd* v. *Secretary of State for the Environment* (1972) Est Gaz Dib 1007; see generally J. Beatson and M.H. Matthews, *Administrative Law Cases and Materials* (1983) 286.

311. *Westbourne Industrial Enterprises Ltd* v. *Labour Relations Board* (1973) 6 WWR 451.

312. *R.* v. *Australian Stevedoring Industry Board* (1953) 88 CLR 100.

313. *id.* at 119-120.

314. *Argosy Co. Ltd* v. *Inland Revenue Commissioner* (1971) 1 WLR 514.

315. *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* (1965) 1 WLR 1320 at 1326 *per* Lord Denning.

316. R.R.S. Tracey, "Absence of Insufficiency of Evidence and Jurisdictional Error" (1976) 50 *Australian Law Journal* 568 at 571-572.

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conclusion reached by a tribunal of restricted authority emerges from the decided cases, the question of practical importance is whether the basis of intervention by the courts is jurisdictional in character or not. This factor is pragmatically crucial, since classification of the "no evidence" ground as a vehicle of review assailing the roots of jurisdiction entails the corollary that evidence extrinsic to the record may properly be placed before the court to show the arbitrary nature of the tribunal's finding.[317] On the other hand, if the lack of evidence in support of a finding of fact is an instance of error within jurisdiction, or the wrong exercise of jurisdiction possessed by the inferior tribunal, it would follow that the vitiating circumstance should be discoverable by the court from scrutiny of the record itself. On this view of the matter, as a New Zealand court pointed out, "where the evidence is not made part of the record, the superior court cannot entertain on *certiorari* the question whether there was evidence of every matter requiring to be proved".[318] This limitation on availability of means for exposure of the taint may well be decisive in practice, since an allegation of no evidence could be made only if the whole of the material before the tribunal is at the disposal of the court exercising review, and all the evidence can be so available to the superior court for examination of error of law within jurisdiction if the evidence appears on the face of the record.[319] A serious practical disadvantage, then, of regarding lack of evidence as an error of law on the face of the record is that, unless the record contains almost the entirety of the evidence tendered, it may not be feasible to conclude with confidence that there was a dearth of evidence before the tribunal.[320] The equivocality of judicial attitudes to this problem arises partly from discrepant points of departure in the case law with regard to the question whether the "no evidence" ground impinges on jurisdiction[321] and partly from the tendency, in most decided cases, to refrain from addressing the jurisdictional implications of the "no evidence" ground.[322]

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317. *Westbourne Industrial Enterprises Ltd* v. *Labour Relations Board* (1973) 6 WWR 451 at 455.

318. *Hami Paihana* v. *Tokerau Maori Land Board* (1955) NZLR 315 at 322.

319. *R.* v. *Nat Bell Liquors* (1922) 2 AC 128.

320. *R.* v. *Criminal Injuries Compensation Board ex p, Staten* (1972) 1 All ER 1034.

321. See, for an affirmative answer, *Leonard* v. *Amyotet College des Medecins et Chirurgiens* (1971) CS 347 and, for a negative answer, *Radio Iberville* v. *Board of Broadcast Governors* (1965) 2 Ex CR 43.

322. *Re Red Deer and Calgary Power Ltd* (1966) 56 WWR 732.

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The Australian Statutory Regime

The striking feature of the current Australian legislation is that, while it is expressly declared to be a ground of judicial review that "there was no evidence or other material to justify the making of the decision",[323] the invocation of this head of review is drastically controlled. The effect of the statute is that review on this ground is not available unless one of two conditions is satisfied:

(a) the person who made the decision was required by law to reach the decision only if a particular matter was established, and there was no evidence or other material (including facts of which he was entitled to take notice) from which he could reasonably be satisfied that the matter was established;[324] or.

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist.[325]

Condition (a)

A prominent characteristic of this condition is that it expands the corresponding principle of the common law in one direction and contracts it in another. The statutory provision which supersedes the lingering reluctance of the common law to base judicial surveillance undisguisedly on lack of evidence, as such, incorporates in express terms this rubric of review. Moreover, the ground embodied in the statute overlaps with the broader of the alternative common law approaches[326] in that judicial review, according to the statutory formulation, is not restricted to cases involving the total absence of evidence but embraces an indefensibly slender basis of evidentiary support.[327] Unfortunately, however, significantly weakening the thrust of this development, the applicability of the codified ground is confined to circumstances in which proof of the matter insufficiently established by the available evidence represents a compulsory condition precedent for the making of the impugned decision.[328] This exacting standard, by excluding from the ambit of review part of the area catered for by the equivalent common law doctrine, diminishes to some extent the vitality of the legislative provision.

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323. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(h).

324. *id* s 5 (3)(a).

325. Administrative Decisions (Judicial Review) Act 59 of 1977 s 5 (3)(b).

326. For the American version of the ',''insubstantial evidence'' ground, see L.L. Jaffe, *Judicial Control of Administrative Action* (1965) 595.

327. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (3)(a).

328. *ibid.*

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The "no evidence" ground, in the form in which it is codified in modern Australian law, assumes the complexion of a compromise, in that the choice of the stricter test of review embedded in the common law is combined with a mechanism for curtailing the situations in which this ground of review is capable of being invoked. But judges who prefer a more interventionist approach allowing scope for the fullest dimensions of common law theory may seek a contrivance designed to circumvent the statutory limitation. The structural framework of the legislative provision which accommodates breach of the rules of natural justice,[329] jurisdictional deficiency[330] and error of law[331] as pivots of review, existing side by side with the "no evidence" ground, does not contemplate attaching to the first three grounds any limitation comparable with that controlling the "no evidence" ground. It is, therefore, not inherently implausible to suggest, against the backdrop of patterns of reasoning characteristic of the common law which has not hesitated to acknowledge the lack of evidence reinforcing a finding of fact as an instance of contravention of natural justice and as exemplifying jurisdictional fault, legal error or improper purpose, that, by calling in aid elements of the "no evidence" ground indirectly under the aegis of one or more of the broader rubrics of review, the circumscribing factor embodied in the "no evidence" ground may be dispensed with legitimately.[332]

Nevertheless, from the standpoint of policy, the better view is that this is not a proper course. Apart from the consideration that the deliberate selection of a segment of the common law ground for statutory incorporation indicates resolve to exclude other aspects on the basis of the principle *expressio unius est exclusio alterius,* major assumptions made by law reform agencies whose work preceded the enactment of the governing legislation underline the disingenuous character of this method of escape. The Kerr Committee was inclined to regard judicial review for error of law as sufficiently amorphous in scope to render vulnerable findings of fact unsupported by evidence.[333] However, in contrast with this view of the common law, the Ellicott Committee, far from being satisfied that review for insubstantial evidence was provided for by the common law, was not

329. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(a).

330. *id,* s 5 (1)(c).

331. *id,* s 5 (1)(f).

332. J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" 1978 *Federal Law Review* 42 at 61.

333. Report of the Commonwealth Administrative Review Committee, Parliamentary Paper 144 of 1971 paragraph 36 (v).

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even prepared to assert that the absence of evidence, *per se*, unequivocally warranted judicial intervention under the common law.[334] The diffidence typifying the reflections of the Ellicott Committee on this point account in large measure for the specific enumeration of a ground of review, based on inadequate evidence, in contemporary Australian legislation. Once a distinct ground of review, so conceived, finds statutory expression on the footing that more general heads of review are inappropriate, it would seem palpably artificial to resort to a line of reasoning aimed at obviating, by having recourse to the broader grounds of review, a central limitation directly linked with the insubstantial evidence ground.

Five years after the legislation became operative,[335] the judicial resolution of these points of ambiguity remains a matter of conjecture, since no occasion has arisen for a direct pronouncement on this question, although in contexts involving extradition proceedings before a magistrate[336] and deportation proceedings,[337] the courts have invalidated executive action on the ground of incompatibility with evidentiary material. In the latter situation there was an explicit ruling by the court that the minister's finding that the person whose deportation had been ordered was a member of a criminal organization was not supported by evidence.[338]

The tentative view may be expressed, in keeping with the Australian experience during the brief span after codification of the grounds of review, that the courts have not found congenial an overly aggressive stance in relation to review for insubstantial evidence. The Federal Court of Australia has entertained no doubt that the attribution of weight to different elements of the evidence is a matter entirely within the purview of the decision maker[339] and that excessive emphasis on one aspect of the evidence does not necessarily attract judicial review predicated on insubstantial evidence.[340] The Federal Court has declared: "It is not open to this court to allow an appeal from the (Administrative Appeals) Tribunal on the basis that in the court's

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334. Report of the Committee of Review of Prerogative Writ Procedures, Parliamentary Paper 56 of 1973 paragraphs 41-43.

335. The Administrative Decisions (Judicial Review) Act 59 of 1977 came into force on 1 October 1980.

336. *Riley* v. *Evans* (1983) 50 ALR 593.

337. *Barbaro* v. *Minister for Immigration and Ethnic Affairs* (1982) 46 ALR 123.

338. *ibid.*

339. *Tabag* v. *Minister for Immigration and Ethnic Affairs* (1982) 45 ALR 705.

340. *Sean Investments Ltd* v. *MacKellar* (1982) 42 ALR 676 at 684 *per* Franki J.

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opinion the Tribunal attached 'undue' importance to a matter or failed to have 'due' regard to another matter."[341] This spirit of restraint during the early years of the operation of the codified system serves a beneficial purpose of policy, in that it discourages the courts from carving out for themselves a disproportionately large area of responsibility accompanied by the potential likelihood of tensions within the fabric of administration.

Condition (b)

The gist of this requirement is that the person who made the decision "based the decision on the existence of a particular fact, and that fact did not exist."[342]

This appears to be a remarkable provision which extends the frontiers of judicial review far beyond the confines envisaged by the common law. A tribunal which has erred with regard to a matter which is preliminary or collateral to the merits is amenable to the prerogative writs if the error is one of law, but in the realm of factual adjudication the scope of jurisdictional review is strikingly narrower. Even in relation to proof of a fact on the existence of which the legitimacy of jurisdiction depends the courts, typically, have been reluctant to intervene. Thus, the Supreme Court of Canada has observed that "if the jurisdiction depends upon contested facts and there is a real conflict of testimony upon some fact which goes to the question of jurisdiction, and the tribunal decides it in such a way as to give itself jurisdiction, a superior court, on an application for prohibition, will hesitate before reversing its finding of fact and will only do so where the grounds are exceedingly strong".[343] According to the view acted upon by the Supreme Court of New South Wales, if the fact upon which the presence or absence of jurisdiction turns is one which is assigned to the tribunal itself, as part of the general inquiry into the matter which it is charged to determine, its decision, whether right or wrong, cannot be challenged.[344] *A fortiori,* the insistence on "plain"[345] excess of jurisdiction is sound in respect of findings of fact outside the area of jurisdictional fact. The Supreme Court of New Zealand has declared itself loath to reverse findings

341. *Yildiz* v. *Minister for Immigration and Ethnic Affairs* (1982) 46 ALR 112 at 113 *per* Keely J.

342. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (3)(b).

343. *Segal* v. *City of Montreal* 1931 SCR 460 at 473.

344. *Manning* v. *Thompson* (1976) 2 NSWLR 380 at 392, *per* Yeldhem J.

345. See the case cited at n 343 *supra*.

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of fact reached by the Land Valuation Court unless the circumstances are exceptional.[346] In the setting of planning legislation, the Court of Appeal of New Zealand has adopted the attitude that the question whether a reconstruction is substantial or not is a question of fact for the borough to decide[347] and that "It is not a matter on which this court can express a binding view".[348]

This attitude of withdrawal is defensible since, in cases entailing a conflict of evidence as opposed to competing interpretations of an acknowledged set of facts, the court is unfavourably situated to assess conflicting evidence by the examination of affidavits.[349] Apart from this practical consideration, judges have been prepared to give administrative tribunals considerable latitude in relation to fact finding. Declining to interfere with a finding of fact by a local authority, Lord Denning has remarked: "It is important to remember that the decision in these matters should be looked on benevolently because of the difficulties with which they are faced."[350]

These circumspect approaches are encapsulated in the requirement which has taken root in the common law, that exposure of findings of fact by an inferior tribunal to judicial rescrutiny is limited to situations in which the conclusion of fact assailed has a vital bearing on legality of exercise of the statutory power.[351] On the other hand, the Australian statutory regime, far from requiring that the controverted finding of fact should represent an essential condition precedent to invocation of statutory authority, is content to concede the availability of review on account of the non-existence of any fact on which the decision purported to be based, whether the decision maker was legally obligated or not to take this fact into consideration. The wide sweep of the statutory ground of review is accentuated by two other factors. In the first place, the extensive parameters of the new legislative provision conferring on persons entitled to apply for review of a decision the right to obtain reasons for the decision[352] greatly facilitate discovery of, and challenge to, the basis of the decision.

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346. *Manawatu – Orana River Board* v. *Barber* 1953 NZLR 1010 at 1037 *per* Stanton J.

347. *Stewart Investments Ltd* v. *Invercargill City Corporation* 1976 2 NZLR 362 at 366 *per* McCarthy P.

348. *Ashburton Borouth* v. *Clifford* 1969 NZLR 927 at 935 *per* North P.

349. *Bell* v. *Ontario Human Rights Commission* 1971 SCR 756.

350. *Lambert* v. *Ealing LBC* (1982) 2 All ER 394 at 399 *per* Lord Denning MR.

351. *See the case cited at n 358 infra.*

352. Administrative Decisions (Judicial Review) Act 59 of 1977, s 13(1).

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Secondly, it is not altogether clear on the face of the governing provision whether review on the ground of non-existence of facts relied on by the tribunal is restricted to primary facts or whether this ground of review encompasses, as well, erroneous inferences from established facts. The extended dimension of review reflected in the latter approach, there can be little doubt, unacceptably distorts the supervisory function.

It would therefore seem paradoxical that Australian courts, armed with the wide powers they derive from current judicial review legislation, should have opted during the last five years for an approach which falls short of the interventionist trends discernible in some lines of contemporary English authority. The predominant consideration present to the minds of modern Australian judges is the proper demarcation of respective spheres of responsibility. The Federal Court of Australia has commented emphatically: "This court is not empowered to substitute its decision for that of the decision maker."[353] The court has disclaimed in express terms the power to make a decision on the factual position for the purpose of declaring its own view thereon[354] and the power to decide whether it would have come to the same conclusion as that reached by the executive functionary.[355] By contrast, modern English and New Zealand judges have sought to control findings of fact made by administrative tribunals on the basis of failure to advert to the true facts,[356] reliance upon an incorrect basis of fact,[357] and misunderstanding or ignorance of an established and relevant fact.[358] It is evident that the nebulous quality of these criteria enhances dramatically the opportunity for judicial activism in regard to fact finding.

Evaluation

Despite the seemingly pervasive range of the statutory mandate, the narrow contours of the insubstantial evidence ground, as it has been applied by Australian courts since the introduction of the codified system, are supported by general perspectives of the law.

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353. *Turner* v. *Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 at 391 *per* Tookey J.

354. *Barkovic* v. *Minister for Immigration and Ethnic Affairs* (1981) 39 ALR 186 at 188 *per* Fox J.

355. *Safadi* v. *Minister for Immigration and Ethnic Affairs* (1981) 38 ALR 399 at 402-403 *per* Franki J.

356. *Daganayasi* v. *Minister for Immigration* (1980) 2 NZLR 130.

357. *Laker Airways Ltd* v. *Department of Trade* 1977 QB 643 at 706 *per* Lord Denning MR.

358. *Secretary of State for education and Science* v. *Tameside Metropolitan Borough Council* 1977 AC 1014 at 1030 *per* Scarmen LJ.

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Unlike the Administrative Appeals Tribunal of Australia which, in the limited areas where appellate jurisdiction is conferred on it by statute, is "as free as the Minister to apply or not to apply (government) policy"[359] and is indeed enjoined to consider *de novo* whether the decision of the inferior tribunal is the "right and preferable decision",[360] the Federal Court of Australia, throughout the far wider gamut of its supervisory jurisdiction, is guided by appreciably narrower norms in regard to the exercise of its power. The Federal Court has recognized that "The question for the court generally is whether the action is lawful in the sense that it is within the power conferred; or that the prescribed procedures have been followed; or that the general rules of law including adherence to the principles of natural justice have been observed",[361] Since the proceedings are supervisory in character, the focus is on the legality, rather than the correctness, of the decision impeached;[362] consequently, distension of the function in such a manner as to approximate to the use of an appellate jurisdiction, involving the substantial retrial of factual issues, is to be resisted.[363] Indeed, the chief merit of the 'no evidence' or 'insubstantial evidence' ground, as such, is that it makes superfluous the tortuous reasoning which the use of other grounds of review, like error of law and breach of natural justice, for the purpose in hand renders necessary. But it is an element of the usefulness of the former grounds that they contain a mechanism which enables the graver categories of error to be isolated and rectified. Excessive elasticity, which dilutes review and erodes the legitimate power of the administrative tribunal may well endanger the survival of the supervisory apparatus itself.

Other Grounds of Review

Jurisdictional Grounds in the Narrow Sense

Distinct from the broader jurisdictional grounds connected with improper motivation, extraneous factors, error of law and lack of

359. *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 642.

360. *ibid.*

361. *Hamblin* v. *Duffy* (1981) 34 ALR 333 at 335 *per* Lockart J.

362. *Cf Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* (1948) 1 KB 223.

363. *Cf* D.W. Elliott, "No Evidence – A Ground of Review in Canadian Administrative Law?" (1972) 37 *Saskatchewan Law Review* 48.

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evidence explicitly catered for by other heads of review spelt out in the statute, judicial review is declared to be available on the basis that "the person who purported to make the decision did not have jurisdiction to make the decision"[364] or that "the decision was not authorized by the enactment in pursuance of which it was purported to be made".[365] These grounds of review include improper constitution of the tribunal,[366] and exceeding the legitimate scope of the functions assigned to the tribunal.[367] The latter envisages, *inter alia*, dealing with unauthorized subject-matter or the making of an order outside the scope of the enabling legislation.

Fraud

Judicial review is available on the ground that "the decision was induced or affected by fraud".[368] Fraud inducing the order of an inferior tribunal has been treated by Commonwealth courts as equivalent to,[369] or as an example of,[370] lack of jurisdiction. A causal *nexus* between the fraud perpetrated and the relief obtained has been adverted to as an essential requirement under the common law.[371] The language used in the Australian statutory provision appears to incorporate a similar principle.

Residuary Grounds

Apart from the grounds enumerated in the statute, judicial review of an administrative decision may be sought on the basis that "the decision was otherwise contrary to law".[372] This residuary ground of review permits the accommodation of common law principles not specifically embodied in the legislation. An instance is the principle that the repository of a discretionary power cannot validly commit himself in advance to the use of the power in a particular way.[373]

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364. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(c).
365. *id*, s 5 (1)(d).
366. *Re Atlantic Baptist Senior Citizens' Home Inc* (1974) 50 DLR (3d) 748 at 751.
367. *R.* v. *Labour Relations Board* (1951) 4 DLR 227.
368. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(g).
369. *R.* v. *Commissioner of Police for the Northern Territory ex p, Holroyd* 1966 ALR 243.
370. *Re Cox and Velleman* 1948 OWN 721.
371. *R ex rel Retail Store Union* v. *Labour Relations Board of Saskatchewan* (1969) 69 WWR 81.
372. Administrative Decisions (Judicial Review) Act 59 of 1977, s 5 (1)(j).
373. *South Australia* v. *Commonwealth of Australia* (1962) 108 CLR 130.

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Conclusion

Australian judicial review legislation attempts to accomplish a clear restatement of common law grounds of review, subject to a marginal strengthening of some of these bases of review by amplification of their scope. Ironically, however, there are contexts in which the restrictive statutory formulation adopted in Australia has resulted, perhaps unwittingly, in curtailing the dimensions of judicial review available under the common law. In establishing the conceptual framework of judicial review, current Australian legislation aims at lopping off excrescences developed over the decades by the common law in regard to the elements of a "decision" susceptible to review, and in the course of interpretation, Australian judges, construing such features as the administrative character of the decision impeached and the requirement of decision making under the aegis of statutory authority, have shown firm resolve to fortify common law mechanisms even when this objective makes necessary a strained interpretation of aspects of the statutory regime. In the area of investigative functions not entailing a direct impact on accrued rights the legislation represents a distinct advance on common law approaches. In dealing with the bold legislative attempt to spell out the branches of improper exercise of power the Courts, confronted with incomplete or sparsely formulated elements of the statutory formulation, have opted for continuity with common law tradition in areas like multiple motivation. But, enviously, the courts have on occasion been wary of exploiting to the full the potential for intervention made possible by contemporary legislation; for example, the prevailing judicial attitude that failure to advert to a relevant consideration warrants review only when the factor overlooked is one which the tribunal was not only entitled but obligated to take into consideration, represents a self-imposed fetter on the amplitude of the empowering provision.

Apart from restrained judicial approaches which augur well for a sense of balance in the application of the law, the form of words used in the statute would sometimes appear to inhibit legitimate initiative by the courts. Thus, the narrow test of unreasonableness preferred by the Australian legislature and the failure to cater for refusal by the repository of a personal discretion to exercise his independent judgment in circumstances where no dictation by an external agency is demonstrable may well disappoint judges and commentators who find recent patterns of development in the common law invigorating. In areas like review of statutory power for uncertainty

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the Australian law combines strikingly liberal and markedly restrictive approaches, with consequent impairment of cohesion. A serious gap is apparent with regard to review of administrative policies, as distinguished from administrative decisions. The statutory abrogation in Australia of the distinction between patent and latent legal error rids the law of a variety of intractable problems connected with the record. The legislative incorporation of the 'no evidence' ground, in a qualified form, highlights the need for judicial circumspection and sensitivity to competing policy factors. A feature of special interest with regard to the future development of the law is the extent to which Australian judges will be persuaded to resort to residuary grounds of review to fill gaps in the codified system.

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6

WEDNESBURY UNREASONABLENESS: THE EXPANDING CANVAS

Introduction

IT IS an essential aspect of the English legal tradition in public law that judicial review should be based upon procedural standards.[1] Lord Brightman has recently insisted that judicial review involves simply an appraisal of the manner in which an administrative decision is made.[2] However, judicial attitudes during the last three years indicate a changing philosophy which appears to admit of greater scope for substantive review. The principle which is referred to succinctly in modern law as *Wednesbury* unreasonableness[3] has proved, in the hands of some contemporary judges, a uniquely effective instrument for the exercise of this extended jurisdiction. The central problem posed by recent developments relates to the danger of a "surrogate political process"[4] which may erode the foundations of legislative supremacy and political responsibility. Unbridled judicial review, in accordance with some emerging approaches, has basic implications for the future of the relationship between the administration and the courts.

The extended interpretation of *Wednesbury* unreasonableness in modern law entails the crucial disadvantage of indeterminacy of judicial policy, in so far as the courts would seem to be concerned with an empirical examination of the justice of an administrative decision rather than with the application of an indispensable norm which regulates the exercise of discretionary public power. The essential norm which sustains judicial review relates to the legality of administrative action but leaves intact, as a necessary premise of policy, the range of options available to the administrative tribunal within the bounds of lawful action.[5] Judicial incursion into control

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1. See, for a general discussion, J. Winkler, "The Political Economy of Administrative Discretion" in Adler and Asquith (eds.) *Discretion and Welfare* (1981).
2. *Chief Constable of the North Wales Police* v. *Evans* (1982) 1 W.L.R. 1155 at p. 1174. (H.L.)
3. See n. 11, *infra*.
4. R.B. Stewart, "Reformation of Administrative Law" (1975) 88 Harv. L.R.1669.
5. H.W.R. Wade, *Administrative Law* (5th ed., 1982), p. 362.

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of these preferences, within the ambit of delegated power, strengthens lingering doubts about the beneficial role of the courts in this area[6] by calling into question the objectivity of judicial review.[7] On the theoretical plane, involvement of the courts in the *minutiae* of administrative adjudication is difficult to reconcile with the doctrine of *ultra vires*, from which the rationale of review has ultimately to be derived; for a decision tainted by *Wednesbury* unreasonableness is, quintessentially, one arrived at in excess of conferred power. Although there are tentative indications that a restrained approach which is in part a reaction to preceding trends[8] is asserting itself in the most recent decisions,[9] a series of dramatic cases [10] serves as a focus of conflict in regard to competing elements of social policy – a conflict which pervades the whole spectrum of judicial review on the ground of unreasonableness. There is, as well, the compelling objection that a significant expansion of the controlling jurisdiction in the courts accords inadequate weight to the specialized skills and expertise often possessed by tribunals in particular fields and may endanger the prestige enjoyed by the courts in the community at large by tending to embroil judges in acrimonious and divisive political controversy.

The Test of Wednesbury Unreasonableness

Unreasonableness, as a ground of judicial review of administrative decisions, is a comprehensive term which embraces a wide variety of defects including misdirection, improper purpose, disregard of relevant considerations and advertence to immaterial factors. In the leading case of *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation*[11] decided in 1948, Lord Greene M.R. referred to the

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6. See A.C. Hutchinson. "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 M.L.R. 193: *cf.* R. M. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561.

7. O. Fiss, "Objectivity and Interpretation" (1982) Stan. L. Rev. 739 at p. 745.

8. See, e.g., *R.* v. *Secretary of State for Transport, ex p. Greater London Council* (1985) 3 W.L.R. 574.

9. *R.* v. *Secretary of State for the Environment, ex p. Nottinghamshire County Council* (1986) A.C. 240 at pp. 250-251, *per* Lord Scarman: *Re Westminster City Council* (1986) 2 W.L.R. 807 at p. 830. *per* Lord Templeman: *R.* v. *Secretary of State for Social Services, ex p. Association of Metropolitan Authorities* (1986) 1 W.L.R. 1 at p. 6, *per* Webster J.

10. *R.* v. *Inland Revenue Commissioners, ex p. Preston* (1985) A.C. 835: *Wheeler* v. *Leicester City Council* (1985) A.C. 1054: *Gillick* v. *West Norfolk and Wisbech Area Health Authority* (1986) A.C. 112.

11. (1948) 1 K.B. 223.

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rubric of unreasonableness as "a general description of the things that must not be done".[12]

It is settled principle today, however, that judicial review for unreasonableness is not restricted to situations in which a public authority purports to make a decision which is not in accordance with the terms of the powers conferred on it and that, even if a decision on the face of it falls within the letter of these powers, it can still be successfully impugned if it is shown to be unreasonable, in the relevant sense. The essence of this broader criterion of unreasonableness is contained in Lord Greene's observation that "there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".[13] It is no longer necessary to attack an administrative decision on this ground by having recourse to the principle of an inferred error of law attributable to the decision maker.[14] In 1984, Lord Diplock recognized that unreasonableness can now stand on its own feet as an accepted ground of review.[15] Although the terminology applicable has not escaped criticism on the basis of its inherent ambiguity,[16] unreasonableness or irrationality is at present accorded the status of a ground of review distinct from illegality (in the sense that the decision-making authority has made an error of law, for example, by purporting to exercise a power which it did not possess).[17] The hallmark of the *Wednesbury* connotation of unreasonableness is that the repository of a discretion, although acting within the four corners of the legislative grant of discretion, has arrived at a decision which is repugnant to all reason.

Limits of The Wednesbury Rule

A principle of judicial intervention, so conceived, obviously contains within it the risk of generating a clash of ideas, attitudes and values

12. At p. 229.

13. *ibid.*

14. This was the disingenuous device suggested by Viscount Radcliffe in *Edwards* v. *Bairstow* (1956) A.C. 14 (H.L.)

15. *Council of Civil Service Unions* v. *Minister for the Civil Service* (1985) A.C. 374 at p. 411 (H.L.)

16. *Westminister Bank Ltd* v. *Beverley B.C.* (1971) A.C. 508 at p. 530, *per* Lord Reid (H.L.)

17. A gratuitous invasion of private rights, insufficiently linked with a legitimate planning objective, may be assailed on this ground: *Mixnam's Properties Ltd* v. *Chertsey U.D.C.* (1965) A.C. 735: *Minister of Housing and Local Government* v. *Hartnell* (1965) A.C. 1134.

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between the executive and the judicial organs of government. In their development of the apparatus of review in keeping with the *Wednesbury* formula, the courts have been perennially conscious of this danger. Their preference for a stance of detachment is often engendered by awareness of the pragmatic reality that they are ill equipped, institutionally as well as in terms of their training and experience, to weigh the merits of one solution of a practical question as against another.[18] This limitation is aggravated by aspects of the adversarial process, in that the kind of evidence which is admissible under established judicial procedures and the manner in which it is required to be adduced tend to exclude from the court's attention competing policy considerations which call for comparative evaluation.[19] Judges, accordingly, have shown great sensitivity to the need for avoiding scrupulously even the suggestion of usurping the substance of discretionary power from its rightful donee.[20]

The resulting spirit of self-restraint finds expression primarily in a strictly controlled dimension of unreasonableness which guards against the likelihood of conflict. Throughout the range of definitions emerging from the decided cases is the recurring emphasis that no line of reasoning which seeks to proceed from "wrong" to "unreasonable" can be accepted as sound.[21] The gist of the *Wednesbury* principle is that the decision assailed must be not only wrong, but unreasonably wrong, so wrong[22] that no reasonable person could sensibly reach it.[23] This excludes from the ambit of review differences of opinion of the kind which may well exist among reasonable persons.[24] The crucial distinction, in regard to containing the *Wednesbury* formula, is that between a mistaken and an unreasonable exercise of judgment. Although an element of *mala fides* is not indispensable,[25] the decision

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18. *Roberts* v. *Hopwood* (1925) A.C. 578 at p. 606-607. per Lord Sumner (H.L).

19. See n. 15, *supra.*

20. See, for example, Diplock L.J. in *Luby* v. *Newcastle-under-Lyme Corporation* (1964) 2 Q.B. 64 at pp. 75-76 (C.A.).

21. *Secretary of State for Education and Science* v. *Tameside Metropolitan B.C.* (1977) A.C. 1014. at pp. 1074-1075 *per* Lord Russell of Killowen (H.L.).

22. With regard to degrees of unreasonableness, see *National Assistance Board* v. *Wilkinson* (1952) 2 Q.B. 648

23. See the *Tameside* case, cited at n. 21 *supra,* at p. 1025 *per* Lord Denning M.R. (C.A.).

24. *Re W. (an Infant)* (1971) A.C. 682 at p. 700. *per* Lord Hailsham of St. Marylebone L.C. (H.L.).

25. *Clinch* v. *I.R.C.* (1974) 1 Q.B. 76 at p. 61, *per* Ackner J.

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impeached must contain some quality of perversity,[26] arbitrariness,[27] caprice[28] or absurdity[29] which removes it from the class of a merely erroneous exercise of discretion. The courts, therefore, have been at pains to stress that, in the absence of anything akin to appellate jurisdiction,[30] the case for judicial intervention must be strong[31] or even overwhelming.[32]

These circumspect judicial approaches to the application of the *Wednesbury* test of review are much in evidence throughout the spectrum of social policy.

(a) *Education Policy*

The non-interventionist attitude of the House of Lords in the *Tameside* case[33] drew profoundly upon the inconclusive debate between the rival ideologies in regard to the merits of the comprehensive and grammar school systems, each of which was capable of impeccable support on the basis of educational credentials. The cardinal clement which shines through the speeches in the House of Lords is disinclination to assess the comparative strength of conflicting educational principles and to base a judicial decision on the preferred theory. The issues involved in the controversy made necessary a consideration of the balance of inconvenience, since the adoption of each of the courses of action favoured respectively by the borough council and by the Secretary of State inevitably entailed some measure of difficulty in the circumstances. The factor which received emphasis was that the dislocation caused by discarding the announced transition needed to be weighed in the balance against the disturbance which would be the probable result of implementing the new system within a brief time-span.[34] The speeches indicate a sensitivity to the compelling arguments on the two sides which militate against cavalier dismissal of either point of view as demonstrably unreasonable.

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26. *Demetriades* v. *Glasgow Corporation* (1951) 2 All E.R. 457 at p. 463.
27. *Weinburger* v. *Inglis* (1919) A.C. 606.
28. *R.* v. *Barnet and Camden Rent Tribunal, ex p. Frey Investments Ltd* (1972) 2 Q.B. 342. Q.B. 342.
29. *Short* v. *Poole Corporation* (1926) Ch. 66 at p. 91, *per* Warrington L.J.
30. *Smith* v. *East Elloe R.D.C.* (1956) A.C. 736 at p. 763, *per* Lord Reid (H.L.).
31. *Secretary of State for Employment* v. *Associated Society for Locomotive Engineers and Firemen* (1972) 2 Q.B. 455 at p. 511, *per* Roskill L.J. (C.A.).
32. See n. 30, *supra.*
33. *Secretary of State for Education and Science* v. *Tameside Metropolitan* (1977) A.C. 1014.
34. *ibid.*, at p. 1061, *per* Viscount Dilhorne.

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The judicial withdrawal which the decision represents is founded on recognition that the subject matter involves, typically, the interplay of subjective preferences and assessments, the validity of which lies entirely beyond the pale of *Wednesbury* unreasonableness. While each school of thought may well claim, with sincerity of conviction, that the other side is acting erroneously[35] or is wrong[36] or even deplorably wrong,[37] the refusal of the courts to intervene was firmly rooted in the impracticability of asserting that no reasonable local authority, fully informing itself of the proper considerations and with due appreciation of its responsibility, could conceivably have made the decision which appealed to the respondent borough council as the best avenue of escape from a potential impasse. This decision serves as a useful reminder of the appropriate limits of judicial review on the basis of the *Wednesbury* test.

(b) *Retrenchment of Labour*

A similar spirit of judicial self-restraint is characteristic of the decision of the Court of Appeal in *R.* v. *Hertfordshire County Council, ex p. National Union of Public Employees.*[38]

The Court of Appeal, conscious of the multitude of methods available to the council for distributing its economies among its various expenditures on capital items, maintenance, wages and the like, adopted the attitude that to require the council to consider every one of them, and also to demonstrate that each option had received earnest appraisal, on pain of having the ultimate decision declared ineffectual, would paralyse local government by extending the *Wednesbury* principle far beyond its legitimate limits.[39] Having regard to the necessity for the council, in a situation which it had perforce to accept, to cover extensive ground within a restricted period, the court recognized that the core of the decision-making process consisted of identification of the most practical alternatives. Of particular interest, in relation to the object of containing the judicial role, is the comment by Mustill J: "The *Wednesbury* line of authority is concerned with the overlooking of some consideration

35. *ibid.*, at p. 1026, *per* Lord Denning M.R. (C.A).
36. *ibid.*, at p. 1074, *per* Lord Russell.
37. *ibid.*, at p. 1035, *per* Geoffrey Lane L.J. (C.A.).
38. (1985) I. R.L.R. 258 (C.A).
39. *ibid.*, at p. 262

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which, when weighed with other relevant factors, is at least potentially decisive: a consideration, what is more, which is of such obvious materiality that to disregard it could properly be regarded as unfair."[40] The implied gradation of essentiality of relevant considerations provides a safety valve which enables the courts to remain aloof in the absence of substantial injustice. The chief features of the decision are a healthy respect for the legislative allocation of responsibility and insistence upon the narrow confines within which judicial interference with the exercise of options committed to administrative judgment is acceptable.

(c) *Industrial Arbitration*

Some significant insights into modern judicial predilections are offered by recent judgments interpreting the role of a body charged by statute[41] with the general duty of promoting the improvement of industrial relations.[42] The Advisory, Conciliation and Arbitration Service (ACAS) had the legal validity of its exercise of judgment in regard to an industrial matter questioned in judicial review proceedings in *United Kingdom Association of Professional Engineers* v. *Advisory, Conciliation and Arbitration Service.*[43] The problem related to the claim of a trade union for recognition. ACAS, in setting out its findings as required by the governing legislation,[44] rejected the claim of the applicant union on the basis that recognition, incompatible as it was with existing collective bargaining arrangements (which were likely to be fragmented by the admission of a new union), encountered the vehement opposition of established unions, so that industrial action in some sectors would be the probable outcome of the grant of recognition.

A declaration of nullity of the finding by ACAS was granted at first instance by May J., who was satisfied that an error of law in regard to construction of the policy reflected in the legislation and, in particular, the duties imposed on ACAS vitiated the determination by that body. The primary fault, in the opinion of May J., lay in the lack of a sense of balance, in that ACAS allowed itself to be influenced unduly by one relevant consideration – promoting the

40. *Ibid: cf.* Donaldson M.R. at p. 260.
41. Employment Protection Act. 1975.
42. S. 1(2).
43. (1981) A.C. 424.
44. Employment Protection Act 1975, s. 12(4).

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improvement of existing voluntary relations – to the extent of relegating, with inadequate justification, the equally vital aspect of stimulating the extension of collective bargaining.[45]

The House of Lords found the approach of May J. wholly misconceived. The speech of Lord Scarman underscores the strictly limited range of judicial review, directed as it is to the patent illegality as opposed to the soundness of a decision involving choices and priorities which are matters of discretion entrusted by the applicable legislation to the administrative tribunal.[46] The tenor of this speech concedes that the interlocking strands of industrial policy, their respective nuances and weight, and the bearing of one aspect on another are matters in regard to which differences of opinion are natural and that these considerations, quite decidedly, are for the administrative body rather than for the courts to consider in arriving at a decision which appears balanced and cohesive to the body which functions as the delegate of the legislature. The House, astute to contain the *Wednesbury* principle within its allocated compass, saw no merit in the contention that no reasonable statutory body, situated as ACAS was, could on the material available to it have reached plausibly the decision which ACAS made. No other view, it is submitted, would have done justice to the range of policy options which must be open to the statutory body as an essential condition for the effective discharge of its functions in a diversity of factual contexts.

(d) *Environmental Planning*

The need to disavow a judicial policy which draws too tightly the bounds within which a local planning authority may exercise statutory discretion was recognized, by implication, by the House of Lords in *Fawcett Properties Ltd* v. *Buckingham County Council*.[47] In pursuance of a power conferred on it by planning legislation[48] to grant authority for the development of land subject to such conditions as it deemed desirable, a local planning authority gave the appellant's predecessor in title permission to build two cottages on his land, subject to the condition that the occupation of the house should be limited to persons whose employment was in agriculture, in the sense defined in planning law,[49] and to their dependants.

45. Both objectives were identified as statutory imperatives: see s. 4.
46. (1981) A.C. 424 at pp. 442, 445.
47. (1961) A.C. 636.
48. Town and Country Planning Act 1947, s. 14.
49. *id.*, s.119(1).

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In this case the basis of the challenge against a limiting condition imposed by a planning authority was that the category of persons falling within the ambit of the limiting condition applicable to occupation of the two cottages was conceived of, in the light of the definition of agriculture extracted from the planning law, in such comprehensive terms that the condition, although not entirely unrelated to any planning considerations, nevertheless bore as a whole no fair or reasonable relation to any planning policy. It was contended, on this footing, that the condition sought to be imposed transgressed the powers of the planning authority and attracted review by the court in terms of the limited jurisdiction established by the *Wednesbury* rule. This argument had little appeal to the House of Lords. Lord Keith of Avonholm, reacting sympathetically to the planning authority's aim to dissuade in the area development unconnected with the exploitation of adjacent land for agricultural or allied purposes, had no doubt that the planning authority's policy of protecting the green belt was intrinsically invulnerable in relation to the *Wednesbury* principle of judicial review, and also that indicia linked with the vocation or employment of the occupier provided reasonable means of implementing the chosen policy.[50] Clearly indicative of the latitude which was regarded as suitable, in the construction of delegated planning powers, was the focus on a broad relationship between the overall policy object and the instrument selected to ensure its attainment, without meticulous examination of improbable situations in which the terms of the limiting condition might not be effective in promoting the underlying purpose because of an unusual combination of circumstances.[51]

Equally, the courts have insisted that, where alternative statutory powers of control over development of land are available to a local authority, one providing for payment of compensation and the other not, the authority's preference for the procedure which does not entail the obligation to compensate is not amenable to judicial review by recourse to the *Wednesbury* rule.[52] This is based on the convincing rationale that, in the absence of any curtailment of the freedom of choice enjoined by the legislation on the donee of the planning power, an oblique restriction as a matter of judicial construction is impermissible.[53]

50. (1961) A.C. 636 at p. 675.

51. *ibid.*

52. *Hoveringham Gravels Ltd* v. *Secretary of State for the Environment* (1975) 1 Q.B. 754 at p. 764. *per* Orr L.J.; *cf.* at p. 771, *per* Scarman L.J. (C.A.).

53. *Westminister Bank Ltd* v. *Beverley B.C.* (1971) A.C. 508 at p. 530, *per* Lord Reid (H.L.).

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(e) *Differential Rents*

In the context of legislation empowering a local authority to grant to tenants of houses provided by the local authority such rebates from rent, subject to suitable terms and conditions, as the authority thinks fit,[54] the courts have implacably refused to adjudicate, under the head of reasonableness, upon the propriety of the local authority's decision to grant or withhold the benefit of differential rents in a given case. The exercise of discretion in regard to determination of an equitable rent structure involves, at bottom, the application of social policy, since any deficit in the housing revenue account has to be made good from the general rate fund, so that inherent in the decision in regard to availability of differential rents is the weighing of interests of tenants as a class and of individual indigent tenants against the interests of the general body of ratepayers. Since the introduction of national assistance, there is the further choice as to whether an individual impoverished tenant should be assisted at the expense of the ratepayers by way of a reduction in rent or, in the alternative, by the general body of taxpayers in the form of national assistance. While the considerations by reference to which these matters need to be determined are not beyond the pale of justiciability,[55] it is evident that, by its very nature, the variety of policy options in particular circumstances is such as to generate a substantial cleavage of opinion.

This reality has, quite properly, inhibited the courts from making liberal play with the *Wednesbury* formula in exercising surveillance over the use, by local authorities, of discretion assigned to them.[56] The established view is that the statutory scheme confers on local authorities entitlement to operate a differential rents structure, should they be inclined to do so, but that the courts will seldom compel them to resort to such a structure because of the exigencies of a particular case, provided that the authority in question has made its decision in good faith after taking into account all material circumstances.[57]

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54. Housing Act 1957, s. 111 (3).

55. *Belcher* v. *Reading Corporation* (1950) Ch. 380.

56. See, for an emphatic expression of this view, Diplock L.J. in *Luby* v. *Newcastle-under-Lyme Corporation* (1964) 2 Q.B. 64 at pp. 75-76.

57. *Smith* v. *Cardiff Corporation* (No. 2) (1955) Ch. 159; *Summerfield* v. *Hampstead B.C.* (1957) 1 W.L.R. 167.

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Extension of the Scope of Review

The straws are in the wind, and these restrained judicial attitudes appear to be on the verge of a dramatic transformation. Increasing boldness in subjecting to scrutiny the substantive core of administrative decisions is a feature of the current renaissance of administrative law. The results of this development are sometimes disquieting, and the methods of reasoning used by the courts are not always of impeccable validity. It is worth examining the major conceptual levers which judges have deployed in recent years in their strenuous efforts to extend the borders of their jurisdiction.

(a) *Fiduciary Duty*

An extended application of this concept in a public law setting has exposed flexibly to judicial review controversial policy-oriented decisions of public authorities.

The high-water mark of judicial activism in this area is probably represented by the decision of the House of Lords in *Bromley London Borough Council* v. *Greater London Council.*[58] The Greater London Council issued a precept to all London boroughs to levy a supplementary rate of 6.1 pence in the pound to enable the G.L.C. to finance by grant to the London Transport Executive the cost of reducing L.T.E. bus and tube fares by 25%. The application by the London Borough of Bromley for judicial review by way of *certiorari* was successful in the Court of Appeal and the House of Lords, and the precept was quashed as having no legal effect.

It was apparent that the statutory power conferred on the G.L.C. to make grants to the L.T.E. was wide enough in scope to embrace grants to revenue as well as for capital purposes.[59] Nevertheless, the House of Lords, by a process of reasoning the strength of which at several points is far from self-evident, reached the conclusion that the decision by the G.L.C. exceeded the limits of its statutory power. Adopting an exceedingly stringent approach to the construction of the relevant legislative powers, Lord Diplock laid stress on the legal structure of the G.L.C., the sources from which it derived its funds and the categories of persons to whom it owed duties,[60] while Lord Scarman was guided by the legislative history of the transport authority

58. (1983) 1 A.C. 768 (H.L.).
59. See Transport (London) Act 1969. s. 3. which refers to "any purpose".
60. (1983) 1 A.C. 768 at pp. 827-829.

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for Greater London[61] and even invoked, by way of analogy, comparable arrangements applicable to British Rail.[62] The effect of this exercise was to focus on the *vires* of the G.L.C. in making, in effect, a transfer from central government to local government funding, in the light of definite knowledge possessed by the G.L.C. at the time that its decision to subsidize transport from funds generated by rates would entail forfeiture of grants from central government sources.[63]

The gist of the reasoning contained in the speeches in the House of Lords is that a policy calculated to achieve this result was fundamentally incompatible with the essential statutory function of the G.L.C. The concept of a fiduciary duty[64] devolving on the G.L.C. is the sheet-anchor of the argument. Judicial intervention was predicated on the premise that the G.L.C.'s failure to conserve its resources by forestalling the loss of central government revenue and the L.T.E.'s failure to avoid a deficit in the management of its transport services amounted to a jettisoning of sound business principles, fidelity to which was a necessary ingredient of the fiduciary duty owed to ratepayers.[65] While it was accepted that, notwithstanding the obligations in regard to financial planning and advance budgeting imposed by statute on the L.T.E.,[66] deficit financing did not necessarily transgress the *vires* of the L.T.E., the vitiating factor, in the opinion of the House of Lords, was the reduction of transport fares, by a definite proportion across the board, not because of the perception that a higher fare had ceased to be commercially feasible but in the implementation of a social policy espoused by the G.L.C. and the L.T.E. It was this aspect of the decision, resulting in a substantial sacrifice of one group of interests to another, that was considered altogether inconsistent with the fiduciary duty imputable to the G.L.C.

Ostensibly in accordance with the statutory regime applicable[67] the G.L.C., as a matter of civic policy, had purported to determine in what proportions the revenue required by the L.T.E. to conduct its passenger transport services should be obtained, respectively, from fares paid by passengers and by grants made by the G.L.C. to the L.T.E. at the expense of the ratepayers of the Greater London area; and it was this policy determination, reflecting the priorities decided upon by the elected authority, that was struck down by the courts.

61. *ibid.*, at pp. 839-840.
62. *ibid.*
63. *ibid.*,at p. 830, *per* Lord Diplock.
64. *ibid.*,at p. 839, *per* Lord Scarman.
65. *ibid.*,at p. 831, *per* Lord Keith of Kinkel.
66. Transport (London) Act 1969. s.7(3).
67. Transport (London) Act 1969. see particularly ss. 1-7 and 11.

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It is a decision in the light of which the traditional insistence by the courts that "the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the courts are to weigh the considerations involved and the less inclined they must be to intervene,"[68] and the emphatic disclaimer that the wisdom, expediency and merits of a decision are justiciable in judicial review proceedings,[69] sound somewhat hollow.

This reservation regarding the trend of the ruling is heightened by the circumstance that the G.L.C.'s decision to issue the precept, which was a necessary step in the reduction of bus and tube fares, gave effect to a policy objective which had been prominently incorporated in the election manifesto of the party gaining control of the G.L.C. But this consideration did not prevail against the opposing factors to which the House of Lords was inclined to give paramountcy. Lord Brandon thought it "entirely wrong"[70] for an elected majority to regard as conclusive, in respect of a policy option, an undertaking contained in an election manifesto. This observation, which had the support of Lord Wilberforce in the *Bromley* case,[71] is in line with a view expressed by Lord Atkinson half a century ago.[72] On the other hand, in the *Tameside* case,[73] the ability of the group in power in the borough council to have their policy favouring retention of grammar schools endorsed by the majority of the electorate weighed significantly with the House of Lords in considering that the degree of disruption inevitably attendant on abandoning the previously contemplated shift to the comprehensive system was insufficient to justify a holding in regard to unreasonableness, in the *Wednesbury* sense, since the electorate was deemed to have approved of the change of policy despite the difficulties foreseen. It is plain that value-judgments by the courts under the umbrella of unreasonableness, in sectors of social policy where lively disagreement prevails in the community at large, are hardly conducive to distancing the courts from the arena of active political controversy.

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68. *CREEDNZ Inc.* v. *Governor-General* (1981) 1 N.Z.L.R. 172 at p. 198 *per* Richardson J. (C.A. of N.Z.)

69. *Fawcett Properties Ltd* v. *Buckingham C.C.* (1961) A.C. 636 at 685, *per* Lord Jenkins (H.L.).

70. (1983) 1 A.C. 768 at p. 853.

71. *ibid.*, at p. 815.

72. *Roberts* v. *Hopwood* (1925) A.C. 578 at p. 596: *cf.* Lord Sumner at p. 607 and Lord Wrenbury at p. 613.

73. See n. 21. *supra.*

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The concept of fiduciary duty, which was skilfully exploited in the *Bromley* case as a bridgehead for judicial intervention, has reliable antecedents. In *Roberts* v. *Hopwood*,[74] a case decided by the House of Lords in 1925, the question was whether a decision by a borough council to pay its employees a minimum wage which took no account of a marked decline in the cost of living during the preceding year, and which was unrelated to prevailing trade union rates and the scale of current payments by other local authorities for equivalent work, had been arrived at in excess of the statutory power conferred. Although the relevant legislation purported to empower metropolitan borough councils to employ servants and to determine the scale of their remuneration at the seemingly unfettered discretion of the councils themselves[75] Lord Wrenbury, invoking a principle corresponding to the *Wednesbury* limitation on the ambit of discretionary power, insisted that the repository of discretion must "ascertain and follow the course which reason directs".[76] The House of Lords decided that the council's determination of the level of wages was capable of being impeached since it proceeded on the basis of an inflexible standardization of remuneration for men and women, on the footing that a uniform wage should be paid to all adults – a course which met with the judicial criticism that the consequent determination had been made without reference to the objective value of the services performed and the purchasing power of the sums paid.[77] The conclusion that the remuneration so computed subsumed an element of gift was supported on the basis that the councillors, standing "somewhat in the position of trustees or managers of the property of others"[78] owed to the persons from whom the council's funds were derived a duty to administer the affairs of the council "in a fairly businesslike manner".[79]

This idea, closely akin to the notion of a fiduciary relationship between a public authority and its ratepayers, was the foundation of the decision by the Court of Appeal in *Prescott* v. *Birmingham Corporation*.[80] The Corporation operated a transport undertaking under statutory powers which authorized the charging of such fares as the corporation thought fit and, indeed, made explicit provision

74. (1925) A.C. 578.
75. Metropolis Management Act 1855, s.62.
76. (1925) A.C. 578 at p. 613.
77. *ibid.*, at p. 590, *per* Lord Buckmaster.
78. *ibid.*, at p. 596, *per* Lord Atkinson.
79. *ibid.*, at p. 595, *per* Lord Atkinson.
80. 1955 Ch. 210.

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that any shortfall in the revenue of the enterprise should be met by funds derived from rates. The Court of Appeal rejected as *ultra vires* a scheme conceived by the corporation, at a cost to be defrayed in full out of rates, for the provision of facilities for free travel to old people. Jenkins L.J., while envisaging that some element of subsidy might be permissible in the interest of providing a viable service at competitive rates, uncompromisingly asserted that the corporation had violated its fiduciary duty to its ratepayers when it resolved to "go out of (its) way to make losses by giving away rights of free travel".[81]

Changing conceptions of social policy have brought about the statutory negation of the actual decision in *Prescott,* but the basic premise of the reasoning was considered by the House of Lords in the *Bromley* case to retain its validity at the present day.[82] However, the use in a public law context of the concept of fiduciary duty, having its origin in principles of equity operative in private law, as a contrivance for augmenting the purview of *Wednesbury* unreasonableness, has unsatisfactory implications for demarcation of the spheres of executive and judicial responsibility.

Application of the principle which finds expression in the *Wednesbury* test in situations involving a conflict of interest is, indeed, a familiar phenomenon. Thus, the erection of a high fence obstructing a landowner's right to light, for the purpose of providing protection for pedestrians on a public thoroughfare, has been considered an unreasonable interference with rights accompanying ownership of land.[83] The underlying principle is that an equilibrium must be sought between the interest of the individual landowner and the collective interest of the community.[84] These, however, are situations involving the protection of proprietary rights threatened with erosion in consequence of action which a local authority is minded to take in the public interest. The use of fiduciary obligation as a basis for judicial interference with the civic policy adopted by a public authority, within its proper sphere, for regulating competing financial interests of different groups in the community in relation to the maintenance of essential public services represents a drastic expansion of the scope of review which defies the postulate that "it is the competent authority that is selected by Parliament to come to the decision and, if that

81. *ibid.*, at p. 236.

82. (1983) 1 A.C. 768 at pp. 831-832, *per* Lord Keith of Kinkel.

83. *Dormer* v. *Newcastle-upon-Tyne Corporation* (1940) 2 K.B. 204 at p. 217.

84. *Westminster Corporation* v. *London and North Western Railway* (1905) A.C. 426 at p. 433. *per* Lord Macnaghten.

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decision is come to in good faith, the court has no power to interfere".[85] The threat to widespread acceptance of judicial objectivity and impartiality, which the current policy disconcertingly entails, impairs its value in considerable measure.

(b) *Legitimate Expectation*

Lord Scarman has recently observed that "the doctrine of legitimate expectation has an important place in the developing law of judicial review."[86] However, the use of this concept as a lever for expanding the range of judicial review on the basis of the *Wednesbury* principle is a somewhat unexpected twist in the skein.

Despite the suggestion that the idea of legitimate expectation lends itself to development as an aspect of natural justice,[87] the limits of the emerging principle are now demarcated with moderate precision. It is settled law that, even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, and indeed notwithstanding that the advantage contemplated conflicts with his private law rights, he may have a legitimate expectation of receiving the benefit or privilege, in which event the courts will protect his expectation by judicial review within the public law domain.[88] However, it has been considered essential, in the interest of preserving a realistic balance between effectiveness of administration and justice for the individual, that judicial review for denial of a legitimate expectation should be confined to cases where the complainant has been deprived of some benefit which either (i) he had in the past been permitted by the decision-maker to enjoy and which he could legitimately expect to be permitted to continue to do until there had been communicated to him some material grounds for withdrawing it on which he had been given an opportunity to comment; or (ii) he had received assurance from the decision-maker would not be withdrawn without giving him first an opportunity of advancing reasons for contending that it should not be withdrawn.[89]

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85. *Point of Ayr Collieries Ltd* v. *Lloyd George* (1943) 2 All E.R. 546 at p. 547, *per* Lord Greene M.R.; *cf. Carltona Ltd* v. *Commissioners of Works* (1943) 2 All E.R. 560 at p. 564, *per* Lord Greene M.R.

86. *In re Findlay* (1985) A.C. 318 at p. 338 (H.L.).

87. *Council of Civil Service Unions* v. *Minister for the Civil Service* (1985) A.C. 374 at p. 415, *per* Lord Roskill (H.L.).

88. *O'Reilly* v. *Mackman* (1983) 2 A.C. 237 (H.L.).

89. *Council of Civil Service Unions* v. *Minister for the Civil Service* (1985) A.C. 318 at pp. 408-409, *per* Lord Diplock (H.L.)

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The basis of the expectation in the first case is the adoption of a consistent practice over a sufficiently long period to justify anticipation, in all the circumstances, that the practice would continue to be followed in the future. The *Council of Civil Service Unions* case[90] offers a typical illustration. Against a background which admitted of no doubt that, ever since G.C.H.Q. was established in 1947, prior consultation had been the invariable rule when it was proposed that conditions of service relating to civil servants engaged in its work should be altered significantly, Lord Fraser of Tullybelton was satisfied that, had there been no question of national security involved, the civil servants would have had a legitimate expectation that the Minister would consult them before issuing instructions which crucially transformed the terms of their employment.[91]

The second limb of the evolving principle has its proper application in circumstances where the expectation is frustrated by the breach of a representation on which reliance is reasonably placed. This is exemplified by *Attorney-General of Hong Kong* v. *Ng Yuen Shin.*[92] In this case the applicant's expectation of the benefit of a hearing was founded upon an undertaking, expressly given on behalf of the government of Hong Kong, that certain categories of illegal immigrants would be entitled to make representations to the immigrant authorities before orders were made for their deportation from the colony.

In this area, too, the parameters of judicial review have expanded recently. The remarkable feature of the decision of the Queen's Bench Division in *R.* v. *Secretary of State for Transport, ex p. Greater London Council*[93] is that judicial review, predicated on *Wednesbury* unreasonableness, was exercised in a situation where the expectation which the applicant for relief purported to entertain was not forfeited by either of the principles of sustained practice or unequivocal representation. The dispute which culminated in litigation had its origin in the provisions[94] of the London Regional Transport Act 1984, which transferred control of the London Transport Executive, the body responsible for running London transport services, from the Greater London Council to the Secretary of State for Transport, renaming it London Regional Transport. In pursuance of this legislation the Secretary of State issued a direction requiring the Greater London Council to pay London Regional Transport by instalments the maximum

90. *ibid.*
91. (1985) A.C. 318 at pp. 400-401.
92. (1983) 2 A.C. 629.
93. (1986) Q.B. 556.
94. S. 49.

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sum which the statute prescribed, by way of grant for the remainder of the initial financial year. The governing legislation contained no requirement, express or implied, in regard to consultation between the Secretary of State and the Greater London Council before a direction in these terms could lawfully be issued. Nevertheless, the Queen's Bench held that the G.L.C. had a legitimate expectation of being consulted in respect of the quantum of the contribution which it was required to make. McNeill J. reasoned as follows: "Parliament had legislated for a maximum payment in the initial year. That assumes that less than the maximum could be directed. Whichever phrase be used – duty to act fairly, legitimate expectation, a right to be heard – it seems to me that natural justice entitles the payer at least to make representations to the effect that he should not pay the maximum, but some lesser sum."[95]

Clearly, there are far-reaching implications for public administration in general if extended recourse in this form is had to the principle of legitimate expectation so as to secure the result that any person or body called upon to make a payment, authorized by statute on a graduated scale entailing an element of discretion has the right to make representations to the person in whom the discretion is vested regarding the quantum of the payment that is proper in the circumstances. Not only is the wide sweep of a compulsory obligation to consult, conceived in these all-embracing terms, not embedded as a regular rule in the pre-existing law, but previous authority implies reluctance to fetter administrative discretion to the extent required by this development.

Re Findlay, [96] typifying a less intrusive approach, is a case which concerns the power of the Secretary of State to adopt changes in the policy regulating the exercise of his discretion to grant parole to convicted prisoners. The empowering legislation enabled the Secretary of State, if he saw fit, to consult the parole board before formulating new policy but did not require him to do so.[97] In construing a permissive statutory power, the House of Lords emphatically declined to imply a mandatory requirement relating to consultation with the parole board as a precondition of validity of changes in the parole system effected by the Secretary of State.[98] The Secretary of State, in basing his decision on such aspects of public policy as factors of

95. (1986) Q.B. 556 at p. 587.
96. (1985) A.C. 318.
97. Criminal Justice Act 1967, s.59(3)(c).
98. (1985) A.C. 318 at pp. 333-334, *per* Lord Scarman.

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deterrence, retribution and public confidence in the administration of criminal justice, which he had assessed independently of the board, was considered by the House of Lords not to have acted unreasonably.[99] Although the circumstances of the *Findlay* and *G.L.C.* cases are not in *pari materia,* in so far as it is inherent in the subject matter with which the Secretary of State dealt in the former case that the participation of the board, even though it could be expected to be useful, was not indispensable in evaluating the factors on which the contemplated changes of policy depended, it is significant that in none of the speeches in the House of Lords was there shown the slightest inclination to curtail the responsibility allocated by statute to the Secretary of State, by compelling consultation with the board. A stark contrast in judicial attitude is signified by the judgment of McNeill J. in the *G.L.C.* case, where a bold application of the principle of legitimate expectation, in a context which plainly falls outside the purview of established lines of authority, controversially extends the scope of judicial review of an executive discretion on the ground of unreasonableness.

A redeeming feature of the evolving law is the indication of contemporary judicial awareness of the dangers attendant on too intrusive an interpretation of the idea of legitimate expectation. It has been recognized that exigencies of a political nature may, in appropriate circumstances, require drastic curtailment of the legitimate expectation to be consulted. Reasonableness of restrictions in regard to the nature of the representations that may be entertained, and the period within which they are required to be made, is to a substantial extent a question of context.[100] Moreover, the courts seem resolved to resist extension of the doctrine to embrace expectations arising from the mere scale of the implications of particular decisions. This inhibition is the product of consciousness that, if the duty of consultation were to be entirely open-ended, the probable reaction of public authorities would be to opt for safety and to assume, at the expense of efficient conduct of public business, a duty of consultation in all circumstances admitting of doubt.[101]

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99. *ibid.*

100. *R.* v. *Secretary of State for Social Services, ex p. Association of Metropolitan Authorities* (1986) 1 W.L.R. 1.

101. *Re Westminster City Council* (1986) 2 W.L.R. 807 at pp. 822-823. *per* Lord Bridge.

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(c) *Estoppel*

A principle analogous to estoppel is beginning to be used as an index of applicability of the *Wednesbury* rule.

The setting in which the House of Lords has recently adopted this method of distending the scope of administrative unreasonableness concerns a representation by the Inland Revenue regarding discontinuance of an inquiry in consideration of waiver of certain tax benefits claimed by the assessee. In *R.* v. *Inland Revenue Commissioners, ex p. Preston,*[102] in response to a statement by an official of the Inland Revenue that he did not intend to proceed with his investigation if the taxpayer abandoned certain claims for interest relief and capital loss, the latter withdrew the claims and paid capital gains tax on a transaction which the official had been examining. However, as a sequel to the receipt of new information relating to this transaction, the Inland Revenue Commissioners, having concluded that the taxpayer had received from the transaction a benefit which was liable to taxation, issued the taxpayer with a request for further particulars and in due course gave him formal notification initiating the statutory procedure[103] for cancellation of a tax advantage. By the time this development took place, a statutory time-bar prevented the taxpayer from making good his claim for relief in respect of capital gains tax on the sale price of the shares in question, and he argued, accordingly, that the correspondence containing the conditional offer by the Revenue as to termination of the pending investigation constituted a binding legal agreement which estopped the Revenue from raising inquiries on any matters covered by the correspondence.

The basic issue in the judicial review proceedings instituted by the assessee was whether the conduct of the Revenue was characterized by any element of unreasonableness which warranted judicial intervention. The Court of Appeal set aside the order of Woolf J. making a declaration that the action of the Revenue was unlawful. The leading judgment of Lawton L.J. in the Court of Appeal approached the problem[104] from the standpoint of two considerations: whether the preceding sequence of events reflected in the correspondence between the Revenue and the taxpayer amounted to a relevant factor which the Revenue authorities had failed to take into account in resolving to repudiate the concession which they had

102. (1985) A.C. 835 (H.L.).
103. Income and Corporation Taxes Act 1970, s.460.
104. (1985) A.C. 840 at pp. 844-846.

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already made, and whether this decision contravened the duty of fairness *vis-a-vis* a taxpayer which devolved on the Revenue.[105] On either basis, it was assumed, conduct vitiated by unreasonableness of a kind which rendered the *Wednesbury* principle applicable was capable of being established. However, the Court of Appeal was satisfied that an abuse of power on either of these grounds had not been made out in that, having regard to the taxpayer's failure to make as complete and as candid a disclosure as he ought to have done during his correspondence on the material question with the Revenue, the decision by the Commissioners was not unreasonable.[106]

In the House of Lords, although the decision of the Court of Appeal was upheld, the speech of Lord Templeman proceeded on significantly different lines. Instead of using the exclusion of a relevant factor and the obligation of procedural fairness as a yardstick of reasonableness in the exercise of a managerial power, Lord Templeman explicitly acknowledged that conduct equivalent to a breach of contract or breach of representation could, *per se*, be indicative of unreasonableness in the degree postulated by the *Wednesbury* test.[107] Subject to the qualification that relief may be withheld in an appropriate case in the exercise of judicial discretion, Lord Templeman declared: "I consider that the appellant is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the Commissioners have been guilty of conduct equivalent to a breach of contract or breach of representations on their part."[108]

The point of departure typifying the major speech in the House of Lords in this case crucially affects the ambit of unreasonableness as a basis of judicial review. The recognition that incompatibility of a course of conduct with settled expectations, arising from representations intended to be seriously received and in fact acted upon, has intrinsic importance in relation to the incidence of unreasonableness, and reduces appreciably the latitude inherent in orthodox tests governing the duty to advert to relevant considerations and to act fairly. The premise of Lord Templeman's speech in *Preston* made necessary a meticulous examination of the circumstances surrounding the correspondence with a view to ascertaining whether

105. See, on this point, *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd* (1982) A.C. 617 at p. 652. *per* Lord Scarman (H.L.).

106. (1985) A.C. 835 at pp. 866-867.

107. *ibid.*, at pp. 866-867.

108. *ibid.*, at p. 867.

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the terms of the undertaking by the Revenue demonstrated inconsistency with their subsequent action. It was only because of the ambiguous and evasive nature of some of the taxpayer's statements in regard to the transaction which was the subject of scrutiny at the time, which precluded full realization by the Revenue of the character of the transaction, that an estoppel operating against the Revenue was excluded.[109] The tenor of Lord Templeman's speech suggests that, but for this lack of frankness regarding a matter as to which the Revenue was entitled to expect candour, the inhibitory effect of the representation made on behalf of the Revenue might well have been decisive.

(d) *Disregard of Relevant Considerations*

A distinct broadening of this rubric of review has served in recent years as an instrument for expansion of the area of administrative unreasonableness. Contemporary developments in this field represent a marked departure from previous approaches, conspicuous for their restraint, which are now being gradually supplanted.

Judicial caution, in the setting of review on the basis that a material consideration has not been taken into account by the decision maker, underpins emphasis on the principle that:

> It is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid .... It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision.[110]

This distinction between obligatory considerations and permissible considerations within the range of relevant factors has been drawn prominently as a means of protecting legitimate administrative autonomy by restricting judicial intervention to cases of disregard of elements encompassed by the first category.[111]

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109. *ibid.*

110. *CREEDNZ Inc.* v. *Governor-General* (1981) 1 N.Z.L.R. 172 at p. 183. *per* Cooke J. (C.A. of N.Z.).

111. *Ashby* v. *Minister of Immigration* (1981) 1 N.Z.L.R. 222 at p. 224, *per* Cooke J. (C.A. of N.Z.)

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Furthermore, in their approach to judicial review in practice, the courts have been keenly alive to the need for pragmatism in administrative decision making, especially in contexts like immigration which impinge on foreign policy. The courts of New Zealand have declined to interfere with the exercise of executive discretion, founded on a consideration of the statutory criteria,[112] in regard to the issue of temporary entry permits to members of the Springbok rugby team. In particular, the court found itself unable to accept the contention that the Minister, in exercising his discretion in the matter, was bound to be guided by the provisions of the Gleneagles Agreement. The primary reason for the inhibition felt by the court was its conviction that, in sensitive sectors of foreign policy, the content of the national interest did not admit of the isolation of particular strands and their elevation into obligatory conditions which prevail necessarily over countervailing elements.[113]

But there are indications that this mood of circumspection can no longer be taken for granted. Judges, for the moment not infrequently in strident dissents, tend to question the propriety of a detached stance in the contemporary context. Encouraged by growing judicial readiness to acknowledge the relevance of international obligations in the construction of legislation and in the exercise of discretionary administrative power,[114] Lord Scarman has pointed out that there are many contexts in which national commitments undertaken in terms of the Charter of the United Nations, particularly in regard to the disavowal of discrimination on unacceptable grounds, must have an important bearing on the use of legislative authority.[115] Similarly, Lord Denning M.R. has not been averse to recognition of a duty to take into account the provisions of the European Convention on Human Rights and Fundamental Freedoms[116] in interpreting the scope of powers conferred by statutes which have been enacted since the ratification of the Convention by the United Kingdom.[117] The effect of these trends is to reinforce a more aggressive judicial role which no longer looks askance at stricter control of executive discretion. A distended application of the principle of

112. Immigration Act 1964, s.14 (N.Z.).

113. See *Ashby* v. *Minister of Immigration, n. 12, supra* at p. 231, *per* Richardson J.

114. *Saloman* v. *Customs and Excise Commissioners* (1967) 2 Q.B. 116 at p. 143, *per* Diplock L.J.: *cf. Post Office* v. *Estuary Radio Ltd* (1968) 2 Q.B. 740.

115. *Ahmad* v. *Inner London Education Authority* (1978) 1 Q.B. 36 at p. 48.

116. Cmnd. 8969 (1953).

117. *R.* v. *Secretary of State for the Home Department, ex p. Bhajan Singh* (1976) 1 Q.B. 198 at p. 207.

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advertence to relevant considerations, which is increasingly called in aid in situations that really involve competing priorities of social policy, would appear to be serving the courts well in carving out for themselves a strikingly larger area of jurisdiction.

The intensity of interventionist judicial attitudes is underlined by the willingness of the courts today to impugn administrative decisions on the basis of unreasonableness not only in circumstances where a material factor has been excluded from consideration, but in cases where the wrong degree of weight has been accorded to a relevant element of the decision. In a situation where a planning authority treated a previous planning permission which had long since expired as "a vitally material consideration", the courts have been prepared to vitiate the decision as wrong in law on the ground that disproportionate and excessive importance had been ascribed to a consideration, even though its relevance was indisputable.[118] A pre-existing permission is relevant as an aspect of the planning history of the site, and the existence of such permission at some time in the past may properly be taken into account by the planning authority in the interest of achieving consistency with earlier decisions in regard to the land; but the court did not shrink from assailing preoccupation with this element on the part of the planning authority as symptomatic of misdirection or even of perverse conduct,[119] the *Wednesbury* rule being attracted by either finding. It is evident that so expansive an approach to judicial review gives short shrift to the accepted norm that the degree of weight to be given to a relevant consideration is a matter for the decision-making authority.

The Restoration of Balance

(a) *A Changing Judicial Outlook*

Recent judicial pronouncements represent a partial retreat from the aggressive attitudes of the last few years. In *R.* v. *Secretary of State for the Environment, ex p. Nottingham City Council*[120] the House of Lords showed scrupulous caution in reviewing the statutory power of the Secretary of State to issue guidance to local authorities on expenditure limits.[121] This spirit of circumspection was partly

118. *South Oxfordshire D.C.* v. *Secretary of State for the Environment* (1981) 1 W.L.R. 1092.

119. At p. 1099, *per* Woolf J.

120. (1986) A.C. 240

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attributable to the requirement relating to approval of the executive guidance by the House of Commons,[122] with the resulting distinction between accountability to the legislature and review by the courts. But, apart from this dimension, support for a stance of greater detachment pervades the speech of Lord Scarman. In marked contrast with *Bromley*[123] and *R.* v. *Secretary of State for Transport, ex p. G.L.C.*[124] their Lordships were prepared to recognize in the *Nottingham City Council* case that the incidence of a fiscal burden as between taxpayers and ratepayers involves, in substance, a political judgment which is typically alien to the judicial function.[125]

The reassuring development is the explicit acknowledgement by the courts that "judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power".[126] Respect for these limits has largely taken the form of insistence that a meticulous examination of the structure and consequences of a discretionary power is warranted on the part of the courts only if a prima facie case is established in regard to *mala fides*, improper motive or manifest absurdity. In the *Nottingham* case itself the House of Lords declined to embark on this examination in the absence of evidence indicative of a pattern of perversity or apparent absurdity. In *R.* v. *Hillingdon L.B.C., ex p. Puhlhofer*[127] their Lordships, in similar vein, showed reluctance to interfere with a finding of fact reached in good faith by the tribunal identified by the legislature as the judges of fact, in the absence of a well-founded assertion that the tribunal had misconstrued the empowering provision, abused their powers or in some other way acted perversely.[128] The crucial limitation on the scope of judicial review emerging from *Puhlhofer* is that the existence or non-existence of a fact involving "a broad spectrum ranging from the obvious to the debatable to the just conceivable"[129] is essentially within the purview of the subordinate

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121. Local Government, Planning and Land Act 1980, s.59.
122. *id.*, s. 60(7), (8).
123. See n.58, *supra.*
124. See n.93, *supra.*
125. (1986) A.C. 240 at p. 247, *per* Lord Scarman.
126. *ibid.*, at pp. 250-251.
127. (1986) A.C. 484.
128. *ibid.*, at p. 518. *per* Lord Brightman: *cf.* at p. 510, *per* Lord Roskill.
129. *ibid.*, at p. 518. This trend is reinforced by *R.* v. *Secretary of State for the Home Department, ex p. Swati* (1986) 1 W.L.R. 477.

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tribunal. In *Re Westminster City Council*[130] the House of Lords took the opportunity to stress that judicial review "has nothing whatever to do with the political wisdom or unwisdom, propriety or impropriety of the decisions impugned"[131] and that "it is not the function of the court to determine whether a decision is reasonable or not"[132] unless the degree of arbitrariness falls squarely within the *Wednesbury* formula.

In developing this restrained approach the courts have found it necessary to repudiate in part the use which had previously been made of conceptual levers forged for the control of discretionary administrative power. In *R.* v. *Inner London Education Authority, ex p. Westminster City Council*[133] the court was prepared to strike down a decision of the I.L.E.A. to utilize funds to retain an advertising agency for purposes which were partly proper and partly improper. The ruling turned on unauthorized purpose, but if this ground of challenge had not succeeded, the court rejected the suggestion that the I.L.E.A. would have been equally vulnerable on the alternative basis of breach of a fiduciary duty owed to the ratepayers.[134]

(b) *Categories of Functions Excluded from Review*

As a partial counterpoise to the greatly increased intensity of judicial review on the footing of the *Wednesbury* principle in recent years, the courts seem disposed to exclude some types of functions from the ambit of review for reasons of policy.

Modern judges are wary of invoking the test of reasonableness in relation to purely advisory bodies whose function and duty are limited to the making of recommendations. Under the House of Commons (Redistribution of Seats) Act 1979, the task of the boundary commission is to make recommendations to the Secretary of State who, after making any modifications to their report which he considers appropriate, submits it to Parliament for final approval or rejection. The commission, at the end of its inquiries and deliberations, makes no final decision but performs a function which is ancillary to Parliament's own responsibility in making the ultimate decision with regard to representation and constituency boundaries. The Court of Appeal was of opinion that this distinctive nature of the function of the commission might well dissuade an active supervisory role by the courts.[135]

130. (1986) 2 W.L.R. 807.
131. *ibid.*, at p. 813. *per* Lord Bridge of Harwich.
132. *ibid.*, at p. 830. *per* Lord Templeman: *cf.* at p. 843. *per* Lord Oliver of Aylmerton.
133. (1986) 1 W.L.R. 28.
134. *ibid.*, at p. 50. *per* Glidewell J.
135. *R.* v. *Boundary Commission for England, ex p. Foot* (1983) Q.B. 600 at p. 626.

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It has been accepted that the scope of judicial review of the statutory discretion exercised by the Secretary of State for Home Affairs, in regard to the transfer of a prisoner from one gaol to another, is necessarily limited.[136] Judicial review of operational reasons used by the Secretary of State in regard to such a decision has been deemed undesirable,[137] and security factors are generally characterized as overriding.[138] Indeed, there are many administrative decisions made within prisons which may not be capable of judicial review at all, even though they clearly have an important bearing on the rights of prisoners. The classification of a prisoner by the Secretary of State with a view to deciding whether he should be held in a top-security prison or an open prison, and the decision to segregate a prisoner, are areas in which judicial review is generally unsuitable.[139]

In regard to disciplinary action against prison officers, the rigour of judicial review is diminished by the latitude available to the executive in respect of consideration of relevant material. Where, for example, the Secretary of State decided to dismiss a prison officer after disciplinary inquiry, it was held that the Secretary was not restricted to consideration of the facts surrounding the specific charge and the limited entries made in the officer's record of service, and that he had properly taken into account the officer's annual service record and a series of written warnings which he had been given previously.[140] The court was eager to eschew an approach which, artificially and by inference, restricted "what can be taken into consideration in a way which may well exclude matters which can properly be regarded as material".[141]

(c) *Managerial Functions*

The Court of Appeal has declined to exercise review of the decision by the governor of a prison that a prisoner was guilty of an offence and should suffer, in part, forfeiture of remission of sentence.[142] The basic approach of Lawton L. J. was that the courts are concerned

136. *R.* v. *Secretary of State for the Home Department, ex p. McAvoy* (1984) 1 W.L.R. 1408.
137. *ibid.*, at p. 1417, *per* Webster J.
138. *ibid.*
139. *R.* v. *Board of Visitors of Hull Prison, ex p. St. Germain* (1979) Q.B. 425.
140. *R.* v. *Secretary of State for the Home Department, ex p. Broom* (1986) Q.B. 198.
141. *ibid.*, at p. 208, *per* Kennedy J.
142. *R.* v. *Deputy Governor of Camphill Prison, ex p. King* (1985) Q.B. 735.

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not with supervising the exercise of statutory powers of management but with preventing the misuse of public power. The chief element of the spirit of self-restraint pervading the judgments was the court's appreciation of the negative policy consequences attendant on the exercise of review. The court felt able to distance itself the more easily because of the availability of an alternative remedy less deleterious in its social consequences and equally effective for the purpose of the applicant for relief. Since the prison governor discharged a managerial function under the supervision of the Secretary of State, the latter was held open to judicial review in regard to the proper performance of his statutory duty,[143] so that there was the assurance of redress in a compelling case.[144]

Where a local authority, in the exercise of statutory power,[145] resolved to refer several tenancy agreements to a rent tribunal to decide whether the rents demanded by the landlords were exorbitant, the Court of Appeal considered that there was no occasion for the exercise of judicial review.[146] The rationale of the decision was that potential jeopardy to the interest of the landlords, who objected to the reference, arose not from the local authority's action in making the reference but from the substantive decision of the rent tribunal in proceedings in which the landlords would be afforded every opportunity to be represented.[147] This was thought to be an uncongenial context for invocation of the *Wednesbury* rule, since the anticipated invasion of rights was at yet one further remove.

(d) *Pickwell's Case: a Limiting Principle*

Pickwell v. *Camden London Borough Council* [148] expresses the trend of judicial withdrawal. In this case the Queen's Bench Division refused to characterize as unreasonable, in the *Wednesbury* sense, the exercise by a local authority, at a time of crisis in the local authority's administration caused by a strike, of a statutory power to fix wage rates for its employees at a level higher than that agreed upon nationally. Ormrod L. J. underlined[149] that the principle of

143. Prison Rules (1964) (S.I. 1964 No. 388), r.47(7).

144. (1985) Q.B. 735 at p. 752, *per* Griffiths L.J.

145. Rent Act 1968, s. 72.

146. *R.* v. *Barnet and Camden Rent Tribunal, ex p. Frey Investments Ltd* (1972) 2 Q.B. 342.

147. *ibid.*, at p. 358. *per* Salmon L.J.

148. 1983 Q.B. 962

149. *ibid.*, at p.1001.

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Wednesbury unreasonableness does not permit expenditure to be disallowed, or a surcharge to be levied, whenever the local authority's reasons for the expenditure are "ill-advised, stupid or even dishonest"[150] and that it is not for the court to substitute its own view of what is a desirable policy in relation to the subject matter of a discretion conferred on the local authority.[151] The thrust of decisions like *Roberts* v. *Hopwood*[152] and *Prescott* v. *Birmingham Corporation*[153] is significantly weakened by the approach of Forbes J. to judicial appraisal of a local authority's task in balancing the conflicting interests of inhabitants, ratepayers and employees.[154]

However, the principal importance of the decision consists of the line of reasoning favoured by Ormrod L. J. in regard to the question whether disregard of material considerations and advertence to irrelevant considerations are to be regarded as subsumed in the concept of unreasonableness or whether these factors are best treated as a separate ground of challenge. Subject to recognition that there may be some decisions which are so self-evidently erroneous that the court may be justified in drawing the inference that the local authority has purported to use the discretion, given to it for one purpose, in reality to achieve an ulterior or collateral objective which is *ultra vires*. Ormrod L. J. was inclined to take the view that failure to refer to relevant matters, or the taking into account of irrelevant matters, is in effect evidence that the local authority may have exceeded its authority but does not amount in itself to illegality.[155] In other words, despite clear proof that relevant considerations have been disregarded or that irrelevant considerations have been taken into account, the court, in evaluating the substantive quality of the decision, has sufficient scope for manoeuvre to conclude that, notwithstanding these lapses, the decision is not intrinsically unreasonable, assessed in relation to *Wednesbury* criteria. The availability of judicial discrimination in declining review in cases of this kind goes against the grain of conventional approaches and diminishes in crucial respects the scope of judicial intervention.

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150. *Re Decision of Walker* (1944) 1 All E.R. 614. at page 616, *per* Du Parcq L.J.

151. *Luby* v. *Newcastle-under-Lyme Corporation* (1964) 2 Q.B. 64 at p. 72. *per* Diplock L.J. (affd. (1965) 1 Q.B. 214 (C.A.))

152. See n.74. *supra.*

153. See n.80. *supra.*

154. (1983) Q.B. 962 at p. 987.

155. *ibid.*, at pp.999-1000.

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Conclusion and Postscript: Two Recent Cases

Next to the lately established principle regarding the exclusivity of judicial review procedure, developments in the area of *Wednesbury* unreasonableness form the salient feature of contemporary administrative law. In the wake of these developments the law has cut loose from its stable moorings and is now adrift on uncharted waters.

The nature of judicial review requires that the residual scope of the *Wednesbury* rule should be strictly controlled and, indeed, judicial attitudes have been noteworthy for their caution until the emergence of the trends of the last three years. A hypothetical example of unreasonableness,[156] endorsed in the *Wednesbury* case itself,[157] is the dismissal of a red-haired teacher because she had red hair. Actual situations in which the intervention of the courts was thought to be warranted have been equally extreme in their departure from reason – for instance, where only four days were allowed by a Minister for lodging objections to a scheme for a comprehensive school[158] or where gratuity for an employee was assessed at the contumelious rate of a penny a year.[159] From these infinitesimal origins *Wednesbury* unreasonableness, as a standard of judicial review, has today ramified into so vast an area that its character is barely recognizable.

The essential criticism of some recent developments is that they have the effect of transforming unacceptably the purpose of judicial review which, after all, seeks to ensure that the individual receives fair treatment, and not to guarantee that the administrative authority, after according fair treatment on a matter which it is authorized by law to decide for itself, reaches a conclusion which is correct in the eyes of the court.[160] Modern judicial approaches are almost the direct antithesis of values previously held and applied, and the resulting contradictions, seen in relation to their policy implications, represent a reproach to the evolving law. Judicial resolve to confine intervention, on the ground of disregard of a material consideration, to situations in which the factor overlooked could be expected decisively to affect the outcome has given way to the willingness of judges to interfere even on the basis of disproportionate weight given by the

156. *Short* v. *Poole Corporation* (1926) Ch. 66.

157. *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* (1948) 1 K.B. 223 at p. 230. *per* Lord Greene M.R.

158. *Lee* v. *Department of Education and Science* (1967) 66 L.G.R. 211.

159. *Williams* v. *Giddy* (1911) A.C. 381.

160. *Chief Constable of the North Wales Police* v. *Evans* (1982) 1 WLR. 1155 at p. 1161. *per* Lord Hailsham of St. Marylebone L.C.

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decision-maker to a relevant consideration. The attitude that an approximate nexus between the overall object of the administrative authority and the specific means selected for its attainment should suffice for purposes of *Wednesbury* review, without examination of abnormal situations in which the link is apparently slender, has succumbed to the removal of judicial inhibition in regard to the weighing of competing pecuniary interests affected by policy which the administrative authority is empowered by statute to determine.

This expansion of the contours of *Wednesbury* unreasonableness has been effected by conceptual means of doubtful validity. The idea of fiduciary obligation has been transplanted from its accustomed environment to an alien setting in which its application to buttress one group of interests stultifies legitimate initiative on the part of the administrative tribunal. The enlarged scope of legitimate expectation, giving rise to a duty to consult in the context of levying of charges on a graduated scale in circumstances where the quantum of payment is a matter of executive discretion, fails to strike a balance between administrative efficacy and justice for the individual. The rigid imposition of an estoppel in any situation where proposed administrative action is incompatible with a previous representation may often constitute an intolerable fetter. The increasingly interventionist attitude of the courts in the area of disregard of relevant considerations, in respect of the range of factors treated as material as well as in relation to the novel trend of quantifying probative weight, is equally destructive of a sense of balance.

There is, as well, the practical hardship that, given the present exposure of administrative tribunals to attack on *Wednesbury* grounds, a tribunal may find itself compelled to choose in contentious sectors of public policy between the Scylla of involvement and the Charybdis of withdrawal, knowing full well that, whichever way it decides, it may not escape condemnation. This was, indeed, the lot of a local authority in *Wheeler* v. *Leicester City Council.*[161] The Council, aware that a substantial part of its population was of Asian origin, was disturbed that three members of the Leicester Football Club proposed to be members of the English Rugby Football Union team touring South Africa. The council put to representatives of the Leicester Football Club a series of questions which asked whether the club was opposed to the tour and would press the three club members to withdraw from the touring side. Dissatisfied with the response which these questions elicited, the council refused the club permission

161. 1985 A.C. 1054 (H.L.)

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to use a football pitch on their recreation ground which they had extended to the club for many years in the exercise of their statutory discretionary power. The House of Lords, overruling the majority of the Court of Appeal, was of opinion that the council's attempt "to force acceptance by the club of their own policy on their own terms," combined with the threat to apply a sanction, came within the pale of *Wednesbury* unreasonableness.[162] Yet, against the background of a climate of judicial opinion which looks with favour upon advertence to the developing content of international obligations as a relevant factor in these circumstances, and also in the light of the statutory duty imposed on the local authority to do all in its power to promote racial harmony,[163] the council may well be forgiven the cynical reflection that abstention from the course which they followed could have entailed equal, if not greater, vulnerability in terms of the revamped *Wednesbury* formula.

The disconcerting limits to which the apparatus of review is capable of being extended in keeping with the emerging judicial outlook, and the consequent mutilation of legal principle, are demonstrated by the argument urged in support of *Wednesbury* review in *Gillick* v. *West Norfolk and Wisbech Area Health Authority*.[164] The issue was whether doctors employed by an area health authority could lawfully give contraceptive advice or treatment to the plaintiff's daughters who were under sixteen years of age, without her knowledge and consent. The area authority had received from the Department of Health and Social Security a memorandum of guidance on family planning which stated, *inter alia,* that to abandon the principle of confidentiality between doctor and patient in respect of children under sixteen years might cause some not to seek professional advice at all, thus exposing them to risks such as pregnancy and sexually transmitted diseases, and that in exceptional cases it was for a doctor exercising his clinical judgment to decide whether to prescribe contraception. One of the contentions on the plaintiff's behalf was that the department, in issuing the memorandum, was exercising its discretion in a wholly unreasonable way. The deep cleavage of opinion with regard to the moral and ethical issues underlying the case is evident from the narrowness of the majority in the House of Lords upholding the legality of the department's action. Lord Fraser,[165]

162. *ibid.*, at p. 1078, *per* Lord Roskill.
163. Race Relations Act 1976. s.71.
164. (1986) A.C. 112 (H.L.).
165. *ibid.*, at p. 174.

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Lord Scarman[166] and Lord Bridge[167] recognized the entitlement of a doctor to give contraceptive advice and treatment to a girl under sixteen without her parents' knowledge and consent, in circumstances where she is very likely to begin or continue having sexual intercourse with or without contraceptive treatment, if the doctor is satisfied that her mental or physical health is likely to suffer unless she received contraception. On the other hand, Lord Brandon[168] was convinced that to give such a child contraceptive treatment would be to remove a powerful inhibition and, therefore, to facilitate a sexual relationship.[169]

These are matters in regard to which prevailing social attitudes are marked by a great divide. "Some doctors approve and some doctors disapprove of the idea that a doctor may decide to provide contraception for a girl under sixteen without the knowledge of the parent. Some parents agree and some parents disagree with the proposition that the decision must depend on the judgment of the doctor."[170] To have recourse to the *Wednesbury* rule as a vehicle of review in such circumstances as these is to subvert its purpose. The majority of the House of Lords recognized, refreshingly, that judicial withdrawal from such areas of social and ethical controversy is opportune. Of particular value is the perception, in relation to *Wednesbury* review, that:

> Such a review must always begin by examining the nature of the statutory power which the administrative authority whose action is called in question has purported to exercise, and asking, in the light of that examination, what were, and what were not, relevant considerations for the authority to take into account in deciding to exercise that power. It is only against such a specific statutory background that the question whether the authority has acted unreasonably, in the *Wednesbury* sense, can properly be asked and answered.[171]

Wednesbury unreasonableness would certainly have assumed less pretentious proportions in modern law, had this limitation been borne in mind. As the law now stands, adiposity of the unreasonableness criterion distorts in basic respects the nature and function of judicial review.

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166. *ibid.*, at p. 189.
167. *ibid.*, at p. 194.
168. *ibid.*, at p. 197: *cf.* Lord Templeman at pp. 200-201.
169. *ibid.*, at p. 197.
170. *ibid.*, at p. 202. *per* Lord Templeman.
171. *ibid.*, at p. 192. *per* Lord Bridge of Harwich.

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THE AMENABILITY OF COMMISSISONS OF INQUIRY TO WRITS OF CERTIORARI AND PROHIBITION: ANALOGIES IN CANADIAN AND SRI LANKAN LAW

Introduction

ESPECIALLY in recent times Commissions of Inquiry have been appointed under statutory provisions[1] in Canada for a variety of purposes. The scope of these Commissions has ranged from the investigation of causes of organized crime[2] to inquiries into specific acts of criminal homicide[3] and arson.[4] It is a matter of fundamental importance to ensure that the functions of Commissions of Inquiry are carried out in a manner which involves no conflict with the rights and legitimate expectations of those who are subject to their jurisdiction. This objective is closely linked with the effectiveness of remedies which may be resorted to by an individual who complains of injustice at the hands of a tribunal performing investigative functions.

In Sri Lanka there has been a considerable volume of litigation in regard to the question whether the writs of *certiorari* and prohibition lie against a Commissioner appointed under the Commissions of Inquiry Act.[5] The problems which have received attention in Sri Lanka within the framework of that statute and contemporary legislative provisions are strikingly similar to those which have agitated the Canadian courts. The avenues of development of the relevant body of law in an emergent Asian State governed in this respect by principles identical with those applicable in the major Commonwealth jurisdictions are likely to be of interest, from a comparative standpoint.

Canadian Law

Canadian judges have consistently invoked the dichotomy between quasi-judicial and administrative functions in their consideration of

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1. See, for example, the Canadian Inquiries Act R.S.C. 1952, c. 154, R.S.C. 1970, c. 1-13; Quebec Public Inquiry Commission Act R.S.Q. 1964, c. 11 ; the Quebec Police Act S.Q. 1968, c. 17 ; the Ontario Public Inquiries Act S.Q. 1971. vol. 2, c.49.

2. *Di Lorio and Fontaine* v. *Warden of Common Jail of Montreal and Brunet* (1976) 73 D.L.R. (3d) 491.

3. *Eaber* v. *R.* (1976) 2 C.R. 9.

4. *R.* v. *Coote* (1873) L.R. 4 P.C. 599.

5. No. 17 of 1948, Legislative Enactments (1956 edition), Cap. 393.

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the extent to which Commissions of Inquiry and analogous bodies are exposed to the supervisory jurisdiction of the courts. The general approach of the Canadian courts has been that "In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially".[6]

The mere fact that a hearing by a Commission of Inquiry is held or is provided for by statute, it has been pointed out, does not necessarily constitute such Commission a judicial or quasi-judicial tribunal.[7]

The King's Bench of Saskatchewan, while recognizing that it has "supervisory authority over inferior courts and over tribunals not strictly courts but performing judicial functions"[8] directed itself that this control has to be exercised in the relevant context by the writs of *certiorari* and prohibition. The prerogative writs have been characterized as "of an entirely separate and distinct character",[9] their ambit being curtailed by circumscribing elements which are inherent in the conception of the remedies.

The Supreme Court of Alberta, spelling out the irreducible elements of a judicial or quasi-judicial function, has declared: "The body must have jurisdiction to adjudicate (this is when they must decide the question regarding rights and liabilities of each party) and, secondly, the body must have a duty to act in a judicial manner."[10] Accordingly, a securities commission cancelling a salesman's registration,[11] a public utilities commission determining the value of an expropriated venture,[12] an assessment appeal commission disposing of an appeal[13], a commission investigating the existence of an alleged crime syndicate,[14] the

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6. *Calgary Power Ltd and Halmrast* v. *Copithorne* (1958) 16 D.L.R. (2d) 241 ; *Howarth* v. *National Parole Board* (1974) 50 D.L.R. (3d) 349.

7. *Re B. and Commission of Inquiry, Re Department of Manpower and Immigration* (1975) 60 D.L.R. (3d) 339.

8. *Credit Foncier Franco-Canadian* v. *Board of Review* (1940). 1 D.L.R. 182, at p. 185, *per* MacDonald. J.

9. *Cote* v. *Morgan* (1881) 7 S.C.R. 1 at pages 11-12, *per* Ritchie, C.J.

10. *F. F. Ayriss & Co.* v. *Board of Industrial Relations of Alberta* (1960) 23 D.L.R. (2d) 584 at p. 586 *per* Riley J.

11. *Duplain* v. *Cameron* (1960) D.L.R. (2d) 619.

12. *Re Electric Power Act, Re West Canadian Hydro Electric Corporation, Ltd* (1950) 3 D.L.R. 321.

13. *Sugar City Municipal District* v. *Bennett and White Ltd* (1950) 3 D.L.R. 81.

14. *Re Ontario Crime Commission : ex parte Feeley and Mc Dermott* (1962) 34 D.L.R. (2d) 451.

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Restrictive Trade Practices Commission,[15] a County Court judge conducting a hearing under the Extradition Act,[16] the conduct of an inquiry concerning a proposed egg marketing scheme[17] and alleged misconduct by a pilotage authority[18] have all been held in Canadian judgments to involve purely administrative functions.

According to an established strand of Canadian decisions one of the basic limitations on the purview of *certiorari* and prohibition is that these remedies are not available in respect of mere adverse recommendations which have no impact on legal rights *proprio vigore*. The authoritative exposition of the requisites of *certiorari* is that "Wherever any body of persons having legal authority to determine questions affecting rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division".[19]

In keeping with this formulation of principle, *certiorari* and prohibition have been restricted traditionally in Canada to the impugning of decisions and determinations which intrinsically affect vested rights. Where the function of a tribunal is exclusively investigatory, the assumptions underlying Canadian decisions require the classification of the function as administrative[20] and the consequent denial of prerogative remedies.[21]

The High Court of Ontario has explicitly acted on the principle that "Where recommendations made pursuant to a duty imposed cannot have any independent effect without some other person or body making a decision which carried out such recommendations, the duty to recommend is an administrative duty".[22] A judge of the Supreme Court of Canada reached the conclusion that no powers of a quasi-judicial nature devolved on a board of inquiry appointed under the Ontario Human Rights Code,[23] on the basis that its duties

15. *British Columbia Packers Ltd* v. *Smith MacDonald and Attorney-General of Canada* (1961) O.R. 596.

16. *Re State of Wisconsin and Armstrong* (1973) 32 D.L.R. (3d) 265.

17. *R ex rel, Peterson and Martin* v. *McMurray* (1967) 60 W.W.R. 651.

18. *Baldwin* v. *Poutrot* (1969) S.C.R. 576 at p. 583.

19. *R.* v. *Electricity Commissioners: Ex parte London Electricity Joint Committee Co.* (1920) *Ltd* (1924) 1 K.B. 171 at p. 205, *per* Atkin, L.J.

20. *R.* v. *Council of the College of Physicians and Surgeons: Ex parte Ahmad* (1970) 15 D.L.R. (3d) 105; *Re Lingley* v. *Hickman* (1972) F.C. 171.

21. Cf. *Re Zadrevc and Town of Brampton* (1972) 28 D.L.R. (3d) 641.

22. *Re Nanticoke Ratepayers Association and Environmental Assessment Board* (1978) 83 D.L.R. (3d) 722 at p. 730 *per* Goodman. J. Cf. *Re Training Schools Advisory Board* (1972) 22 D.L.R. (3d) 129.

23. 1961-2 (Ont) c. 93, section 13(1).

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were confined to investigation and report and that "It is not invested with authority to adjudicate upon anything".[24] In several cases[25] identification of the tribunal's powers as administrative has been supported on the footing that the decision of the tribunal had, *per se*, no binding quality.

Towards the end of the last century the Ontario Court of Appeal entertained no doubt that "The writ (of prohibition) is not to be applied to any proceedings of any person or body of persons, whether they be popularly called a Court or by any other name, on whom the law confers no power of pronouncing any judgment or order imposing any legal duty or obligation on any individual".[26] The Supreme Court of Canada, affirming this finding, said; "The object of such inquiry was simply to obtain information for the council as to their members, officers and contractors, and to report the result of the inquiry to the council with the evidence taken, and upon which the council might in their discretion, if they should deem it necessary, take action."[27] Thus, where the Council of the City of Toronto, acting under an Ontario provincial statute, appointed a Judge of the County Court to conduct a public inquiry into allegations of malfeasance against an employee of the city, the latter failed to secure a writ of prohibition.

A similar conclusion was reached by the Court of Appeal of British Columbia in a case where a justice of the Supreme Court of British Columbia was appointed a Commissioner to conduct an inquiry by way of Royal Commission under the British Columbia Public Inquiries Act into alleged unlawful importation of liquor into British Columbia.[28] The Supreme Court of Canada, holding that the conduct of the inquiry in question did not involve a duty to act judicially, observed: "We are not here concerned with a criminal trial, structured as a dispute between two sides, the Crown and the accused. The function

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24. *Bell* v. *Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1 at p. 6 *per* Abbott. J. (dissenting) ; cf. *Re Brown and Brock and the Rentals Administrator* (1945) 3 D.L.R. 323; *Re Wentworth Canning Co.* v. *Farm Products Marketing Board* (1950) C.M.N. 100; *Ontario Securities Commission* v. *Dobson* (1957) 8 D.L.R. (2d) 604; *Harris* v. *R.* (1958) 41 M.P.R. 100.

25. *Re Wilson and Law Society of British Columbia* (No. 2) (1975) 64 D.L.R. (3d) 512; *Lambert* v. *R.* (1975) F.C. 548 ; *Kedward* v. *R.* (1976) 1 F.C. 57.

26. *Re Godson and the City of Toronto* (1889) 16 O.A.R. 452 ; affirmed by the Supreme Court of Canada in (1890) 18 S.C.R. 36.

27. (1890) 18 S.C.R. 36 at p. 40. *per* Ritchie, C.J.

28. *Re Clement and Public Inquiries Act* (1919) 3 W.W.R. 309 at p. 310, *per* Martin, J.A.

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of the Inquiry is merely to investigate and report; no person is accused; those who appear do so as witnesses."[29] The Alberta Court of Appeal has held recently that no judicial or quasi-judicial powers had been conferred on the disciplinary committee of the Alberta Teachers' Association: "The function of Dr Hrynyk was to investigate, report and recommend. He was to gather the facts. He had no power to hear and determine at all."[30] The Trial Division of the Alberta Supreme Court has commented that "There are many investigative bodies who only report or recommend and who have been declared by our Courts not to be generally subject to the superior Courts' supervisory control".[31]

An investigation under the Income Tax Act has been thought to be administrative, since the taxpayer's rights could be impaired only after the assessment which ensures him the full right to be heard and to avail himself of the mechanism for the various appeals provided for under the Act.[32] The mere fact, it has been asserted, that a person's rights might be affected, as opposed to being determined, by a proceeding is not sufficient to render that proceeding a judicial or quasi-judicial one.[33] Thus, a Commissioner conducting an investigation under the Combines Investigation Act,[34] an investigation by the Board of Broadcast Governors,[35] a conciliation board reporting under the Alberta Labour Act[36] and a disciplinary inquiry involving the Saskatchewan College of Physicians and Surgeons[37] have all been held by Canadian courts to be immune from the reach of *certiorari* and prohibition. Emphasis has been laid on the principle that, although the right of the petitioner to his reputation might well be jeopardized by the report, this does not, in itself, invest the inquiry preceding the report with a judicial or quasi-judicial character.[38]

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29. *Di Iorio and Fontaine* v. *Warden of Common Jail of Montreal and Brunet* (1976) 73 D.L.R. (3d) 491 at p. 525, *per* Dickson, J.

30. *Discipline Committee of Alberta Teachers' Association* v. *Youngberg* (1978) 1 W.W.R. 538 at p. 548, *per* Moir, J.A.

31. *Re Sedlmayr Gardiner and Demay and the Commission into Royal American Shows* (1978) 82 D.L.R. (3d) 161 at p. 168 *per* Miller, J.

32. *Guay* v. *Lanfleur* (1964) 47 D.L.R. (2d) 226.

33. *St John* v. *Fraser* (1935) 3 D.L.R. 465.

34. *O'Connor* v. *Waldron* (1935) 1 D.L.R. 260.

35. *R.* v. *Board of Broadcast Governors and the Minister of Transport, Ex parte Swift Current Telecasting Co., Ltd* (1962) 33 D.L.R. (2d) 449.

36. *F. F. Ayriss & Co.* v. *Board of Industrial Relations of Alberta* (1960) 23 (2d) 449.

37. *R.* v. *Saskatchewan College of Physicians and Surgeons, Ex parte Samuels* (1966) 58 D.L.R. (2d) 622.

38. *Re Band Commission of Inquiry Re Department of Manpower and Immigration* (1975) 60 D.L.R. (3d) 339 at p. 349, *per* Addy, J.

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This line of decisions adverts, overtly or inferentially, to a series of indispensable attributes of a judicial or quasi-judicial power, construed as a condition precedent of availability of the writs of *certiorari* and prohibition and other appropriate relief. Prominent among these attributes are the following: (i) A *lis inter partes* has been identified as an essential prerequisite.[39] A petitioner has been considered disentitled to relief in circumstances where no *lis* was demonstrable between him and the board, the order of which was sought to be assailed, even if the board was a suable entity.[40] Conversely, the High Court of Ontario has granted relief on the basis that "There is a clear *lis* between the parties and the action, in this regard, is properly constituted to resolve the *lis*.[41] However, the value of the concept of a *lis*, within the framework of *certiorari* proceedings, has been questioned persuasively by the Queen's Bench of Manitoba.[42] The cogency of this approach is rooted in the basic complexion of *certiorari* proceedings in the getting of which "the court is not concerned with the merits of a dispute between litigants but with getting the record from the inferior tribunal brought before it for the purpose of ascertaining whether the inferior tribunal had acted within its jurisdiction".[43] This statement of principle subsumes procedural as well as substantive *vires*.[44] (ii) "An adjudication affecting the extinguishment or modification of parties' rights or interests"[45] has been insisted upon as an element of a judicial or quasi-judicial function. (iii) It is necessry that the proceeding before the board or tribunal should be "a required original step leading to adverse action against the parties".[46] In other words, the determination by the board

39. *Campbell Soup Co., Ltd* v. *Farm Products Marketing Board* (1975) 63 D.L.R. (3d) 401 at p. 438, *per* Morden, J.

40. *Hollinger Bus Lines Ltd* v. *Ontario Labour Relations Board* (1952) 3 D.L.R. 162. This was an action for a declaration. See also *Metallic Roofing Co.* v. *Local Union No. 30* (1903)5 C.L.R. 424; *Rich* v. *Melancthon Board of Health* (1912) 2 D.L.R. 866; *Commodore Grill* v. *Dunnville* (1941) 4 D.L.R. 708

41. *Campbell Soup Co., Ltd* v. *Farm Products Marketing Board* (1975) 63 D.L.R. (3d) 401, at p. 438, *per* Morden, J. *Braaant Dairy Co. Ltd* v. *Milk Commission of Ontario* (1973) 30 D.L.R. (3d) 559.

42. *Klymchuk* v. *Cowan* (1964) 45 D.L.R. (2d) 587.

43. At p. 588, *per* Smith, J.

44. Excess of jurisdiction has been held to include denial of natural justice : *R.* v. *Botting* (1966) 56 D.L.R. (2d) 25 at p. 40, *per* Laskin, J.A.

45. *F. F. Ayriss & Co.*, v. *Board of Industrial Relations of Alberta* (1960) 23 D.L.R. (2d) 584 at p. 586, *per* Riley, J,: *Cf Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931) 2 D.L.R. 1.

46. *R.* v. *Ontario Labour Relations Board, ex parte Kitchner Food Market Ltd* (1966) 57 D.L.R. (2d) 521 at p. 530, *per* Laskin, J.A.; *cf Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.* (1939) 4 D.L.R. 99.

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must be an integral aspect of the statutory scheme which envisages action culminating in jeopardy to the rights or interests of the petitioner.

The Canadian decisions which allude to these characteristics of judicial and quasi-judicial power reflect the fundamental contrast between the function of a Commission of Inquiry and that of a regular Court or other judicial tribunal. The Court of Appeal of Ontario has suggested that "A Commission of Inquiry has a very different function to perform from that of a court of law or an administrative tribunal or an arbitrator, all of which deal with rights between parties."[47] The difference is illustrated, for example, by the fact that a Commission of Inquiry is generally not bound by the rules of evidence applied traditionally in the Courts,[48] with the exception of the exclusionary doctrine as to privilege.[49] "The approach of the Commission should not be a technical or unduly legalistic one. A full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject matter of the inquiry."[50]

On the other hand, there is unequivocal support in a group of Canadian judicial pronouncements for the proposition that the investigative character of a tribunal does not militate conclusively against the propriety of judicial review.

This has been recognized clearly in several contexts:

(a) Where the area of investigation accorded to the Commission of Inquiry consists of or includes matter which is not within the competence of the provincial legislature responsible for the enabling legislation, the courts may exercise supervisory[51] jurisdiction. The Supreme Court of Canada has taken the view that a provincial Commission empowered to inquire into the administration and management of the Royal Canadian Mounted Police had been given

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47. *Re Bartolotti and Ministry of Housing* (1977) 76 D.L.R. (3d) 408 at p. 415, *per* Howland, J.A. ; cf *Re Ontario Crime Commission* (1963) 37 D.L.R. (2d) 382.

48. *The Inquiry into the Confidentiality of Health Records in Ontario Divisional Court* (1978) 90 D.L.R. (3d) 576. For the principles governing the exercise of quasi-judicial powers, see *Samuels and Charter Airways Ltd* v. *Attorney-General for Canada and Air Transport Board* (1956) 1 D.L.R. (2d) 110 at p. 115, *per* Johnson, J.A.; cf. *Committee for Justice and Liberty* v. *National Energy Board* (1976) 68 D.L.R. (3d) 716.

49. *Re Children's Aid Society of the County of York* (1934) O.W.N. 418 at p.420.

50. *Re Bartolotti and Ministry of Housing* (1977) 76 D.L.R. (3d) 408 at p. 415, *per* Howland, J.A.

51. Special words are necessary to confer appellate, as distinct from supervisory, jurisdiction: *Re Ontario Crime Commission, Ex parte Feeley and McDermott* (1962) 34 D.L.R. (2d) 451 at p. 468, *per* Schroeder, J.A.

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terms of reference beyond provincial jurisdiction.[52] The Court drew a distinction between inquiry into the alleged commission of individual criminal acts by members of that police force and investigation of the manner in which that federally constituted body actually operated.[53] In particular, a provision which purported to give the Commissioner the power to make recommendations on steps to be taken to avoid the repetition of illegal acts was struck down as *ultra vires*, since such recommendations would naturally contemplate changes in the regulations and the practices of an agency of the federal government.[54]

(b) The availability of judicial review has been conceded explicitly in circumstances where "the Commissioner, in the course of conducting his inquiry, sought to inquire into matters outside of his terms of reference".[55] The principle is of crucial importance that "It is the duty of a superior Court to be vigilant at all times to see that the jurisdiction conferred by the Legislature on a tribunal is adhered to by the tribunal, and that it does not enter upon an inquiry that is not within its jurisdiction or, if it enters upon an inquiry within its jurisdiction, that it does not exceed its jurisdiction and that it does not deprive itself of jurisdiction to make a decision by doing an act that it is not authorized to do or by refusing to exercise the jurisdiction that has been conferred upon it by the legislative authority".[56]

The Ontario Court of Appeal has drawn a distinction between cases in which the tribunal embarked upon the inquiry clothed with proper authority and those in which the tribunal had in fact no authority *ab initio*.[57] Referring to a case where the three members of the special committee which examined complaints against the plaintiff did not constitute the Disciplinary Committee provided for by the statute,[58] the Canadian Supreme Court made the comment "That is a defect *in substantialibus*, a defect that sterilizes the proceedings as regards legal consequences".[59]

52. *Attorney-General of the Province of Quebec* v. *Keable* (1977) 1 S.C.R. 218.

53. *ibid.*

54. *ibid.*

55. *Re Sedlmayr. Gardiner and Demay and the Commission into Royal American Shows* (1978) 82 D.L.R. (3d) 161 at p. 173, per Miller, J. cf. *Hockey* v. *N.U.G.E.* (1964) W.I.R. 174 ; *Reference Re a Commission of Inquiry into the Police Department of Charlottetown* (1977) 74 D.L.R. (3d) 422.

56. *Re Jackson and Ontario Labour Relations Board* (1955) 3 D.L.R. 297 at p. 300 per McRuer C.J.H.C.

57. *Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.* (1939) 4 D.L.R. 99 at p. 109, *per* Gillanders, J.A.

58. *Harris* v. *Law Society of Alberta* (1936) 1 D.L.R. 401.

59. At p. 403, *per* Duff, C.J.C.; contrast *Hands* v. *Law Society of Upper Canada* (1888) 16 O.R. 625 which concerned merely procedural irregularities.

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A Commission may exceed its jurisdiction in either the substantive or the procedural aspect.[60] The former occurs where the Commission takes its inquiry beyond its proper limits,[61] just as much as a statutory Commission declines jurisdiction by refusing to entertain an allegation properly brought before it.[62] Examples of the latter are where the Commission, in an effort to obtain evidence pertaining to the credibility of a witness, subjected the witness to a line of questioning which was irrelevant to the subject matter of the inquiry and was not defensible on any proper footing,[63] where the applicant for relief has not been apprised adequately of the nature[64] or substance[65] of the charge made against him and where mandatory procedural requirements imposed by statute have been infringed by the Commission.[66]

The paramount character of the jurisdiction of the superior courts to confine a subordinate tribunal within the legitimate ambit of its authority, irrespective of the nature of the function discharged by the tribunal, is underscored in a judgment of the Courts of Alberta: "A Superior Court exercising the powers of the former Court of King's Bench has a supervisory authority over inferior courts and over tribunals which are not judicial for the purpose of seeing that they do not go beyond their jurisdiction unless such authority is taken away by competent legal authority."[67]

(c) In Canada the supervisory jurisdiction of the Courts may be invoked in situations where "the report of the Commission of Inquiry is susceptible of affecting the rights of a person".[68] The Supreme Court of Canada has granted an order prohibiting a board of inquiry appointed under the Ontario Human Rights Code from carrying out its investigation even though it could culminate only in a recommendation which, *per se,* had no force.[69] An order of prohibition

60. *Re Royal Commission into Metropolitan Toronto Police Practices and Ashton* (1975) 64 D.L.R. (3d) 477.

61. *ibid.*

62. *Re Latif and Canadian Human Rights Commission* (1979) 105 D.L.R. (3d) 609.

63. See the case cited at note 57, *supra.*

64. *Re Crabbe and Jamieson* (1972) 80 D.L.R. (3d) 490.

65. *Citroni* v. *Quebec Police Commission* (1978) 80 D.L.R. (3d) 490.

66. *Landreville* v. *R.* (No. 2) (1977) 75 D.L.R. (3d) 380 at p. 405, *per* Collier, J.

67. *Kettenbach Farms Ltd* v. *Henke* (1938) 1 D.L.R. 44 at p. 45, *per* Harvey, C.J.A., cf. the opinion of the Privy Council in *Board* v. *Board* (1919) 48 D.L.R. 13 and the judgment of the Supreme Court of Canada in *Botavy* v. *Attorney-General for Saskatchewan* (1966) 52 D.L.R. (2d) 125.

68. *Re Sedlmayr. Gardiner and Demay and the Commission into Royal American Shows* (1978). 82 D.L.R. (3d) 161 at p. 171 *per* Miller, J.

69. *Bell* v. *Ontario Human Rights Commission* (1971) 18 D.L.R. (3d) 1.

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has been granted against the professional guidance committee of the Alberta Association of Architects preventing it from holding a formal hearing into a complaint against a member, notwithstanding that responsibility for the ultimate decision was attributable to the Council of the Association.[70] The Supreme Court of Canada has granted a writ of evocation – the requisites of which are scarcely distinguishable from those of prohibition and *certiorari* – against the Quebec Police Commission preventing it from proceeding with a hearing or making recommendations to the Director of the Montreal Police Department which would affect the rank and status of a member of the force.[71] Indeed, the Judicial Committee of the Privy Council has been emphatic in its assertion that "A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority".[72]

In demarcating the scope of this qualification to the principle that *certiorari* and prohibition do not lie against tribunals the functions of which are purely investigative, the Supreme Court of Alberta has suggested that "For a situation to fall under this exception, the report of the inquiry must by statute or by-law form the basis of the decision to be made by the higher authority charged with the ultimate responsibility of making the decision".[73] Where the end result of a public inquiry was to file a report with the Lieutenant-Governor in Council, there being no legal compulsion or requirement for the Lieutenant-Governor in Council to take any step in connection with the report or the findings incorporated in it, and no sanction being provided if nothing was done, the Supreme Court of Alberta concluded without hesitation that judicial surveillance in respect of the inquiry was excluded.[74] In a subsequent case[75] a judge of the same Court declared. "I find that the report that will ultimately be made by the Commissioner to the Lieutenant-Governor in Council arising out of this inquiry is not, by itself, susceptible of affecting the rights of

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70. *Edwards and Woolfenden* v. *Alberta Association of Architects and Professional Guidance Committee of Alberta Association of Architects* (1975) 3 W.W.R. 38

71. *Saulnier* v. *Quebec Police Commission* (1975) 57 D.L.R. (3d) 545.

72. *Estate and Trust Agencies* (1927) *Ltd* v. *Singapore Improvement Trust* (1937) A.C. 898 at p. 917, *per* Lord Maugham.

73. *Re Anderson and Royal Commission into Activities of Royal American Shows Inc.* (1978) 82 D.L.R. (3d) 706 at p. 711; cf. *Le Proceurer General du Sanada* v. *La Commission des Droits de La Personne* (1977) C.S. 47 affirmed (1978) C.A. 67.

74. *Re Sedlmayr, Gardiner and Demay and the Commission into Royal American Shows* (1978) 82 D.L.R. (3d) 161.

75. *Re Anderson and Royal Commission into Activities of Royal American Shows Inc.* (1978) 82 D.L.R. (3d) 706.

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the applicant. If that be the case, then this inquiry does not fall within this particular exception."[76]

The Supreme Court of Canada has concluded that the Quebec Police Commission exercised a judicial or quasi-judicial function because it was charged with making a report which may have important effects on the rights of persons dealt with in it"[77] and because it was one which "may very well impair if not destroy"[78] the rights of the appellant. The basis of the decision was that, even though the Commission was reporting to the Minister who, strictly speaking, had the legal right to implement or to refuse to implement the recommendations, nevertheless, from a practical standpoint, it must virtually be taken for granted that he would follow the recommendations of the Commission which he had set up.[79]

By contrast, in reaching the conclusion that the Environmental Assessment Board of Ontario exercised an administrative rather than a quasi-judicial function, the High Court of Ontario took into account that the board was an advisory body which wielded no decision making power.[80] It was apparent, *ex facie* the relevant statutory provision,[81] that the board's function was solely that of holding a hearing to gather information and to make a report in accordance with the provisions of the Act to the Director who was in no way legally bound by the contents of the report in making his decision. Similarly, the Ontario Court of Appeal, referring to the Commissioner appointed under the Combines Investigation Act,[82] observed : "It is clear that the duties of the Commissioner being confined to a preliminary inquiry and there being no finality about the facts as found, it being left to the Governor-in-Council and Parliament, after consideration, to act if so disposed, and also as there has been no invasion of legal rights and imposition of obligations to be found in the report, *certiorari* does not lie."[83] It has been held, for comparable

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76. At p. 711, *per* Miller, J.

77. *Saulnier* v. *Quebec Police Commission* (1975) 57 D.L.R. (3d) 545, at p. 550, *per* Pigeon, J.

78. *ibid.*

79. cf. *Law Society of Upper Canada* v. *French* (1974) 49 D.L.R. (3d) 1.

80. *Re Nanticoke Ratepayers Association and Environmental Assessment Board* (1978) 83 D.L.R. (3d) 722.

81. Environmental Assessment Act, 1975 (Ontario), c. 69, s. 18

82. R.S.C. 1927, c. 26.

83. *Re Imperial Tobacco Co. and Imperial Tobacco Sales Co.* (1939) 4 D.L.R. 99 at p. 103, *per* Fisher, J.A.

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reasons, that the Electoral Boundaries Commission for Ontario[84] is not vested with judicial or quasi-judicial powers.[85] The effective ground of decision was that the report of the Commission was only one of a series of steps that lead to the legal duty and authority of the Governor-in-Council to make an order which operates to give the findings incorporated in the report the force of law.

(d) Even where the jurisdiction of the tribunal is purely investigative, supervisory review by the Courts may be resorted to if the tribunal, "in the exercise of (its) ancillary power, wrongfully impairs the liberty or goods of a person".[86] The courts of Manitoba have acknowledged as an elementary principle of law that "a man shall not suffer in person or in property unless he has had an opportunity of being heard".[87] The cases envisaged are those in which a Commission of Inquiry endeavours to subpoena witnesses and to impose sanctions on those who fail to appear or who appear but fail to give proper evidence when requested. A qualification consistently engrafted by the Canadian courts to this exception is that "A consideration of this kind of exception cannot arise until the Commissioner actually attempts to impose a sanction in the exercise of his ancillary powers, for it seems obvious that until a sanction is imposed it is impossible for a superior Court to decide whether the particular penalty is or is not an abuse of the ancillary powers."[88]

It is evident from this survey of divergent strands of authority that the structural framework of Canadian law involves the adoption, as a basic premise, of the principle that "An investigator or board who does not have the power to adjudicate in the sense of having the power to make a decision which will directly determine and affect the rights and obligations of parties, but rather has only the duty or power to investigate and make a report, exercises an administrative function and not a quasi-judicial function"[89] and is, therefore, outside

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84. See the Electoral Boundaries Readjustment Act, R.S.C. 1970.

85. *Penner* v. *Electoral Boundaries Commission for Ontario* (1977) 2 F.C. 58.

86. *Re Anderson and the Royal Commission into the Activities of Royal American Shows Inc.* (1978) 82 D.L.R. (3d) 706 at p. 711: of M.M.R. v. *Coopers and Lybrand* (1979) 92 D.L.R. (3d) 1 : *Re Petrofina Canada Ltd and Chairman, Restrictive Trade Practices Commission* (1980) 100 D.L.R. (3d) 494.

87. *Canadian Northern Railway Co.* v. *Wilson* (1918) 43 D.L.R. 412 at p. 417, *per* Merdue, C.J.M.

88. *Re Anderson and the Royal Commission into the Activities of Royal American Shows Inc.* (1978) 82 D.L.R. (3d) 706 at p. 711: cf. *M.M.R.* v. *Coopers and Lybrand*

89. *Re Nanticoke Ratepayers Association and Environmental Assessment Board* (1978) 83 D.L.R. (3d) 722 at p. 729.

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the reach of the writs. Such departures as are made in the decided cases have been supported on the basis of closely defined exceptions to the established principle.[90]

Sri Lankan Law

The Commissions of Inquiry Act of Sri Lanka[91] provides that "Whenever it appears to the Governor-General to be necessary that an inquiry should be held and information obtained as to *(a)* the administration of any department of Government or of any public or local authority or institution, or *(b)* the conduct of any member of the public service, or *(c)* any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare, the Governor-General may, by warrant under the Public Seal of the Island, appoint a Commission of inquiry consisting of one or more members to inquire into and report upon such administration conduct or matter".[92] This bears comparison with the provision contained in Canadian legislation[93] that "The Governor-in-Council may, whenever he deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof".[94]

In several Sri Lankan cases tribunals have been held not to be bound to act judicially on the ground that it was not within their competence to make an order "affecting the legal rights of persons". The view has been expressed that the courts have no controlling jurisdiction, exercisable by means of the writs of *certiorari* and prohibition, over a Commissioner appointed under the Commissions of Inquiry Act to investigate and to make recommendations.[95] What rendered the Commissioner in one case[96] amenable to *certiorari* was the important additional circumstance that special supplementary legislation[97] provided that a finding by the Commissioner that a person had been guilty of bribery would have the effect of depriving

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90. cf. R.D. Howe, *The Applicability of the Rules of Natural Justice to Investigatory and Recommendatory Functions* (1974) 12 Osgoode Hall Law Journal 179.

91. No. 17 of 1948.

92. Section 2 (1).

93. The Inquiries Act, R.S.C. 1952, c. 154, now R.S.C., 1970, c. 1-13.

94. Section 2

95. See the cases cited at notes 96 and 97. *infra.*

96. *de Mel* v. *de Silva* (1949) 51 N.L.R. 105.

97. The Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949.

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that person of his civic rights.[98] Subsequent legislation[99] has made this provision regarding the specific offence of bribery applicable to the findings of any Commissions of Inquiry appointed under the Commission of Inquiry Act.

The duty to act judicially has been considered inapplicable to a Commissioner appointed under this Act to inquire into alleged unlawful interception of telephone messages. A report by the Commissioner in which is contained a determination that X intercepted certain telephone messages at the instigation of Y and divulged the contents of the messages to Z cannot be regarded, consistently with the provisions of the Commissions of Inquiry Act, as embodying a determination which "can create, affect or prejudice rights or obligations of X, Y or Z".[100] Where a Commissioner was appointed under this Act to inquire into and report on the activities of the Fisheries Corporation, the Supreme Court declined to issue *certiorari* on the gound that "An examination of the provisions of the Commissions of Inquiry Act does not show that the report of the Commissioner was intended to be a step in a process which may in law have the effect of altering the legal rights or liabilities of persons named in that report".[101] The *ratio decidendi* was that "The whole process begins and ends with the inquiry and report".[102] The observation has been made by a Sri Lankan court, with reference to a Commission of Inquiry appointed under this statute: "The purpose of the Commission, which is merely to inquire into and report on certain matters, does not involve the exercise of judicial or quasi-judicial functions or even of executive power; that being so, any failure of the Commission duly to carry out its purpose is a subject for complaint to the Governor-General and not to the court.[103]

In keeping with this current of authority it has been held that the functions of a magistrate or inquirer holding an inquest of death are not of a judicial character.[104] The reason is that there is no power in an inquirer or magistrate to pronounce any "verdict"; his duty is only to record a finding of the cause of death, and this finding by

98. Section 5.

99. Public Bodies (Prevention of Corruption) Act, No. 13 of 1950.

100. *Dias* v. *Abeywardene* (1966) 68 N.L.R. 409.

101. *Fernando* v. *Jayaratne* (1974) 78 N.L.R. 123.

102. At p. 130, *per* Sharvananda, J.

103. In *Re Ratnagopal* (1968) 70 N.L.R. 409 at p. 428, *per* T.S. Fernando, J.

104. *Seneviratne* v. *Attorney-General* (1968) 71 N.L.R. 439. Canadian law is comparable: *Wolfe* v. *Robinson* (1962) O.R. 132.

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itself does not place in jeopardy vested rights or even automatically initiate legal proceedings.[105] The principle underlying this decision is that it is unusual for there to be a judicial determination of the question whether there is a *prima facie* case. "Every public officer who has to decide whether to prosecute ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him."[106] When the Principal Collector of Customs elects which of two penalties he will impose on a person who has violated the Customs Ordinance,[107] the election, *per se,* does not affect the rights of the individual, for it is only when he is sued for the amount that his rights are imperilled, and he would then have ample opportunity to place his case before the court.[108]It has been stressed that the Collector "makes no adjudication"[109] when he elects to seize goods statutorily declared to be forfeited. .

The Sri Lankan courts have readily implied the duty to act judicially in relation to proceedings which culminate in an award "potent with consequences to the parties".[110] This applies to an arbitrator appointed under the Industrial Disputes Act,[111] since the ultimate award is binding on the parties without any further step having to be taken. Moreover, statutory provision[112] which enables a party to repudiate an award does not have the effect of rendering the act of an arbitrator exclusively administrative in character.[113] It has been considered self-evident that the Chief Valuer functioning under the Mines and Minerals Law[114] has a duty to act judicially, in that "The determination of the Chief Valuer is binding on the person from whom the property was acquired and on the State Graphite Corporation and also on any other persons who had lesser interests in that property".[115] The emphasis in each of these situations was on the question whether the determination by the tribunal was self-executing.

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105. At p. 446, *per* Tennekoon, J.
106. *Wiseman* v. *Borneman* 1971 A.C. 297 at p. 308, *per* Lord Reid.
107. Legislative Enactments (1956 edition) Chapter 185.
108. *Jayawardena* v. *Silva* (1969) 72 N.L.R. 25.
109. *Palasamy Nadar* v. *Lanktree* (1949) 51 N.L.R. 520.
110. *Nadaraja Ltd* v. *Krishnadasan* (1975) 78 N.L.R. 255 at p. 261, *per* Sharvananda, J.
111. Legislative Enactments (1956 edition,) Chapter 131.
112. Industrial Disputes Act, No. 43 of 1950, section 20.
113. *South Ceylon Democratic Workers' Union* v. *Selvadurai* (1962) 71 N.L.R. 244 at p. 248 *per* T.S. Fernando, J.
114. No. 4 of 1973, section 64 (2).
115. *Kahatagaha Mines Ltd* v. *Fernando* (1976) 78 N.L.R. 273 at p. 276, *per* Tennekoon, C.J.

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The question has arisen in this context whether the "rights", the transgression of which is challenged by *certiorari*, must necessarily be legally enforceable rights. There is some Sri Lankan authority stating or implying an answer in the affirmative. *Certiorari* was considered not to lie against a Commission of Inquiry on the footing that "The report of the respondent has no binding force, it is not a step in consequence of which legally enforceable rights may be created or extinguished".[116] In a recent case[117] a former Prime Minister of Sri Lanka sought a writ of prohibition against a Special Presidential Commission of Inquiry. The Special Presidential Commissions of Inquiry Law[118] contained provision that "Where a Commission finds at the inquiry and reports to the President that any person has been guilty of any act of political victimization, misuse or abuse of power, corruption or any fraudulent act, in relation to any court or tribunal or any public body, or in relation to the administration of any law or the administration of justice, the Commission shall recommend whether such person should be made subject to civic disability, and the President shall cause such finding to be published in the *Gazette* as soon as possible and direct that such report be published".[119] Where the Commission made an adverse recommendation, the Constitution of Sri Lanka provides for the attachment of civic disabilities consequent on a resolution approved by the Cabinet of Ministers, introduced in Parliament by the Prime Minister and passed by not less than two thirds of the total number of Members, including those not present, voting in its favour.[120] The cumulative effect of these provisions was held to be tantamount to deprivation of accrued rights. The enforceability of these rights was clear. By virtue of the petitioner's election as a Member of Parliament she acquired the right to sit and vote in Parliament, and she became entitled to all the privileges, immunities and powers conferred by statute[121] on a Member of Parliament. The entirety of these attributes is subsumed in the concept of rights conferred and entrenched by rules of law.[122] The Sri Lankan Court of Appeal, granting the writ on the ground that the Commission acted in excess of their jurisdiction, declared:

116. *Fernando* v. *Jayaratne* (1974) 78 N.L.R. 123 at p. 129 *per* Sharvananda, J.

117 *Sirimavo Bandaranaike* v. *Weeraratne* (1978) Court of Appeal Application No. 1/1978 (unreported).

118. No. 7 of 1978.

119. Section 9(1).

120. Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, Article 81.

121. Parliament (Powers and Privileges) Act, No. 21 of 1953

122. cf. J. Salmond, *Jurisprudence* (11th edition), p. 270.

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"They are interests protected by the law, and are therefore vested rights in the true sense of that term. If the disqualification contemplated in the Law is imposed on the petitioner, there could be no doubt that these vested rights will be impaired."[123]

In the Special Presidential Commission of Inquiry case one of the arguments on behalf of the Republic of Sri Lanka was that the finding of the Commission and its recommendation could not assail any accrued right or attach any new disability without the necessary resolution being passed by Parliament in terms of the Constitution.[124] The Court of Appeal rejected this contention on the basis that the finding and the recommendation by the Commission should be viewed as "the first step in the process of attaching a new disability".[125] A finding of guilt and a recommendation for the imposition of civic disabilities constituted conditions precedent to action by the Legislature. It was held to be apparent that the report of the Commission was a step "in consequence of which legally enforceable rights may be extinguished, and new disabilities attached".[126]

The frontiers of judicial review in Sri Lanka have been considerably extended by a recent strand of opinion that prohibition and *certiorari* are not restricted to circumstances in which legally enforceable rights are contravened. Soon after the present Government of Sri Lanka assumed office in 1977, the President of the Republic appointed two Commissioners under the Commissions of Inquiry Act to inquire into and report on the affairs of local authorities and the persons, if any, who had been responsible for mismanagement, abuse of power, corruption or other irregularities. After the reports of the Commissioners were received, Parliament enacted two statutes[127] imposing civic disabilities on persons against whom findings had been made by the Commissioners and whose names were incorporated in the Schedules to the two Laws. Fifteen petitioners applied for writs of *certiorari* to quash the findings of the two Commissions relating to them on the ground, *inter alia*, that there had been a failure to observe the rules of natural justice.[128] The Court of Appeal considered, *in limine*, the question whether the inquiries and reports of the

123. See p. 15 of the judgment (unreported).
124. Article 81.
125. At p. 16 of the judgment (unreported).
126. *ibid.*
127. Law No. 38 of 1978 and Law No. 39 of 1978.
128. *Mendis* v. *Silva* (1978) Court of Appeal Application No. 669/78 (unreported).

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Commissions were amenable wholly or in part to *certiorari*. Rejecting the contention that *certiorari* did not lie because no legally enforceable right of the petitioners had been placed in jeopardy, the Court of Appeal adverted with emphasis to the grave consequences of an adverse finding by the Commissions on the character and reputation of the petitioners.

The contemporary law of Sri Lanka embodies a series of amorphous principles as to the dimensions of judicial control of administrative "decisions or determinations". The assumption pervading the early Sri Lankan cases that a "fact-finding" Commission would be treated as a judicial body only if some other authority was *necessarily* required to act on its findings[129] has been discarded in subsequent judicial pronouncements which recognize that the duty to act judicially may well attend an investigation which *could* reasonably result in a disability or sanction imposed by an independent functionary or tribunal on the footing of recommendations made as a sequel to the investigation.[130] An equivalent principle permeates some Australian[131] and Canadian[132] decisions which are at variance with the attitude that distinct responsibility vested in the body empowered to make the final determination in its own discretion militates necessarily against a duty to act judicially on the part of the tribunal embarking on the investigation and submitting its report.

The principle countenanced by English authority[133] that a judicial component may infuse the functions of an investigative body the recommendations of which are by no means binding on the authority receiving the report, finds expression either directly or as an inarticulate premise in recent Sri Lankan decisions. Indeed, the rudiments of procedural fairness have been invoked successfully in England in relation to bodies which are not legally entitled to submit recommendations to the deciding body at all.[134] The values sustaining emphasis on this principle, presenting as they do a vivid contrast with assertions of the non-judicial character of inquiries of this kind,[135]

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129. *de Mel* v. *de Silva* (1949) 51 N.L.R. 105 at pages 111-112.

130. *Mendis* v. *Silva, supra.*

131. *Ex parte Mineral Deposits Pty. Ltd, re Claye and Lynch* (1959) S.R. (N.S.W.) 167.

132. *R.* v. *Ontario Labour Ralations Board, ex parte Kitchener Food Market Ltd* (1966) 57 D.L.R. (2d) 521.

133. *Marriott* v. *Minister of Health* (1935) 154 L.T. 47.

134. *Wednesbury Corporation* v. *Ministry of Housing and Local Government* (No. 2) (1966) 2 Q.B. 275.

135. *Hearts of Oak Assurance Co.* v. *Attorney-General* (1932) A.C. 392 ; *Re S.B.A. Properties Ltd. (1967) 1 W.L.R. 799.*

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are closely interlinked with such ideas as irreparable damage to reputation or exposure to scandal[136] and the emergence of a novel hazard potentially injurious to existing rights or settled expectations.[137] The policy rationale underlying recent Sri Lankan decisions is, on the whole, in harmony with these benefical extensions of the scope of *certiorari* and prohibition.

Policy Objectives and Development of the Law

It is an assumption of the law in Commonwealth jurisdictions, including Canada and Sri Lanka, that *certiorari* lies only to quash "a determination or a decision"[138] and that a report containing mere recommendations cannot be impugned by *certiorari.*[139] In some Australian decisions the principle is formulated uncompromisingly that "legal consequences",[140] in the sense of "a direct effect upon legal rights",[141] must be shown to arise from a report before the prerogative writs could be granted.[142] The essential element is a "new jeopardy"[143] so understood.

However, the dividing line between a determination and a recommendation is tenuous in peripheral contexts. In an Indian case[144] the function of a selection board was to prepare a list in order of preference for appointment to the Indian Forest Service and to forward the list to the Union Public Service Commission. In terms of the applicable rules it was evident that the recommendations of the selection board were not binding on the Commission which was entitled to base its decision on the observations of the Minister and on the records of other eligible officers. Rejecting a submission that the selection board was not required to determine any right, the Indian Supreme Court declared: "Looking at the composition of the board and the nature of the duties entrusted to it, we have no

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136. *Re Ontario Crime Commission* (1962) 133 C.C.C. 116.

137. *Testro Bros. Pty. Ltd.* v. *Tait* (1963) 109 C.L.R. 353.

138. *R.* v. *St. Lawrence's Hospital Statutory Visitors, ex parte Pritchard* (1953) 1 W.L.R. 1158 at p. 1166, *per* Parker, J.

139. *R.* v. *Macfarlane : ex parte O'Flanagon and O'Kelly* (1923) 32 C.L.R. 518 ; of *Ex parte Hirsch* (1960) O.R. 159.

140. *McGuinness* v. *Attorney-General for Victoria* (1940) 63 C.L.R. 73 at p. 102 *per* Dixon, J.

141. *R.* v. *Coppel ; Ex parte Viney Industries Pty. Ltd* (1962) V.R. 630.

142. cf. *R.* v. *Collins: Ex parte A.C.T.U. – Solo Enterprises Pty. Ltd* (1976) 50 A.L.J.R. 471.

143. *Testro Bros. Pty Ltd* v. *Tait* (1963) 109 C.L.R. 353 at p. 369, *per* Kitto. J.

144. *Kraipak* v. *Union of India* (1970) A.I.R. (S.C.) 150.

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doubt that its recommendations should have carried considerable weight with the Commission."[145] The High Court of Australia has recognized that the fact that the report is not self-executing or that the discretion of the Executive is interposed between it and any actual consequences to the person affected does not necessarily preclude the issue of *certiorari* or prohibition.[146] In the present condition of the Canadian, Sri Lankan and other Commonwealth authorities, it is clear that *certiorari* is not confined to situations in which the body responsible for the final determination lacks discretion to refrain from acting on the recommendation made to it.

It has been suggested in Sri Lanka that the duty to act judicially devolves on a Commission only where "according to the statutory scheme the report has the probability or potentiality in law of affecting prejudicially the rights of individuals, by reason of the statutory scheme itself making it possible for the report to be the basis of affecting the legal rights or liabilities of a person to whom it relates" [147] It is submitted, however, that there is an adequate basis for *certiorari* if the recommendation is an indipensable part of the proceedings which are capable of resulting in a decision or action entailing detriment to the petitioner.

Judicial pronouncements in Canada as well as in Sri Lanka concede that Commissions of Inquiry are amenable to *certiorari* and prohibition on the ground of violation of the rules of natural justice in circumstances where their deliberations and actions have no impact on legally enforceable rights. The Appellate Division of the Alberta Supreme Court commented: "It can be said on occasion that to not lay charges may place the person who has come under suspicion in the report in a position where he has not had the opportunity to clear his name by obtaining an acquittal."[148] The Sri Lankan Court of Appeal, significantly influenced in granting *certiorari* by the consideration that the persons seeking relief were all men in public life, remarked: "To them, more so perhaps than to others, their integrity, character and reputation are all important. Any adverse decision on those matters would undoubtedly affect their character, reputation and integrity, blast their reputation for ever and ruin their future careers; so that, apart from the loss of their civic rights, the determination of the

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145. At p. 157, *per* Hedge, J.

146. *Brettingham-Moore* v. *St. Leonards Municipality* (1969) 121 C.L.R. 509 at p. 522, *per* Barwick, C.J.

147. *Fernando* v. *Jayaratne*, *supra* at p. 128, *per* Sharvananda, J.

148. *Re Orysiuk and R.* (1977) 37 C.C.C. (2d) 445 at p. 455, *per* Morrow, J.A.; *Re Public Inquiries Act and Shulman* (1967) 2 O.R. 375.

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two Commissions would grievously affect these persons."[149] In a case where the Board of Trade, far from having the duty to determine any matter, even in the sense of expressing an opinion whether there was a *prima facie* case or not, was required only to investigate and report, the English Court of Appeal said: "Their proceedings are not judicial proceedings. They are not even quasi-judicial. But this should not lead us to minimize the significance of their task. They have to make a report which may have wide repercussions. They may accuse some, they may condemn others, they may ruin reputations or careers."[150]

All that is necessary according to the liberal view which has gained acceptance, is that the applicant should have "some right or interest or legitimate expectation of which it would not be fair to deprive him without hearing what he has to say".[151] This approach,[152] which is conducive to accomplishment of the objective of imparting greater effectiveness and coherence to the principles regulating the grant of the prerogative writs, cannot be reconciled with insistence on violation of legally enforceable rights as a necessary requirement of relief.

Many of the unsatisfactory features of trends of judicial decision in Canada and in Sri Lanka derive from adherence to the conceptual analysis which distinguishes rigidly between quasi-judicial and administrative functions, and from the classification of the functions of Commissions of Inquiry as exclusively administrative in character. The element pertaining to the duty to act judicially, together with its concomitants such as the notion of a *lis inter partes*,[153] as an essential requisite of *certiorari* and prohibition, owes its origin to

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149. *Mendis* v. *Silva* (1978) Court of Appeal Application No. 669/78 (unreported), at p. 24 of the judgment, *per* Vytilingam, J.

150. *In Re Pergamon Press* (1970) 3 All E.R. 535 at p. 539, *per* Lord Denning, M.R. *Gaiman* v. *National Association for Mental Health* (1971) Ch. 317 ; *Breen A.E.U.* (1971) 2 Q.B. 175 : *Furnell* v. *Whangarai High Schools Board* (1973) 2 W.L.R. 92.

151. *Schmidt* v. *Secretary of State for Home Affairs* (1969) 2 Ch. 149; cf. for a striking illustration of this trend in Australia *R.* v. *McArthur ex parte Cornish* (1966) Tas. S.R. 157.

152. Statutory provisions in Ontario reflect an analogous trend : see section 5 of the Public Inquiries Act, 1971 (S.O. 1971, volume 2, c. 49). For a general assessment of judicial attitudes, see H.L. Molot, *Administrative Discretian and Current Judicial Activism* (1979) 11 Ottawa Law Review 337.

153. For a recent example of judicial assertion of the importance of this element, see the judgment of the Trial Division of the Federal Court in *Re-Copeland and McDonald* (1979) 88 D.L.R. (3d) 724 at p. 729, *per* Cattanach, J.; cf. the approach of the Ontario High Court of Justice in *Re Dagg and Ontario Human Rights Commission* (1979) 102 D.L.R. (3d) 155 at p. 159 *per* Griffiths, J.

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historical factors in England.[154] Nevertheless, in recent years, the English courts have liberated themselves substantially from the thraldom of concepts of their own making. Lord Widgery, C.J., has been explicit : "One knows nowadays that it is not necessary to show a judicial act in order to get *certiorari*."[155] Moreover, in Commonwealth jurisdictions including Canada,[156] the courts have recently been prepared to require standards of procedural fairness and objectivity outside the sphere of quasi-judicial functions and powers.

Conclusion

A satisfying and coherent approach to the problem, it is conceived, should proceed on the basis of ascertainment and evaluation of the nature of the function discharged by the Commission in question. In principle, a Commission which serves merely "to inform the mind of government"[157] should not be susceptible to the supervisory jurisdiction of the courts. On the other hand, Commissions of Inquiry the functions of which subject individuals and legal entities to jeopardy or hazard should be capable, as a matter of policy, of being reached by *certiorari* and prohibition. The general principle that Commissions of Inquiry do not attract these writs because of the investigative character of their work, is not a suitable point of departure for the

154. During the Tudor period justices of the peace emerged as the pivots of local administration and, after the abolition of prerogative courts like the Court of Star Chamber, an important aspect of the jurisdiction of the Court of King's Bench concerned surveillance of their functions. The concept of a judicial function as a prerequisite of review by *certiorari* and prohibition had its origin in the judicial veneer which characterized the administrative duties of justices of the peace. The assumption that a great part of their administrative work was tantamount to "the exercise of a jurisdiction" (F.W. Maitland, 'The Shallows and Silences of Real Life,' *Collected Papers*, volume 1, p. 478) profoundly influenced the development of terminology in respect of the *facta probanda* of the writs. Although their "jurisdiction", for practical intents and purposes, was construed in a sense coeval with "power" or "authority", the limitation of *certiorari* and prohibition to decisions involving the performance of a judicial function took firm root in English law.

155. *R.* v. *Hull Prison Board of Visitors* (1978) 2 All E.R. 198 at p. 202.

156. *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1979) 88 D.L.R. (3d) 671; at pages 680-683 ; *McCarthy* v. *Board of Trustees of Calgary Roman Catholic Separate School District No.* 1 (1979) 101; D.L.R. (3d) 48 at pages 55-56 ; *Re Gillingham and Metropolitan Totonto Board of Commissioners of Police* (1979) 101; D.L.R. (3d) 570 at p. 575.

157. *R.* v. *Collins: Ex parte A.C.T.U. – Solo Enterprises Pty. Ltd supra*, at p. 473, *per* Stephen, J.

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modern law which has to contend with the rapid proliferation of tribunals of this kind and with the increasing variety and complexity of their functions. It is undeniable that "An unjust decision in an administrative inquiry in the context of a Welfare State may have greater effect than a decision in a quasi-judicial inquiry".[158] The availability of the writs against Commissions of Inquiry in the contemporary context should depend not on conceptual or terminological criteria but on pragmatic considerations like the role of policy and expediency in the tasks assigned to the tribunal. Extensive discretionary power has been thought to be inconsistent with imposition of the duty to comply with such objective standards as the rules of natural justice,[159] and the courts have generally shown themselves disinclined to invoke a supervisory jurisdiction in these contexts.[160] It is important to preserve the potential of the law for development in the future by releasing it from restraints and inhibitions, embedded in historical circumstances, which are not defensible from the standpoint of policy.

158. *Fernando* v. *Jayaratne* (1974) 78 N.L.R. 123 at p. 130 *per* Sharvananda, J.

159. *R.* v. *Secretary of State for the Environment; Ex parte Ostler* (1976) 3 W.L.R. 288.

160. *Boucant Bay Co.* v. *Commonwealth* (1927) 40 C.L.R. 98; *Giese* v. *Wiliston* (1963) 37 D.L.R. (2d) 447; *B.P. Australia Ltd* v. *Gold Coast City Council* (1967) Qd. R. 307. For recent Canadian decisions reflecting this view, see *Martineau* v. *Matsqui Institute Disciplinary Board* (No. 2) (1979) 106 D.L.R. (3d) 385 at p. 410, *per* Dickson, J: *Re Soloniuk and Meewasin Valley Authority* (1980) 109 D.L.R. (3d) 408 at p. 420, *per* Noble, J.

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PROCEDURAL FAIRNESS IN RELATION TO ADMINISTRATIVE DECISIONS: RECENT TRENDS IN CANADIAN LAW

IN a perceptive article[1] published in 1975 Professor D.J. Mullan welcomed the doctrine of procedural fairness as "a most desirable advance in the common law relating to judicial review of administrative action".[2] However, the uncertainty surrounding the status and dimensions of the doctrine at the time he wrote is reflected in Mullan's assertion that "All courts in Canada still have a choice as to whether they are going to accept the English movement towards a duty to act fairly with procedural content".[3] There have been significant developments in Canadian administrative law since then, and the entrenchment of the principle as a basis of judicial review admits of little controversy today. Recent academic reaction in Canada has ranged from denigration of the new concept as undermining the autonomy of the legal order and as destroying "the distinctiveness of the methods and functions of administrative adjudication"[4] to the anticipation of a sophisticated institutional model which would strengthen and enhance implied procedural review.[5] The purpose of this chapter is to survey contemporary trends in Canada regarding the concept of fairness, with particular reference to its rationale and scope, the different connotations of fairness in the context of administrative decisions and the relationship between the emergent doctrine and the traditional rules of natural justice in the light of current judicial attitudes. Possible approaches to the problems which remain are assessed, drawing on the experience of other Commonwealth jurisdictions, and some tentative conclusions are offered as to the policy framework of modern Canadian law on the basis of the decided cases.

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1. D.J. Mullan, "Fairness: The New Natural Justice?" (1975) 25 *University of Toronto Law Journal* 281.

2. At 300.

3. At 296.

4. M. Loughlin, "Procedural Fairness: A Study of the crisis in Administrative Law Theory" (1978) 28 *University of Toronto Law Journal* 215 at 240.

5. R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law." (1980) 26 *McGill Law Journal* 1 at 22. Cf. H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) *Osgoode Hall Law Journal 1;* Grey, "The Duty to Act Fairly After *Nicholson*" (1980) 25 *McGill Law Journal* 598; H.W. Arthurs, "Jonah and the Whale: The Appearance, Disappearance and Reappearance of Administrative Law" (1980) 30 *University of Toronto Law Journal* 225.

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The content of fairness

An analysis of the case law in Canada and in other Commonwealth jurisdictions suggests that the standard of fairness is susceptible to several interpretations. Although there is some overlap, these connotations are broadly distinct.

(i) In a series of Canadian judgments fairness has been construed as requiring no more than good faith in reaching a decision. In a case where a school board decided to use an existing school for expanding a French immersion programme and required pupils formerly attending the school to go to another school in the vicinity, the Manitoba Court of Queen's Bench declared: "If they (the school trustees) acted fairly, in good faith, and within their jurisdiction, the Court cannot intervene."[6] A comparable approach is suggested by the statement that "the fundamental obligation"[7] of an administrative tribunal or functionary is "to demonstrate objectivity and fair play".[8] This connotation of fairness, which is axiomatic in Canadian law[9] and finds support in contemporary English decisions[10] signifies no novel development of established principles of judicial review.

(ii) Inherent in the postulate of good faith is the lack of bias. The Supreme Court of New Zealand has pointed out that "The requirement of fairness in exercising an administrative statutory power of decision necessarily includes an impartial consideration of the relevant application. Impartiality is subsumed within the whole concept of fairness".[11] Although it is clear that bias is tantamount to denial of fairness, classification of the relevant tribunal's function as quasi-judicial or as administrative governs, together with other factors, the meaning of bias. It has been consistently emphasized in Canada that the commitment of members of elected bodies to policies and programmes of a general nature does not furnish evidence of bias, within the framework of administrative decision-making procedures. The Manitoba Court of Queen's Bench stated: "One can reasonably expect that duly elected public representatives will have preconceived views on

6. *Damus* v *Board of Trustees of St Boniface School Division No.4* (1980) 108 DLR (3d) 530 at 542 *per* Morse J.

7. *Roper* v *Executive Committee of the Medical Board of the Royal Victoria Hospital* (1974) 50 DLR (3d) 725 (SC of Canada) at 728, *per* De Grandpre J.

8. *ibid.*

9. *Roncarelli* v *Duplessis* (1959) SCR 121 (SC of Canada); *Re Training Schools Advisory Board* (1972) 1 OR 14 (Ontario HC) at 17-18.

10. *R.* v *Secretary of State Ex parte Perestrello* (1980) 3 WLR 1 (QB) at 13 *per* Woolf J.

11. *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR 342 at 348 *per* Mahon J.

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particular subjects .... Surely, they should not be condemned or be found to have failed in their duty to act fairly because they hold to their views and seek to bring about that which they were elected to do, provided they act in good faith."[12] An important consideration is that "They are not judges but legislators from whom the ultimate recourse is to the electorate".[13] On the other hand, it has been recognized that "In respect of a quasi-judicial tribunal in the fullest sense of that concept required to adhere to the principles of natural justice, this would amount to an allegation of bias such as might be ground for quashing the decision".[14]

(iii) The Supreme Court of New Zealand, in a case[15] where review proceedings were instituted against a minister for his refusal to grant an entry permit to an alien, associated unfairness with advertence to irrelevant considerations. The minister's decision was sought to be impugned on the ground that the minister, in exercising his discretion, had taken into account irrelevant matters and had acted unfairly. Although the facts disclosed no unfairness on the part of the minister or his department, the court indicated that such a claim could succeed in an appropriate case.

(iv) In contrast to the above meanings of fairness, a recent line of Canadian judicial opinion has unequivocally accorded the doctrine of fairness a procedural content. On the assumption that the Ontario Human Rights Commission was required to act fairly, the Ontario High Court of Justice expressed the view that that duty "required the Commission to receive the representations of the applicant and to give the applicant the substance of the information upon which the Commission relied in arriving at their decision".[16] Where a probationary police constable was requested by his superior officers to relinquish his post on the ground that he had been involved in an altercation while he was off duty, the Ontario High Court of Justice held that the Board of Commissioners of Police which confirmed the 'resignation' without hearing the constable despite attempted withdrawal of the 'resignation' by him, had failed to act fairly by

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12. *Damus* v *Board of Trustees of St Boniface School Division No. 4* (1980) 108 DLR (3d) 530 at 541 *per* Morse J.

13. *Re Cadillac Development Corporation Ltd and City of Toronto* (1973) 39 DLR (3d) 188 at 211 *per* Henry J.

14. *id* at 210.

15. *Lucas* v *Colman* (Wellington Registry M 134/75 27 March 1975 unreported).

16. *Re Dagg and Ontario Human Rights Commission* (1979) 102 DLR (3d) 155 at 159 *per* Griffiths J.

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refusing to give the constable an opportunity to answer the case against him.[17] The Federal Court of Appeal has acted on the principle that where one of the parties to a dispute is given the opportunity to reply to the petition of another, the nature of the answer may be such that fairness requires that the latter be afforded a further opportunity to reply.[18] The Ontario Court of Appeal has entertained no doubt that a Housing Corporation acts fairly when it makes a tenant aware of the complaints giving rise to the proposed termination of his tenancy and allows the tenant an opportunity to remedy the complaints or to answer them.[19] A school board investigating complaints about the principal of a school was considered by the Supreme Court of Nova Scotia to have discharged adequately its duty to act fairly by giving the principal the opportunity at a series of meetings *in camera* to meet the charges against him.[20]

The emphasis on procedural content is apparent in the recent pronouncement by the New Zealand Supreme Court that "The keystone of ... the doctrine of administrative fairness where a power of statutory decision is involved, consists in the procedure adopted in arriving at the relevant decision. Assuming the findings to have been *intra vires*, it is always the procedural content of the impugned process which will govern the question of validity".[21] In a case where the sole question was whether the Egg Marketing Authority had acted fairly in exercising its power of decision, the New Zealand Supreme Court granted *certiorari* because the authority had failed to give the hearing which fairness demanded.[22] The cardinal principle is that "If, in the exercise of a statutory power of decision, an executive official or statutory body adopts a procedure which reasonably inspires an objective lack of confidence in the fairness or integrity of the decision making process, then the resulting determination is open to successful challenge upon an application for review".[23]

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17. *Re Gillingham and Metropolitan Toronto Board of Commissioners of Police* (1979) 101 DLR (3d) 570.

18. *Intuit Tapirisat of Canada* v *Leger* (1978) 95 DLR (3d) 665.

19. *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187.

20. *Re Ratepayers of the School District of the New Ross Consolidated School and Chester and District Municipal School Board* (1979) 102 DLR (3d) 486 at 495 *per* Glube J.

21. *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR 342 (SC) at 347 *per* Mahon J.

22. *Smit* v *Egg Marketing Authority* (Wellington Registry A 189/71 21 March 1973 unreported).

23. *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979)1 NZLR 342 at 348 *per* Mahon J.

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These authorities leave no room for doubt that the concept of fairness is invested with procedural content in contemporary Canadian and New Zealand law. Recent English decisions,[24] following earlier authority,[25] reflect an indistinguishable trend. In relation to the discharge of a probationary police constable on the basis of a charge of perjury, the Ontario court of appeal formulated the gist of the procedural content of fairness as follows: "Was the applicant told why his services were being dispensed with, and was he given a fair opportunity to respond?"[26] When a member of a prisoners' rights group had her visiting privileges at a provincial institution discontinued, without the assignment of any reason except that her privileges "would not be in the best interests of the institution", the majority of the court of appeal of British Columbia was of opinion that no obligation of fairness was applicable[27] but, had a different finding been reached on this point, the appropriate standard of fairness would have been that the member be informed of the general nature of the allegations relating to her on which the decision might be founded, and that she be given an opportunity, by any reasonable method, of refuting them.[28]

The procedural content of fairness, explicitly conceded in the case law, is naturally variable, in view of the diversity of circumstances in which the duty to act fairly has been invoked. The modern Canadian approach is founded on the premise that "Between judicial decisions and those which are discretionary and policy oriented will be found a myriad decision making processes with a flexible gradation of procedural fairness through the administrative spectrum".[29] The policy of the courts must perforce envisage "a continuum ranging from a pure executive function on one end to a judicial function on

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24. *R.* v *Secretary of State for the Home Department, Ex parte Hosenball* (1977) 3 All ER 452; *McInnes* v *Onslow Fane* (1978) 3 All ER 211; *Norwest Holst Ltd* v *Department of Trade* (1978) 3 All ER 280; *Lewis* v. *Heffer* (1978) 3 All ER 354; *Cinnamond* v *British Airports Authority* (1980) 1 WLR 582; *R.* v *Secretary of State for Trade, Ex parte Perestrello* (1980) 3 W.L.R.1

25. For an exhaustive list, see D.J. Mullen *op cit* 305 note 104.

26. *Re Proctor and Board of Commissioners of Police of the City of Sarnia; Attorney-General for Ontario Intervenant* (1979) 99 DLR (3d) 356 at 368 *per* Thorson JA.

27. *Culbane* v *Attorney-General of British Columbia and Harrison* (1980) 108 DLR (3d) 648.

28. At 666 *per* Lambert JA.

29. *Martineau* v *Matsqui Institute Disciplinary Board (No.2)* (1979) 106 DLR (3d) 385 (SC of Canada) at 410 *per* Dickson J.

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the other".[30] "What is really in issue is what it is appropriate to require of a particular authority in the way of procedure, given the nature of the authority, the nature of the power exercised by it, and the consequences of the power for the individuals affected."[31] The empirical and *ad hoc* assessment of the content of procedural fairness, which is characteristic of modern law, has been stressed by the New Zealand Supreme Court.[32]

The Classification of Functions

One of the central themes of Mullan's article concerned the value of the doctrine of procedural fairness "primarily because it allows the courts to ask what kinds of procedural protections are necessary for a particular decision making process unburdened by the traditional classification process. In other words, it enables the asking of the real questions which the classification process has hidden artificially for many years."[33] The utility of the evolving concept, according to his approach, is directly linked to its potential in respect of relegation of the criteria underlying the orthodox classification of functions. Mullan cautioned: "It may be that the fairness doctrine will not dispense with the traditional classification process. Indeed, it could lead to an additional classification decision having to be made by the courts and, in so far as this is possible, there are dangers in the development of fairness."[34] Mullan suggested that atrophy of the classification process would presage "a highly desirable simplifying of the theoretical underpinnings of the law in this area".[35]

Indeed, the suggestion that the notion of fairness effectively dispenses with the need for classification of functions as judicial, quasi-judicial or administrative derives support from a group of Canadian decisions.

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30. *MNR* v *Coopers and Lybrand* (1978) 92 DLR (3d) 1 (SC of Canada) at 7 *per* Dickson J.

31. *Intuit Tapirisat of Canada* v *Leger* (1978) 95 DLR (3d) 665 (Fed Ct of App) at p 671-672 *per* Le Dain J.

32. "The doctrine of fairness defies any general classification. Its application to the administrative decision represents the function of a group of variables comprising the intermingled elements of law and fact which control the decision, and it is not possible ... for the law to prescribe a code of administrative procedure. Everything turns on the circumstances of the case" *(Meadowvale Stud Farm Ltd* v *Stratford County Council* [1979] 1 NZLR 342 at 346 *per* Mahon J).

33. D.J. Mullan "Fairness: The New Natural Justice?" (1975) 25 *University of Toronto Law Journal* 281 at 300.

34. *Op cit* at 303.

35. *Op cit* at 315.

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Typical of this line of authority is the observation by the Supreme Court of British Columbia that "Classification is not necessary; rather, the duty to act 'fairly' or 'judicially' should be viewed as increasing in its procedural requirements the closer one moves to the judicial end, and the greater the effect on the rights of the affected party".[36] In similar vein a judge of the appellate division of the Alberta Supreme Court remarked, in the course of a decision[37] imposing on a municipal corporation the duty to act with fairness: "I find it unnecessary to 'characterise' council's function in its handling of the appellant's application for reclassification."[38] There has been abundant authority in Ontario[39] and British Columbia[40] and in judgments of the Canadian Supreme Court[41] that the application of at least some of the elements of natural justice should be independent of classification of functions. Recently the English court of appeal has been emphatic in its opinion that "Nowadays the rules of natural justice apply not only to people doing a judicial act: they often apply to people exercising an administrative power",[42] and the New Zealand court of appeal has commented that a clear-cut distinction "is not in these days to be accepted as supplying the answer".[43]

Nevertheless, the consensus of judicial opinion in Canadian jurisdictions today is manifestly consistent not only with retention of the traditional classification process but with its treatment as a factor

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36. *Re Provincial Agricultural Land Commission and Pickell* (1980) 109 DLR (3d) 465 at 47 *per* Mackinnon J.

37. *Campeau Corporation* v *City of Calgary* (1978) 7 Alberta LR (2d) 294.

38. At 302 *per* Lieberman JA. For a comparable approach, see *Re Chadwill Coal Co. Ltd and McRae* (1976) 14 OR (2d) 394 at 396 *per* Reid J; *Re Abel and Director, Pentaguishene Mental Health Centre* (1979) 24 OR (2d) 279 at 294 *per* Grange J. Both were decisions of the Ontario High Court of Justice.

39. *Re Cloverdale Shopping Centre Ltd and Township of Etobicoke* (1966) 57 DLR (2d) 200 *Re Cardinal and Board of Commissioners of Police of City of Cornwall* (1973) 42 DLR (3d) 323; *Re Dick and Attorney-General for Ontario* (1973) 42 DLR (3d) 657; *Re Roberts and Niagara South Board of Education* (1974) 1 OR (2d) 548; *Re Convalodge Ltd & CUPP Local 1496* (1974) 45 DLR (3d) 488.

40. *R.* v *British Columbia Pollution Control Board Ex parte Greater Campbell River Water District* (1967) 61 DLR (2d) 221; *R.* v *Venables Ex parte Jones* (1970) 15 DLR (3d) 35; *Urbanek* v *College of Physicians and Surgeons of British Columbia* (1972) 24 DLR (3d) 9.

41. *St. John* v *Fraser* (1935) SCR 441 at 452 *per* Davis J; *Guay* v *Lafleur* (1965) SCR 12 at *per* Hall J.

42. *Cinnamond* v *British Airports Authority* (1980) 1 WLR 582 at 590. Lord Denning MR has repeatedly expressed this view: see *Breen* v *Amalgamated Engineering Union* (197) 2 QB 175; *Pearlberg* v *Varty* (1971) 1 WLR 728; *In re Pergamon Press Ltd* (1971) Ch 38.

43. *Lower Hutt City Council* v *Bank* (1974) 1 NZLR 545 at 548 *per* McCarthy P.

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of decisive importance from the standpoint of the availability and intensity of judicial review.

The proposition which commended itself to an English court, that "In the sphere of the so-called quasi-judicial the rules of natural justice run, and the administrative or executive field there is a general duty of fairness",[44] crystallizes the prevailing view in Canada. The Alberta Supreme Court has set out its approach as follows: "When the duty is characterized as judicial or quasi-judicial, the rules of natural justice apply; even though the act is characterized as administrative, however, there is a duty to act fairly."[45] The Saskatchewan Queen's Bench[46] has made this comment on the present condition of the law: "It has long been acknowledged that, while the Superior Courts have the power by use of the prerogative writs to review or supervise the activities of statutory bodies exercising judicial or quasi-judicial functions, that power in general terms was not extended to the acts of statutory bodies, tribunals, commissions or bodies which exercised purely administrative functions. However, in recent years, even the purely administrative bodies have been required by the Courts to observe procedural fairness in dealing with the rights of members of the public affected by their decisions."[47] The Federal Court of Appeal has recently proceeded on the basis that the discretion exercised by the Governor-in-Council under the National Transportation Act[48] to vary or rescind orders or rules of the petition of an interested party or of his own motion cannot be characterized as judicial or quasi-judicial in nature but that, where the discretion is exercised in the former situation, there is a duty in the Governor-in-Council to act fairly from a procedural point of view.[49] The Supreme Court of Canada, considering that the power of the minister to cancel an entry permit was "intended to be purely administrative and not to be carried out in any judicial or quasi-judicial manner",[50] yet concluded: "It is true that, in exercising ... an administrative power, the Minister is required to act fairly."[51]

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44. *Bates* v *Lord Hailsham of St Marylebone* (1972) 1 WLR 1373 at 1378, *per* Magarry J.

45. *McCarthy* v *Board of Trustees of Calgary Roman Catholic Separate School District No. 1* (1979) 101 DLR (3d) 48 at p.55-56 *per* Laycraft J.

46. *Re Soloniuk and Meewasin Valley Authority* (1980) 109 DLR (3d) 408.

47. At 417 *per* Noble J.

48. RSC c N-17 s 64(1).

49. *Intuit Tapirisat of Canada* v *Leger* (1978) 95 DLR (3d) 665.

50. *Minister of Manpower and Immigration* v *Hardeyal* (1977) 75 DLR (3d) 465.

51. At 471; cf *Re Alberta Union of Provincial Employees and Alberta Classification Appeal Board* (1977) 81 DLR (3d) 184 (Alberta SC Trial Div) at 195 *per* McDonald J.

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The crucial consequences of classification are underscored in Canadian judgments and in academic writing. The Ontario Divisional Court has described the classification of a function as judicial or quasi-judicial, on the one hand, or as administrative, executive or legislative, on the other, as "continuing to provide, in our jurisdiction, the key to the question of whether a hearing is required."[52] The Canadian Supreme Court has characterized this dichotomy as "the essential criterion for application of the rules of natural justice".[53] This is supported by a *cursus curiae*.[54] In keeping with these authorities a recent edition of a Canadian textbook on administrative law suggests that "Different, frequently opposite, consequences flow from classification as judicial or administrative (or otherwise non-judicial)".[55]

The difficulties attendant on the classification process have been acknowledged candidly by the Canadian courts.[56] "The lines of demarcation are not clear, and sometimes the statutory body is empowered to act both judicially and administratively in the same statute."[57] This consideration has greatly increased the complexity of the classification process. Thus, it has been said: "The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component and some administrative or ministerial, or perhaps better categorized as business powers."[58] The appellate division of the Supreme Court of Alberta has favoured the approach that "A composite function which involves both judicial and administrative duties is (to be) properly designated as quasi-judicial".[59]

One of the primary reasons for the importance of the classification of functions is that the identity of the remedy at common law could well depend on the result of the classification. R.F. Reid and H.

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52. *Re Braeside Farms Ltd and Treasurer of Ontario* (1978) 88 DLR (3d) 267 at 272.

53. *Intuit Tapirisat of Canada* v *Leger* (1978) 95 DLR (3d) 665 at 669 note 2 *per* Le Dain J.

54. *Wiswell* v *Metropolitan Corporation of Greater Winnipeg* (1965) 51 DLR (2d) 754; *Walters* v *Essex County Board of Education* (1973) 38 DLR (3d) 693; *Saulnier* v *Quebec Police Commission* (1975) 57 DLR (3d) 545 *Mitchel* v *R.* (1975) 61 DLR (3d) 77; *Bowen* v *City of Edmonton* (1977) 80 DLR (3d) 501.

55. R.F. Reid and H. David, *Administrative Law and Practice* (2 ed) 1978 167.

56. *Voyageur Explorations Ltd* v *Ontario Securities Commission* (1969) 8 DLR (3d) 135 at 140.

57. *Re Soloniuk and Meewasin Valley Authority* (1980) 109 DLR (3d) 408 at 421-422 *per* Noble J.

58. *Wellbridge Holdings Ltd* v *Metropolitan Corporation of Greater Winnnipeg* (1970) 22 DLR (3d) 470 at 477 *per* Laskin J.

59. *Re Harvie and Calgary Regional Planning Commission* (1978) 94 DLR 49 at 62 *per* Clement JA.

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David are of opinion that "The popular remedy, *certiorari*, is available to question judicial and quasi-judicial functions but does not avail against administrative functions".[60] In a situation where the tribunal which had violated the duty to act fairly was regarded as having discharged an administrative, rather than a quasi-judicial, function, the Saskatchewan Queen's Bench held that the decision of the tribunal should be quashed without actual issue of the writ of *certiorari*.[61] The Alberta Supreme Court has stated: "The duty to act fairly may apply and the body exercising statutory powers which are subject to that duty ought not to ignore it merely because the law of remedies is in such a state as to render it uncertain how the duty may be enforced."[62] On the other hand, the view has been expressed that "When the Supreme Court of Canada recognized the right of the citizen to fair treatment in the exercise of (administrative) powers, it must also be taken to have recognized the traditional remedy by which the right might be enforced".[63]

The latter approach, which regards expansion of the ambit of *certiorari* and prohibition as the natural corollary of reformulation of the principles of substantive law, is to be preferred from the point of view of policy. However, the pivotal role of conceptualism and nomenclature in the development of the law regulating the remedies has been conducive to some degree of inhibition in extending the frontiers of the remedies beyond the scope of functions in the setting of which the requisites of the remedies were originally conceived. This spirit of lingering reluctance is seen to permeate current judicial attitudes.

Fairness and Natural Justice

According to Mullan, "To suggest that there are both rules of natural justice and rules of fairness is not only to encourage further unsatisfactory line-drawing on the part of the courts but also to generate efforts to ascertain the content of the rules of fairness as opposed to the content of the rules of natural justice."[64] He submitted

60. *Op cit* 167

61. *Re Soloniuk and Meewasin Valley Authority* (1980) 109 DLR (3d) 408.

62. *Re Alberta Union of Provincial Employees and Alberta Classification Appeal Board* (1977) 81 DLR (3d) 184 at 196 *per* McDonald J.

63. *McCarthy* v *Board of Trustees of Calgary Roman Catholic Separate School District No 1* (1979) 101 DLR (3d) 48 at 58 *per* Laycraft J; cf for English law *R.* v *Hillingdon London Borough Council, Ex parte Royco Homes Ltd* 1974) QB 720 at 728 *per* Lord Widgery CJ.

64. *Op cit* 303.

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that "It would be unfortunate if natural justice and fairness came to be viewed as separate standards and indeed, if they did, there is a very serious danger that the law in this area could become even more complicated and less rationally based than it is at present".[65] More recently, Mullan has made the comment: "Given the unfortunate past of the classification process, it is perhaps unwise to predicate the application of those rules (of natural justice) on the function in issue being quasi-judicial. To do so is to encourage further endless, unsatisfactory debate in the course of litigation as to what constitutes a quasi-judicial function."[66]

Nevertheless, the avenues of development of contemporary Canadian law render undeniable the existence of separate conceptions of natural justice and fairness, each applicable to distinct situations and distinguishable, in respect of the degrèe of the duty devolving on the decision-making authority.

The Canadian cases which recognize the duty to act fairly as a concomitant of the exercise of administrative powers, all contemplate circumstances in which the rules of natural justice are inoperative. Fairness was evolved as a residual standard in these contexts only because the principles of natural justice, for some reason, could not be called in aid. The cases fall naturally into several groups.

(i) A substantial content of policy and expediency as an aspect of the process culminating in the decision tends to militate against attribution of a judicial or quasi-judicial function to the tribunal responsible for the decision. This principle, which is part of English[67] and Australian[68] law, has been adopted in Canada.[69] The Saskatchewan Queen's Bench, construing a statute[70] which empowered the relevant body to reject an application by an owner of property to make improvements if it was of opinion that the proposed improvements were inconsistent with the master development plan, held that the

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65. *ibid.*

66. D.J. Mullan, "Administrative Law" (1980) 1 *Supreme Court Law Review* 1 at 12.

67. *Boulter* v *Kent JJ* (1897) AC 556 at 564; *Leeds (Corp)* v *Ryder* (1907) AC 420 at 423.

68. *Shell Co. of Australia* v *Federal Commissioner of Taxation* (1931) AC 275 at 295.

69. *Re Ashby* (1934) 3 DLR 565 (Ontario CA) at 567: "The distinguishing mark of an administrative tribunal is that it possesses a complete, absolute and unfettered discretion and, having no fixed standard to follow, it is guided by its own ideas of policy and expediency". Cf. *Re Brown and Rentals Administrator* (1945) 3 DLR 324 (Ontario CA) at 333: "The true test... is to see what the function of the tribunal is. Is it to apply the law or policy as expediency?"

70. Meewasin Valley Authority Act 1979 (Sask) c M 11 s 1.

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authority exercised administrative, as opposed to quasi-judicial, powers.[71] The basis of this ruling was that "The master development plan is nothing more than a guide which the Authority can enlarge or change at any time in the future as circumstances and policy considerations might dictate".[72] The Manitoba Queen's Bench has considered that the Milk Control Board of Manitoba, in exercising statutory power[73] to determine the maximum and minimum prices of fluid milk, acts in a legislative and policy-oriented capacity, on the ground that the statute concerned the public interest rather than the 'rights' of producers, processors and consumers.[74] The Supreme Court of British Columbia, in a specific statutory context,[75] posed for its decision the question: "Is the type of decision to be made by the Minister of Forests as to the terms on which tree-farm licence No. 24 is to be replaced a broad, policy-oriented decision or is it a straight law/fact determination resulting in serious consequences to individuals?"[76] In the former event no function of a judicial or quasi-judicial nature was thought to be involved.

Notwithstanding that the rules of natural justice were excluded, the duty to act fairly was insisted upon in each of the above cases. With reference to the discretion exercised by the Governor-in-Council to modify or rescind orders of the Canadian Radio-television and Telecommunications Commission,[77] the Federal Court of Appeal concluded: "Because of the broad scope of the policy considerations that may be relevant to the exercise of discretion, the authority conferred could not by any of the applicable criteria be characterized as a judicial or quasi-judicial power. The Governor-in-Council may in a particular case consider the precise issues of fact, law and policy that were before the Commission, but he is not confined to them. He may decide upon the basis of broader considerations of policy."[78] Accordingly, the Governor-in-Council was subject to no duty other than that of acting fairly. The House of Lords, holding that a hearing was not required in the circumstances, recently identified as one of the relevant *indicia* that "A local inquiry does not provide a suitable

71. *Re Soloniuk and Meewasin Valley Authority* (1980) 109 DLR (3d) 408.

72. At 420 *per* Noble J.

73. Milk Control Act 1976 (Man) s.5.

74. *Re Citizens Health Action Committee Inc and Milk Control Board of Manitoba* (1979) 100 DLR (3d) 741.

75. Forest Act 1978 (BC) c 23 s 33.

76. *Re Islands Protection Society and the Queen* (1979) 98 DLR (3d) 504 at 522 *per* Murray J.

77. National Transportation Act RSC c N-17 s 64(1).

78. *Intuit Tapirisal of Canada* v *Leger* (1978) 95 DLR (3d) 665 at 673 *ad fin per* Le Dain J.

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forum in which to debate what is in the relevant sense a matter of government policy".[79] Similar reasoning has been resorted to by the Australian High Court[80] and by the New South Wales Court of Appeal.[81]

(ii) An established limitation on the scope of natural justice is that the concept, although applicable to the holder of an office, has no bearing on the termination of a contract between master and servant.[82] Where a regional board of commissioners of police purported to dismiss a probationary constable without a hearing within eighteen months of his appointment, pursuant to a statutory provision[83] that a police officer was not subject to any penalty except after a hearing and final disposition of the matter but that this did not affect the authority of a board of commissioners of police to dispense with the services of a constable during his eighteen-month probationary period, the majority of the Supreme Court of Canada held that the board of commissioners was under a duty to act fairly in the latter event.[84] This was a situation in which, on account of the *nexus* between the board and the probationary constable, a quasi-judicial function bringing into play the rules of natural justice could not have been imputed to the board. In two other cases[85] where municipal boards took action to dismiss probationary police constables, the necessity for

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79. *Bushell* v *Secretary of State for the Environment* (1980) 3 WLR 22 at 35 *per* Lord Diplock.

80. *Salemi* v *Minister for Immigration and Ethnic Affairs* (1977) 51 ALJR 538 at 560 *per* Jacobs J: "Though the principles of natural justice extend to executive or administrative acts, it is necessary to bear in mind that the kind of act referred to is the act which directly affects the person (or corporation) individually, and not simply as a member of the public or a class of the public. An executive or administrative decision of the latter kind is truly a 'policy' or 'political' decision."

81. *Gardner* v *Dairy Industry Authority of New South Wales* (1977) 1 NSWLR 505 at 519 *per* Hutley JA: "The rules of natural justice are really only applicable to alterations of rights of single individuals or small groups."

82. *Ridge* v *Baldwin* (1964) AC 40; *Vidyodaya University Council* v *Silva* (1965) 1 WLR 77 following *Barber* v *Manchester Regional Hospital Board* (1958) 1 WLR 181. But see *Palmer* v *Inverness Hospitals Board* (1963) SC 311, cited with approval in *Mallock* v *Aberdeen Corporation* (1971) 1 WLR 1578.

83. Police Act RSO 1970 c 351 s 72, and s 27(b) of RRO 1970, Reg 680 (Police Regulations) as amended by O Reg 296/73, s 1.

84. *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671; cf *Harelkin* v *University of Regina* (1979) 96 DLR (3d) 14 (SC of Canada).

85. *Re Proctor and Board of Commissioners of Police of the City of Sarnia: Attorney-General for Ontario, Intervenant* (1979) 99 DLR (3d) 356 (Ont CA); *Re Gillingham and Metropolitan Toronto Board of Commissioners of Police* (1979) 101 DLR (3d) 570 (Ont HC of J).

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recognition of the duty to act fairly arose from exclusion of the rules of natural justice for the identical reason.

(iii) The distinction between adjudicative and investigative functions being integral to the conception of the duty to act judicially so as to attract the operation of the rules of natural justice,[86] the Canadian courts have had no hesitation in holding that exclusively investigative or recommendatory functions fall outside the purview of the exercise of judicial and quasi-judicial powers and render applicable, at most, the duty to act fairly.[87] The Ontario Human Rights Commission, in deciding whether or not to recommend to the Minister of Labour the appointment of a body of inquiry, has been considered to exercise an administrative function.[88] This conclusion was reached on the basis that the Commission was an investigative body whose duty for this purpose was solely to gather information and to make appropriate recommendations to the minister. The Federal Court has held on similar grounds that a commission of inquiry established under statute[89] to investigate and report on certain activities of the royal Canadian Mounted Police was not bound to comply with the rules of natural justice.[90] By contrast, although the statute in question[91] did not in terms provide for a formal hearing, the Ontario court of appeal considered that, if the power conferred was not merely investigative but also adjudicative with regard to the rights of an employee, the requirements of natural justice must necessarily be complied with.[92]

(iv) The idea of a *lis inter partes* has been accepted, in several recent Canadian decisions, as an essential element of a quasi-judicial function. The Manitoba Queen's Bench, holding that the Milk Control Board of Manitoba acted in a purely legislative capacity in fixing

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86. *Royal American Shows Inc* v *Laycraft* (1978) 82 DLR (3d) 161 (SC of Alberta); *Re Anderson and Royal Commission into the Activities of Royal American Shows Inc* (1978) 82 DLR (3d) 706 (SC of Alberta). There have been recent indications of judicial reluctance to apply this distinction absolutely: see *Board of Police Commissioners* v *Tickell* (1979) 2 WWR 361 (Saskatchewan QB); cf *Re Rozander and Energy Resources Conservation Board (No 2)* (1979) 93 DLR (3d) 284 (SC of Alberta).

87. Where, however, the body is empowered not only to make a recommendation but to perform an administrative or executive function, the duty of fairness must be observed: *Re Peterson and Atkinson* (1978) 23 OR (2d) 266 (Ontario HC of J) at 270 *per* Cromarty J.

88. *Re Dagg and Ontario Human Rights Commission* (1979) 102 DLR (3d) 155 (Ont HC of J.)

89. Inquiries Act RSC 1970 c 1-13.

90. *Re Copeland and McDonald* (1979) 88 DLR (3d) 724.

91. Employment Standards Act 1974 (Ont) c 112 s 33(1).

92. *Re Downing and Graydon* (1978) 92 DLR (3d) 355.

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the maximum and the minimum price of fluid milk, stressed: "This is not a situation where the board is being asked to resolve anything resembling a *lis inter partes*."[93] Similarly, the Ontario court of appeal held that the determination by the general manager of the Health Insurance Plan[94] that an overpayment had been made to a laboratory and his decision that it should be recovered by deductions from future payments were "purely administrative"[95] on the ground that the general manager "was in no way acting as an arbiter between two independent parties".[96]

(v) The impact of the decision on legal rights may be identified, in correspondence with the balance of authority, as a crucial factor demarcating the province of quasi-judicial functions. Thus, in reaching the conclusion that the price control duties of a Milk Board did not subsume quasi-judicial elements, the Manitoba Queen's bench reasoned: "The paramount purpose and intention of the statute is concerned with the public interest. The 'rights' of producers, processors, consumers or any other interested persons are not the primary objectives of the legislation. Indeed, it may well be asked whether these persons have 'rights' in a legal sense as to the price of milk."[97] But this consideration is not conclusive. It cannot be said that, because a public servant's rights are affected by a decision of the Classification Appeal Board, the board has a duty to act judicially,[98] for other criteria are relevant.[99] The uncertainty of the law in this regard, as the high court of Australia has pointed out, derives from the fact that "There exists no detailed consideration of the basis upon which the possession of a legitimate expectation gives rise to a right to be accorded natural justice".[100] The acknowledgement of an antithesis between the concepts of 'right' and 'privilege' and the restriction of natural justice to the former context, which was a prominent aspect

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93. *Re Citizens Health Action Committee Inc and Milk Control Board of Manitoba* (1979) 100 DLR (3d) 741 at 746 *ad fin per* Wright J.

94. Health Insurance Act 1972 (Ont) c 91, ss 4(2)(a), 4(2)(c) and 22(1).

95. *Re S & M Laboratories Ltd and the Queen in Right of Ontario* (1979) 99 DLR (3d) 160 at 164 *per* Howland CJO.

96. *ibid;* cf *Re Copeland and McDonald* (1979) 88 DLR 724.

97. *Re Citizens Health Action Committee Inc and Milk Control Board of Manitoba* (1979) 100 DLR (3d) 741 at 746 *ad fin per* Wright J.

98. *Tottrup* v *The Queen in Right of the Province of Alberta* (1977) 79 DLR (3d) 533.

99. *Edwards and Woolfenden* v *Alberta Association of Architects* (1975) 3 WWR 38.

100. *Salemi* v *Minister for Immigration and Ethnic Affairs (No 2)* (1977) 14 ALR 1 at 34 *per* Stephen J.

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of English administrative law at one time,[101] seems, regrettably, to have been resuscitated in New Zealand.[102]

Where one or more of the elements referred to in the preceding paragraphs cannot be shown to exist, the function discharged by the tribunal is construed as not being judicial or quasi-judicial in character, so that the rules of natural justice lack relevance. If the approach is adopted that "It is not enough that (the body) should have legal authority to determine questions affecting the rights of subjects; there must be superadded to that characteristic the further characteristic that the body has the duty to act judicially",[103] the result could well have been that, in circumstances where a duty to act judicially was not demonstrable, no procedural protection of any kind or in any degree could validly be claimed. It is this deficiency in respect of at least a major segment of the variety of functions to which the amorphous label 'administrative' has been attached, which recent trends in Canadian law – in particular, the notion of procedural fairness – endeavour to supply.

The Supreme Court of Canada has recognized that "What rightly lies behind this emergence (of the doctrine of procedural fairness) is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question".[104] The practical effect of the principle of fairness, as it has been conceived and moulded by the Canadian courts, is to provide an intermediate standard between the plenary protection assured by the rules of natural justice and untrammelled discretion bereft of any procedural safeguard, however rudimentary in content, which had previously been associated with the total range of administrative authority.

The fundamental character of procedural fairness as a *via media* between the interests of administrative efficiency and individual liberty is indicated by the quantitative gradations which typify the respective

101. *Nakkuda Ali* v *Jayaratne* (1951) AC 66.

102. *Modern Theatres (Provincial) Ltd* v *Peryman* (1960) NZLR 191.

103. *Calgary Power Ltd and Halmrast* v *Copitborne* (1958)16 DLR (2d) 241 (SC of Canada) at 247 *per* Martland J, quoting *R.* v *Legislative Committee of the Church Assembly Ex parte Haynes-Smith* (1928) 1 KB 411 at 415 *per* Hewart LCJ.

104. *Re Nicholson and Haldimand – Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671 at 681 *per* Laskin CJC.

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standards of natural justice and the emergent concept. The Alberta Supreme Court, dealing with the purported dismissal of a superintendent of schools, observed: "It is not necessary that there be a hearing in all cases as, for instance, where the reason for the dismissal is a general dissatisfaction with the employee's performance. However, the employee must at least be given the reasons for his dismissal and be given an opportunity to answer them."[105] The epitome of procedural fairness, distinguished from the comparative amplitude of natural justice, consists of provision of "a meaningful opportunity"[106] to refute the substance of allegations made. The Federal Court of Appeal has postulated "a fair opportunity to dispute or explain".[107]

That the procedural content of fairness is not commensurate with the degree of protection conferred by the rules of natural justice is spelt out in express terms in numerous Canadian judgments. The Ontario Court of Appeal held that the Ontario Housing Corporation, in resolving to terminate a tenancy, exercised a purely administrative power. The Acting Chief Justice, having declared that "The Corporation is not given either the power or the obligation under the governing legislation to act judicially or quasi-judicially",[108] continued: "I do not accept the argument that there was here a quasi-judicial act which, at common law, required the strict application of the *audi alteram partem* principle."[109] The applicable standard was held to be the duty to act fairly. The Federal court has stated: "If there is no issue or *lis* to be determined, then the function of the tribunal is described as administrative and the principles of natural justice, particularly the common law concept of bias, do not apply with the same full force and effect to such a tribunal as they apply to a quasi-judicial tribunal which is required to determine a *quasi-lis* ."[110]

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105. *McCarthy* v *Board of Trustees of Calgary Roman Catholic Separate School District No. 1* (1979) 101 DLR (3d) 48 at 55 *per* Laycraft J.

106. *Re Canadian Radio-Television Commission and London Cable TV Ltd* (1976) 67 DLR (3d) 267 (FC of App) quashed *sub nomine Canadian Cablesystems (Ontario) Ltd* v *Consumers' Association of Canada* (1977) 2 SCR 740.

107. *Lazarov* v *Secretary of State of Canada* (1973) FC 927 at 940.

108. *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187 at 190 *per* MacKinnon ACJO.

109. At 191 *per* MacKinnon ACJO.

110. *Re Copeland and McDonald* (1979) 88 DLR (3d) 724 at 729 *per* Cattanach J. The Supreme Court of New Zealand in *Manbaas* v *Bolger* (17 August 1979 Wellington A 219/79 unreported) described procedural fairness as "a promising doctrine whereby some control of procedure when a person or body is required to make a decision of an administrative nature could be imposed without the full rigour of the rules of natural justice."

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The observation by a court of first instance, that "There may be a common law duty to act fairly falling short of a requirement of a hearing or, indeed, falling short of a duty to act judicially",[111] has received the unqualified endorsement of the majority of the Canadian Supreme Court which referred to "the emergence of a notion of fairness involving something less than the procedural protection of traditional natural justice."[112]

Some of the most cogent criticisms of the concept of procedural fairness relate to the substitution of an admittedly nebulous doctrine for the comparatively precise and stable dimensions of natural justice.[113] The apprehension entertained by opponents of the new doctrine is that a sheet anchor of judicial review, embedded in the common law, may be eroded insidiously by a doctrine confounded by formidable difficulties of definition and application. This fear is at least partially allayed by the modern Canadian attitude that, far from traditional natural justice being superseded by the innovative concept,[114] the two notions are capable of effective co-existence in distinct contexts. Despite a common origin of these ideas,[115] a clear bifurcation of their spheres of applicability is a feature of modern Canadian law.[116] Consequently, the principles of natural justice remain intact, and procedural fairness represents a viable standard solely in circumstances in respect of which a *lacuna* hitherto existed. This structural framework has been adopted explicitly by the Ontario court of appeal.[117] The

111. *Per* Hughes J. quoted in *Re Nicholson and Haldimand-Norfolk Reginal Board of Commissioners of Police* (1978) 88 DLR (3d) 671 at 676.

112. At 680 *per* Laskin CJC; cf. Re *Abel and Director Pentanguishene Mental Health Centre* (1979) 24 OR (2d) 279 (Ontario HC of J) at 297 *per* Grange J: "The duty to act fairly ... may in some circumstances involve the application of some or all of these rules."

113. J.F. Northey, "Pedantic or Semantic" 1974 *New Zealand Law Journal* 133 at 140; D.L. Mathieson "Executive Decisions and *Audi Alteram Partem*" 1974 *New Zealand Law Journal* 277 at 284.

114. Cf. the conclusion by Loughlin *op cit* at 236, that "there seems to be more certainty in Canada than in England that the rules of natural justice are still the primary mechanism for providing procedural protection."

115. An explicit statement is to be found in *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR 342 (SC of New Zealand) at 348, *per* Mahon J.

116. See, however, for examples of use of natural justice and fairness in a synonymous sense *Re W.D. Latimer Co. Ltd and Bray* (1974) 52 DLR (3d) 161 (Ontario CA) at 168 *per* Dubin JA; *Re TE Quinn Truck Lines Ltd and Snow* (1979) 102 DLR (3d) 435 (Ontario HC of J) at 444 *per* Sanders J.

117. "The wholesome restraint thus placed on arbitrariness in administrative decisions does not, however, detract from the specific and well established requirements of natural justice which govern the exercise of judicial powers" *Re Downing and Graydon* (1978) 92 DLR (3d) 355 at 369 *per* Blair JA.

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dualism, which is a characteristic of the contemporary law, is mirrored strikingly in the comment by the Ontario High Court of Justice, made in connection with the purported dismissal of the Chief of Police by a Police Commission: "In any event, the obligation cast upon the Board in this quasi-judicial proceeding ... went far beyond fairness and involved the whole concept of natural justice."[118] The residual complexion of procedural fairness has been acknowledged by the courts of Australian jurisdictions including New South Wales.[119]

The Limits of Procedural Fairness

Professor Mullan cautioned against "the daunting possibility that judges will start describing functions as quasi-administrative in an endeavour to differentiate those administrative functions which have some procedural content from those which do not".[120] However, the existence of such a distinction within the area of administrative functions has now been recognized in Canada. This development, moreover, is probably irreversible. The majority of the court of appeal of British Columbia has held that a regional director, in withdrawing the visiting privileges of a volunteer at a prison, was not exercising an administrative function which required him to detail the reasons for his decision and to give the aggrieved party an opportunity to respond.[121] The Ontario High Court of Justice has construed a purely investigative or recommendatory function as not entailing the duty to act fairly, in a procedural sense.[122] Procedural fairness has been held by the Federal Court to have no relevance to a Segregation Review Board in a prison.[123] A roughly parallel development has occurred in other jurisdictions. The character of a deportation order has been deemed by the Australian courts to

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118. *Re Brown and Waterloo Regional Board of Police Commissioners* (1979) 103 DLR (3d) 748 at 758.

119. *Dunlop* v *Woollabra Municipal Council* (1975) 2 NSWLR 446 at 470-471 *per* Wootten J.

120. *Op cit* at 303.

121. *Culbane* v *Attorney-General of British Columbia and Harrison* (1980) 108 DLR (3d) 648 at 657-658 *per* Craig JA.

122. *Re Dagg and Ontario Human Rights Commission* (1979) 102 DLR (3d) 155.

123. *Kosbook and Aelick* v *The Solicitor-General of Canada* (1976) 1 Fed Ct Rep 540 at 545 *per* Gibson J: "The Board, not having any judicial or quasi-judicial functions but instead having purely administrative duties, has no duty to inform the plaintiffs at any time of any factual allegations and evidence presented or to be presented to the said Board, nor any duty to afford the plaintiffs an opportunity to be present at any such hearing or to present any evidence in reply to any such allegations or evidence."

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deprive the applicant for relief of his entitlement to procedural fairness.[124] The English courts have considered that "There are many cases where an inquiry is held not as a judicial or quasi-judicial inquiry, but simply as a matter of good administration. In these circumstances there is no need for any preliminary notice of any charge or anything of that sort".[125] This line of opinion in several jurisdictions is founded on the assumption that there are, in the modern social context, kinds of administrative action in relation to which even the basic procedural constraints required by the doctrine of fairness are not apposite.

The criteria relevant to incidence of the duty to act fairly in respect of administrative decision and action may be extracted from the decided cases.

(i) The Supreme Court of Canada has posed, as one of the pertinent criteria, the question: "Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?"[126] The Federal Court of Appeal has favoured the approach that "Procedural fairness, like natural justice, is a common law requirement that is applied as a matter of statutory interpretation. In the absence of express procedural provisions it must be found to be impliedly required by the statute".[127]

However, it would be contrary to sound policy, and incompatible with the salient lines of development of the law to have recourse to exacting criteria as a basis of implication of the duty to act fairly. The preponderant weight of English authority, throughout a sustained process of evolution, has tended toward implication of the rules of natural justice in the absence of compelling considerations to the contrary.[128] *A fortiori,* an analogous approach to procedural fairness with relatively amorphous content, is warranted. Certainly, "indirect

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124. *R.* v *Minister for Immigration and Ethnic Affairs Ex parte Ratu* (1977) 14 ALR 317.

125. *Northwest Holst Ltd* v *Department of Trade* (1979) 3 All ER 280 (Ch Div) at 292 *per* Lord Denning MR; cf. *Lewis* v *Heffer* (1978) 3 All ER 354 (CA) at 368 *per* Geoffrey Lane LJ; *Cinnamond* v *Britain Airports Authority* (1980) 1 WLR 582 (CA) at 590 *per* Lord Denning MR.

126. *M.N.R.* v *Coopers and Lybrand* (1978) 92 DLR (3d) 1 at 7 *per* Dickson J.

127. *Intuit Tapirisat of Canada* v *Leger* (1978) 95 DLR (3d) 665 at 671-672 *per* Le Dain J.

128. See *Dr Bonham's* case (1610) 8 Co Rep 113b; *Capel* v *Child* (1832) 2 C & J 558; *Bonaker* v *Evans* (1850) 16 QB 162; *Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180; *Durayappah* v *Fernando* (1967) 2 AC 337; *Wiseman* v *Borneman* (1971) AC 297.

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references, uncertain inferences or equivocal considerations"[129] should not be considered to require exclusion of the duty to act fairly.

Statutory prescription of a procedure which is not reconcilable with compulsory imposition of the attributes of fairness is treated as excluding the duty.[130] A term incorporated in a bargain arrived at collectively may produce a similar result.[131] The availability of an alternative procedure, with distinct safeguards, may render the duty to act fairly superfluous. The Supreme Court of Nova Scotia has taken the view that, where a right of appeal exists together with an evidentiary hearing from a decision to terminate welfare payments, the officials making the decision are not required to accept a duty of fairness towards the welfare recipient.[132] A precondition of redundancy of the duty of fairness is the adequacy of protection ensured by the alternative procedure.

(ii) The existence of a duty to act fairly has a direct bearing on the question whether there is any obligation on the part of the administrative tribunal to apply substantive rules to individual cases rather than to implement social and economic policy in a broad sense.[133] "The existence of a right to review is more likely in cases where the decision is of a type that turns on the existence of facts that may be open to dispute."[134] The rationale reinforcing fair procedure in these cases is that it "produces some assurance that the decision will not be based on a misconception as to the facts in circumstances where the outcome might be different if the true facts were known".[135] This rationale is inapplicable to situations involving a choice of conflicting objectives, the evaluation of which is often alien to judicial aptitude and experience. It has even been suggested that "The decision is more likely to be reviewable on the grounds of unfair procedure if it is one that deals directly with the situation of a particular person rather than dealing generally with a class of

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129. *Salemi* v. *Minister of Immigration and Ethnic Affairs* (1977) 51 ALJR 538 (HC of Australia) at 556 *per* Gibbs J.

130. *Cf Re TE Quinn Truck Lines Ltd and Snow* (1979) 102 DLR (3d) 435 (Ontario HC of J).

131. *Re Proctor and Board of Commissioners of Police of the City of Sarnia; Attorney-General for Ontario, Intervenant* (1979) 99 DLR (3d) 356 (Ontario CA) at 361-365 *per* Brooke JA.

132. *Re Rafuse and Hambling* (1979) 107 DLR (3d) 349 at 364 *per* Cowan CJTD.

133. *M.N.R.* v *Coopers and Lybrand* (1978) 92 DLR (3d) 1 (SC of Canada) at 7 *per* Dickson J.

134. *Culbane* v *Attorney-General of British Columbia and Harrison* (1980) 108 DLR (3d) 648 (British Columbia CA) at 669 *per* Lambert JA.

135. *ibid.*

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people".[136] The distinction is one which has to be applied with discrimination, but it is frequently the case that issues pertaining to decisions of the latter type are dominated by broad considerations of policy.

(iii) A factor identified as relevant in the case law is the suitability of the adversary procedure to the subject matter of the decision.[137] The cogency of this element, nevertheless, may be convincingly assailed. The primary consideraton is the collective social interest which invests the problem with a larger dimension transcending a bipartite conflict of claims. This makes inappropriate the analogy of a *lis,* with its accompanying curtailment of the range of issues arising for consideration by reference to the initiative and the interest of the adversaries.

(iv) The consideration whether the decision directly or indirectly affects the rights and obligations of persons is relevant but not conclusive. The probability of serious consequences to those who dwell and have their livelihood in the area of the licence was relied upon by the Supreme Court of British Columbia in support of its conclusion that the Minister of Forests, in deciding whether to grant a replacement tree-farm licence, was under a duty to act fairly.[138] The accrual of a substantial benefit of reduced or subsidized rent, which was the consequence of an administrative decision, has been considered a sufficient foundation of the duty of fairness.[139]

Within the perspective of this duty the concept of "rights" has a far more extensive connotation than is contemplated by the Hohfeldian analysis of jural correlatives.[140] This liberal approach finds expression in the comment by the Supreme Court of British Columbia that "Although the interest of the petitioner in the property and in the decision of the Council was not a legal right in the strictest sense, it is clear that the decision of the Council would have a substantial effect on the economic interests of the petitioner. Where the determination of an administrative body results in serious consequences to individuals, that body has a duty to act fairly".[141] The appellate division of the Supreme Court of Alberta has envisaged "an appreciable

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136. At 669-670.

137. See the case cited at note 133 *supra.*

138. *Re Islands Protection Society and the Queen* (1979) 98 DLR (3d) 504.

139. *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187 (Ontario CA).

140. W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (ed W.W. Cook) Chapter 1.

141. *Re Trans-West Developments Ltd and City of Nanaimo* (1979) 107 DLR (3d) 68 at 79 *per* Andrews J.

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effect on a right or interest of a subject"[142] as attracting the extended principle of judicial review on the ground of contravention of procedural fairness.

In harmony with this trend the notion of reasonable expectation has emerged as an adequate basis of the duty to act fairly. The Supreme Court of New Zealand has recently held that a company which was carrying on a licensed business which it simply sought to continue had a 'legitimate expectation' that its application would be granted and that, in this situation, the administrative authority should have notified the company of the grounds of its decison and afforded the company an opportunity of replying before refusing its application.[143]

In a series of English decisions[144] the absence of a duty to act fairly was explained on the footing that the person claiming to be aggrieved sought a 'privilege' but was without a 'right'. Conceptual reasoning on these lines is a feature of some Canadian[145] and New Zealand[146] decisions as well. But it is submitted that the distinction made in these cases is at variance with the policy objective of the doctrine of fairness.

(v) It has been suggested that a sufficiently proximate *nexus* between the party claiming relief and the body whose decision is assailed, is an essential requisite of the duty of fairness. Referring to a leading case[147] in which a probationary police constable successfully invoked the doctrine of fairness in relation to his purported dismissal, the court of appeal of British Columbia said: "The constable seeking relief had a history of serving his employers over a period of many months. Notwithstanding the provisions of the statute there in question which denied him permanency of employment, his probationary

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142. *Re Harvie and Calgary Regional Planning Commission* (1978) 95 DLR (3d) 49 at pages 66-67 *per* Clement JA.

143. *Smitty's Industries Ltd* v. *Attorney-General* (1980) 1 NZLR 355.

144. *Scbmid* v *Secretary of State for Home Affairs* (1967) 2 Ch 149 at 170-171; *R* v *Governor of Pentonville Prison, Ex parte Azam* (1974) AC 18 at 31.

145. *Re Chakravorty and Attorney-General of Alberta* (1972) 28 DLR (3d) 78 (Alberta SC) at 92 *per* Riley J; *Dowbopuluk* v *Martin* (1972) 23 DLR (3d) 42 (Ontario HC) at p 49, *per* Addy J; *Prata* v *Minister of Manpower and Immigration* (1975) 52 DLR (3d) 383 (SC of Canada) at 385 *per* Martland J; but see *Lszarov* v *Secretary of State for Canada* (1973) FC 927 (FCA) at 931-932 *per* Thurlow J.

146. *Pagliara* v *Attorney-General* (1974) 1 NZLR 86.

147. *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671 (SC of Canada).

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position entitled him, in the view of the majority of the Supreme Court of Canada, to receive the relief he sought."[148] The court was prepared to refuse relief in the absence of an "analogous relationship".[149] The criterion of a proximate *nexus*, however, is of only marginal value in this context, because of its intrinsic vagueness in the varied and complex situations in which it needs to be applied.

Social Policy and Procedural Fairness

The recent movement in Canadian law, toward entrenchment of a standard of fairness with procedural content, conformity with which is a condition of validity of the exercise of a wide range of administrative powers, serves the purpose of extending to functions which cannot in any realistic sense be designated 'judicial' or 'quasi-judicial', minimal postulates of the rule of law.[150]

In substance, the concept of fairness embodies a response to the vulnerability of individual rights, aggravated by social and economic movements inherent in our civilization. "It is ... of the essence of the common law that it develops with the times to the extent necessary to see that justice is maintained in a developing and increasingly complex society."[151] However, a counterpoise to this aspiration is the public interest in ensuring that administrative tribunals which seek to regulate such fields of activity as the distribution of resources and facilities, price and quality control of essential commodities and the provision of opportunity for recreation and cultural pursuits are not hampered by restraints which may not be altogether suited to the situation in question.[152] The dangers attendant on stringent control of administrative action by having recourse to judicial remedies are

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148. *Culbane* v *Attorney-General of British Columbia and Harrison* (1980) 108 DLR (3d) 648 at 652 *per* Taggart J.A.

149. *ibid.*

150. Cf. *Re Webb and Ontario Housing Corporation* (1978) 93 DLR (3d) 187 (Ontario CA) at 191 *per* MacKinnon ACJO: "The Courts are incresingly applying the test of procedural 'fairness" to administrative actions of donees of a power and there is, understandably and naturally, a predilection towards seeing that everyone is treated 'fairly' ."

151. *Re Harvie and Calgary Regional Planning Commission* (1974) 94 DLR 49 (Alberta SC, AC) at 67 *per* Clement JA.

152. Cf *McInnes* v *Onslow Fane* (1978) 3 All ER 211 (Ch Div) at 219 *per* Megarry VC.

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perennially present to the minds of judges today.[153] This apprehension has prompted the warning articulated recently by the Supreme Court of New Zealand, that "The separate existence of the newly discovered (and more generally applicable) concept of fairness as the yardstick to be applied as a ground for the intervention of the Court seems to be becoming more debatable as time goes by".[154]

Social policy, therefore, necessitates the formulation of criteria which enable demarcation of the confines of procedural fairness. Several criteria have already emerged, overtly or inferentially, from the case law.

(i) Under no circumstances would judicial surveillance involve the merits, as opposed to procedural aspects, of an administrative determination.[155] The courts are vigilant to ensure that allegations relating to procedural deficiencies are not availed of as a pretext for seeking review of administrative decisions on their merits.[156] It is of paramount importance that the courts should respect the legislative allocation of responsibility in regard to categories of governmental action and contain their supervisory jurisdiction within its legitimate ambit.

(ii) The invocation of crown privilege as to matters involving the security of the state precludes investigation by the courts of complaints of procedural unfairness. The English court of appeal has spelt out this limitation explicitly.[157]

(iii) With a view to causing minimal interference with the administrative process, the Canadian Supreme Court has considered it "specially important"[158] that "a remedy be granted only in cases

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153. Cf *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR

153. Cf. *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR 342 at 348 *per* Mahon J: "Persons entrusted with responsibilities. (in central and local government) are not to be obstructed by purely formalistic objections and complaints. Were it otherwise, the machinery of government would stop. Nor should such decisions rightly be overturned because of the individual opinion of a reviewing tribunal as to what constitutes fair play, a topic which is notoriously susceptible to differences of opinion."

154. *Smitty's Industries Ltd* v *Attorney-General* (1980) 1 NZLR 355 at 366 *per* Vautier J.

155. *Re Provincial Agricultural Land Commission and Pickell* (1980) 109 DLR (3d) 465 (British Columbia SC).

156. *Re Bruce and Reynett* (1979) 104 DLR (3d) 11 (Fed Ct Trial Div) at 30 *per* Walsh J.

157. "The field of judicial scrutiny, by reference to the enforcement of the rules of common fairness, is an extremely restricted field in the sphere of the operations necessary to protect the security of the State. There is a certain range of such operations which depend for their efficacy entirely on secrecy" (*R.* v *Secretary of State for the Home Department Ex parte Hosenball* [1977], 3 All Er 452 at 465 *per* Cumming-Bruce LJ).

158. *See Note* 159 *infra.*

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of serious injustice".[159] This would seem to suggest that, even where infringement of the duty of fairness is established, the aggrieved person may yet be denied a remedy if the detriment sustained by him is disproportionate to the positive value upholding the administrative decision or action.

(iv) The discriminating character of judicial relief has received consistent emphasis.[160] A principle of value which substantially reconciles the availability of discretion to the court with the protection of individual rights is that, once it is established that the particular decision is reviewable, that the process by which the decision was reached fell short of the appropriate standard of fairness, and that the court consequently has a discretion to set aside the decision, the obligation to establish that the discretion should not be exercised devolves on the person seeking to uphold the decision which was reached by an unfair process.[161]

A perceptive assessment of the nature and gravity of injustice to the individual, judged in relation to the countervailing factors having to do with administrative efficiency, expedition and confidence, in a specific statutory or factual context, is a necessary preliminary to delineation of the parameters of procedural fairness. The appraisal of these competing policy objectives is itself dependent on priorities and values which are far from self-evident and offer the judiciary, in peripheral contexts, a wide range of options.

The Rationale of Canadian Law

It can hardly be contended that the concept of procedural fairness, in modern administrative law, fulfils a function which could not have been catered for effectively by the rules of natural justice. A conspicuous quality of these rules is their resilience and adaptability. The rudimentary character of the obligation required by these rules has been underlined by the Supreme Court of Canada.[162] Natural justice, in the opinion of an English court, is "capable of applying appropriately to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative' ".[163] It has been

159. *Martineau* v *Matsqui Institute Disciplinary Board supra* at 360 *per* Pigeon J.
160. *Culbane* v *Attorney-General of British Columbia and Harrison* (1980) 108 DLR (3d) 648 (British Columbia CA) at 656-659 *per* Craig JA.
161. At 665-670 *per* Lambert JA.
162. *R.* v *Noxzema Chemical Co of Canada Ltd* (1942) 2 DLR 51 at 52-53 *per* Davis J.
163. *McInnes* v *Onslow Fane* (1978) 3 ALL ER 211 (Ch Div) at 219 *per* Megarry VC.

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conceded in Canada[164] and in England[165] that the right of cross-examination is not inflexibly subsumed in the rules of natural justice; nor do these rules, according to authority in Canada,[166] Australia[167] and England[168] invariably call for the communication of reasons for a decision. The propriety of adjournments is not rigidly controlled by the rules of natural justice.[169] Manifestly, the procedural consequences of natural justice "will not necessarily be uniform"[170] but will depend on "the particular statutory framework within which they are to apply" [171] The rules of natural justice, then, could well have been interpreted and applied in such a manner as to dispense with a separate doctrine of procedural fairness.

The justification of this doctrine, it is submitted, lies not in conceptual but in historical considerations and in the development of judicial attitudes and responses to central problems in this area. The separation of quasi-judicial functions, from administrative functions and the limitation of natural justice to the former context had their origin in the early phases of the evolution of the law relating to the prerogative writs in England. During the Tudor period justices of the peace functioned as the pivots of local administration and, after the abolition of prerogative courts like the Court of Star Chamber, a vital aspect of the jurisdiction of the Court of King's Bench concerned surveillance of their functions. The concept of a judicial function as a prerequisite of review by *certiorari* had its genesis in the judicial veneer which typified the administrative duties of justices of the peace. The assumption that a great part of their administrative work was tantamount to "the exercise of a jurisdiction"[172] profoundly

164. *Groeneveld* v *Calgary Power Ltd* (1980) 109 DLR (3d) 99 (Alberta Ct of QB).

165. *Re Golden Chemical Products Ltd* (1976) *The Times* 10 December.

166. *Re Prince Edward Island Housing Corporation and Bennie* (1978) 100 DLR (3d) 591 (Prince Edward Island SC).

167. *Kentucky Fried Chicken Pty Ltd* v *Gantidis* (1979) 24 ALR 161 (HC of Australia).

168. *Cannock Chase District Council* v *Kelly* (1978) 1 ALL ER 152.

169. *Re Flamboro Down Holdings Ltd and Teamsters Local* (1979) 99 DLR (3d) 165 (Ontario HC of J). But the right to legal representation appears to be part of natural justice in circumstances where an effective hearing is otherwise impracticable: Re Men's Clothing Manufacturers Association of Ontario and Arthurs (1979) 26 OR (2d) 20 (Ontario HC of J) at 29 *per* Southey J.

170. *Salemi* v *Minister for Immigration and Ethnic Affairs* (1977) 51 ALJR 538 (HC of Australia) at 557 *per* Gibbs J.

171. *Mobil Oil Australia Pty Ltd* v *Commissioner of Taxation* (1963) 37 ALJR 182 (HC of Australia) at 190 *per* Kitto J.

172. F.W. Maitland, "The Shallows and Silences of Real Life" Collected Papers, Volume 1 478.

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influenced the development of terminology in respect of the *facta probanda* of the writs. Although their 'jurisdiction', for practical intents and purposes, was construed in a sense coeval with 'power' or 'authority', the limitation of *certiorari* and prohibition to decisions which were considered to involve the performance of a judicial function took firm root in English law.

The excessive judicial self-restraint which induced the view, taken by the English courts several decades ago,[173] that the 'superadded' element of 'a duty to act judicially' was a prerequisite of judicial review by means of *certiorari*, had a pervasive influence throughout the Commonwealth.[174] Once a comparable approach had been adopted by the Supreme Court of Canada,[175] with the result that transgression of the rules of natural justice would be of avail as a basis of complaint only within the confines of judicial and quasi-judicial functions,[176] an extensive area of arbitrary or capricious administrative action was inevitably rendered immune from judicial superintendence.[177] A virile and cohesive system of judicial review called for a residual principle which, over at least a part of the gamut of administrative powers, would achieve the function of which the rules of natural justice, drastically circumscribed in purview, were incapable. It is this pragmatic purpose that is served by the concept of procedural fairness in the present law of Canada.

Two practical considerations lie at the heart of judicial espousal of procedural fairness today. Firstly, there is merit in jettisoning a terminology which does not accord with ordinary parlance and with a genuine appraisal of functions. The incongruity of applying the term 'judicial' to a variety of functions of an unreservedly administrative character has deterred judges, in all probability, from resorting to this artificial expedient of preserving the applicability of natural justice. Secondly, the emergent doctrine may well appeal to judges who, although convinced that elements of procedural fairness are appropriate to a power exercised in a given statutory and factual

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173. *R.* v *Legislative Committee of the Church Assembly Ex parte Haynes-Smith* (1928) 1 KB 411 at 415; *Nakkuda Ali* v *Jayaratne* (1951) AC 66.

174. But see the decisions of the Supreme Court of Canada in *Alliance des Professeurs Catholiques de Montreal* v *Labour Relations Board of Quebec* (1953) 2 SCR 140; *Saltfleet Board of Health* v *Knapman* (1956) SCR 877.

175. *Calgary Power Ltd and Halmrast* v *Copitborne* (1958) 16 DLR (2d) 241.

176. *The Calgary Power* case has been described as 'a Canadian *Nakkuda Ali*': H.W.R. Wade, *Administrative Law* (4 ed 1977) 442 note 1.

177. *Cf. R.* v *Saikaly* (1979) 27 Chitty's LJ 98 (Ontario Div Ct) affirmed (1979) 27 Chitty's LJ 174 (Ontario CA).

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setting, are reluctant to acquiesce in invocation of natural justice because of an impression of the broader contours of the latter concept.

The new doctrine has a beneficial role in terms of policy,[178] in that it not only facilitates the preservation of "public confidence in the integrity of the process under review"[179] but is of material assistance to the decision making authority in so far as it "would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination".[180]

A danger to be avoided in interpreting the new concept is the assumption made in a strand of English authority[181] that the duty to act fairly is not infringed by deviation from minimum procedural standards, provided that the substantive decision is equitable. This approach cannot but detract fundamentally from the value of the doctrine of procedural fairness by weakening its thrust.

The rationalization and improvement of the law would perhaps have been best achieved by a frontal attack on the element of a 'judicial' function and by expansion of the frontiers of natural justice in consequence of the removal of that aberration.[182] But prevailing judicial attitudes have opted for a different, and more qualified, solution. However, in view of the settled character of the rules of natural justice, it is better, from a policy standpoint, to accept the application of the standard of procedural fairness to circumstances not provided for by the traditional concept than to support the substitution of the new doctrine for the old.

Conclusion

The preservation of natural justice and procedural fairness as alternative standards, both viable in modern law, is an advantage which entails the payment of a price-namely, perpetuation of the classification of functions. This process has enabled supervisory review

178. In consequence of these developments the law governing natural justice was thought to be in a "comatose" condition (S.A. de Smith, *Judicial Review of Administrative Action* 3 ed 1973 64) and to have approached its "twilight" stage (H.W.R. Wade, *The Twilight of Natural Justice?* (1951) 67 *Law Quarterly Review* 103).

179. *Meadowvale Stud Farm Ltd* v *Stratford County Council* (1979) 1 NZLR 342 (SC) at 348 *per* Mahon J.

180. *Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671 (SC of Canada) at 682 *ad fin per* Laskin CJC.

181. *Byrne* v *Kinematograph Renters Society Ltd* (1958) 2 ALL ER 579; *Malloch* v *Aberdeen Corporation* (1971) 2 ALL ER 1278.

182. There were reliable antecedents warranting this course. See the authorities cited at note 128, *supra*.

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by the courts to be carried out at two stages – the initial classification of the function and the determination whether procedural standards appropriate to the function have been violated. The refinements attendant on splitting up supervisory review in this way have naturally imparted to the argument at each stage a scholastic and unreal quality. This accounts for the virtual unanimity among writers in assailing the classification of functions as an unsatisfactory phenomenon. But it is difficult to deny that the technique of classification holds a measure of attraction for judges in seemingly objectifying important aspects of supervisory review and in providing a means of distancing themselves by a conceptual device which discourages the impression of overt interference with the administrative process.

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STATUTORY EXCLUSION OF JUDICIAL REVIEW IN AUSTRALIAN, CANADIAN AND NEW ZEALAND LAW

Introduction

JUDICIAL activism in the field of administrative law, represented in England by such remarkable decisions as *Anisminic,*[1] *Pearlman*[2] and *Racal,*[3] has recently been much in evidence in Commonwealth jurisdictions. The initiative of modern judges in extending and adapting remedies for the control of administrative action has prompted fresh approaches to many aspects of the subject. The effect of privative clauses, designed to exclude or restrict judicial review, warrants reassessment in the light of experience in Australia, Canada and New Zealand.

Forms of Privative Clauses and their Interpretation

Commonwealth legislatures have adopted a variety of expressions to ensure, for administrative action in specific contexts, immunity from judicial review: (i) administrative decisions have been declared by statutory provisions to be "final",[4] "final and conclusive,"[5] "final and binding"[6] or "final and without appeal".[7] (ii) The writ of *certiorari* has been excluded specifically.[8] (iii) The statutory bar has purported to encompass all proceedings and actions.[9] (iv) An administrative official or tribunal has been invested with "exclusive jurisdiction"[10] to determine a particular category of matters. (v) An administrative order or ruling has been deemed by statute to be "duly made".[11] (vi) The matter in question has been placed within the "sole discretion"[12] of an administrative body. (vii) It has been declared by statute that a decision or order "is hereby ratified and confirmed

1. *Anisminic Ltd* v. *Foreign Compensation Commission [1969] 2 A.C. 147.*
2. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B.56.
3. *Re Racal Communications Ltd* [1980] 3 W.L.R.181.
4. Industrial Conciliation and Arbitration Act R.S.B.C. 1948, s. 2(4).
5. Regulation of Sugar Cane Prices Acts 1915-54 (Commonwealth of Australia), s. 17(a).
6. Local Government Act 1919 (N.S.W.), s.342N.
7. Landlord and Tenant (Amendment) Acts 1948-54 (N.S.W.), s.41(1).
8. Labour Relations Act R.S.Q. 1941, s.5.
9. Police Offences Ordinance 1023-64 (N.T.) s.104(1).
10. Children of Unmarried Parents Act R.S.N.S. 1967, s.29.
11. City of Brisbane Act 1924 (Qld), s.38.
12. Pollution Control Act R.S.B.C.1967, s. 13(2).

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and is binding on all persons".[13] (viii) The record of an administrative decision has been characterized as "conclusive evidence"[14] of the legality and propriety of the decision. These forms of words have often been used in combination.[15]

Despite the strikingly broad purview of these privative clauses, the courts have generally accorded them limited effect. The higher courts have asserted their inherent power[16] to supervise, by means of the prerogative writs, the conduct and decisions of administrative tribunals in limited contexts.[17]

The essential problem is one of statutory construction in conformity with policy objectives. There is necessarily an appearance of inconsistency between a provision which defines and restricts the power of a tribunal and prescribes the course it must pursue, and a provision which declares that the validity of the tribunal's actions cannot be challenged or called in question on any account whatever.[18] The resulting contradiction has to be resolved by giving effect to the legislative instrument as a whole.[19]

In seeking to ensure that their supervisory jurisdiction is protected against surrender to administrative tribunals,[20] Commonwealth courts have consistently required that privative clauses should be couched in unequivocal language.[21] There exists a strong judicial tradition against regarding preclusive provisions, even though expressed without ambiguity, as prohibiting control of defects or excess of jurisdiction.[22]

In keeping with the presumption against diminution of supervisory jurisdiction in the higher courts,[23] a "final and conclusive" clause

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13. Public Utilities Act R.S.B.C. 1938-39, s.8(2).
14. Succession Duty Act R.S.B.C. 1960, s. 5(2).
15. Rating Act 1925 (N.Z.), s.58.
16. *Stephen* v. *Stewart* (1943) 4 DLR 642, 645-646 (S.C.B.C.).
17. *R. ex rel. Lee* v. *Workmen's Compensation Board* [1942] 2 DLR 665, 676-679 (C.A. of B.C.).
18. *R.* v. *Murray, ex parte Proctor* (1949) 77 CLR 387, 399 *per* Dixon J. (H.C.A.).
19. *R.* v. *Hickman, ex parte Fox* (1945) 70 CLR 598, 617, *per* Dixon J. (H.C.A.)
20. *Calgary & Edmonton Corporation Ltd* v. *British American Oil Co. Ltd* (1963) 40 DLR (2d) 964, 971, *per* Milvain J. (Alta. S.C.).
21. *Oak Bay* v. *Victoria* (1941) 3 DLR 680, 685 (C.A. of B.C.); *Nanaimo Community Hotel* v. *Board of Referees* (1945), 3 DLR 225, 237 (C.A. of B.C.); *Ex parte Tooth & Co. Ltd; Re the Council of the City of Sydney* (1962) 80 W.N.(N.S.W.) 572, 577 (S.C. N.S.W.).
22. *The Coal Miners' Industrial Union of Workers of Western Australia* v. *Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 454 (H.C.A.).
23. *Swift Canadian Co. Ltd* v. *Dancavitch* [1954] 2 DLR 398, 400 (Ont. H.C.); *Battaglia* v. *Workmen's Compensation Board* (1960) 24 DLR (2d) 21, 25 (C.A. of B.C.).

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has been held to exclude appellate, but not supervisory, jurisdiction.[24] A similar interpretation has been placed on the word "final".[25] The words "no action or proceeding" in a privative clause have sometimes been held to envisage actions or proceedings for damages but not applications for other forms of relief in respect of invalid action, such as prohibition.[26] Notwithstanding such a clause, injunctions have been issued.[27] Where mandamus was omitted from the terms of a privative clause, the words "or otherwise" have been construed *ejusdem generis* so as not to include mandamus.[28] The words "conclusive evidence"[29] and "exclusive jurisdiction"[30] do not preclude judicial intervention in circumstances where the administrative tribunal has transgressed the limits of its authority. *A fortiori,* the broad dimensions of appellate jurisdiction conceded by statute do not impliedly abrogate judicial review,[31] save in exceptional contexts.[32]

Review on Jurisdictional Grounds

A privative clause does not render the jurisdiction of the inferior tribunal exclusive,[33] in that

> although the (tribunal) is free to err in either fact or law in the matters assigned to its exclusive jurisdiction, the court always has the power to intervene if the (tribunal) refuses to exercise its jurisdiction where it is required to do so or attempts to take unto itself jurisdiction not assigned to it by the statute.[34]

24. *Ozone Estates Pty. Ltd* v. *City of Sandringham* [1935] V.L.R. 319 (S.C. Vict.); *Re F.C. Pound Ltd and Manitoba Labour Board* [1955] 5 DLR 126, 134 (Man. Q.B.); *R.* v. *Canadian Labour Relations Board, ex parte Brewster Transport Co. Ltd* (1966) 58 DLR (2d) 609 (S.C. of Alta).

25. *Farrant* v. *Water Conservation and Irrigation Commission* (1959) S.R. (N.S.W.) 283 (N.S.W.S.C.).

26. *Wilkinson* v. *Stratford Borough* [1951] N.Z.L.R. 530 (N.Z.S.C.).

27. *Mason* v. *Mayor of Pukekohe* [1923] G.L.R. 41, 42 (S.C., Northern District of N.Z.); *Broad* v. *County of Tauranga* [1928] N.Z.L.R. 702 at p. 715 (N.Z.S.C.).

28. *R.* v. *Public Service Labour Relations Board, ex parte New Brunswick Teachers' Federation* (1970) 17 DLR (3d) 72, 86 (S.C. of N.B.., App. Div.).

29. *Canadian Northern Railway* v. *Wilson* (1918) 43 DLR 412 (C.A. of Man.).

30. *Noranda Mines Ltd* v. *R.* (1969) 7 DLR (3d) 1 (S.C.C.); *Mack Trucks Manufacturing Co. of Canada Ltd.* v. *Forget* (1974) 41 DLR (3d) 421 (S.C.C.).

31. *Midland Motorway Services Ltd* v. *Baird* [1954] N.Z.L.R. 955 (N.Z.S.C.).

32. *Yewen* v. *Terrill* [1950] G.L.R. 517 (N.Z.S.C.); *Re Chromex Nickel Mines Ltd* (1970) 16 DLR (3d) 273 (C.A. of B.C.).

33. *Aatlen* v. *Prince George Pulp & Paper* (1968) 69 DLR (2d) 31, 40 (S.C. of B.C.).

34. *R.* v. *Ontario Labour Relations Board, ex parte T.R.W. Electronic Components Ltd* (1970) 9 DLR (3d) 669, 671 (Ont.H.C.).

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In these circumstances, judicial intervention is not merely permissible but necessary.[35] Privative clauses, accordingly, have been so construed as not to debar, but merely to limit, challenges by prerogative writ, so as to leave intact review on jurisdictional grounds.[36] The underlying principle is that immunity from restraint is confined to acts which are *intra vires.* [37]

The rationale of this approach is that, where the jurisdiction of a tribunal depends on the construction of a statute, the tribunal cannot confer jurisdiction on itself by misinterpreting the statute.[38] If the tribunal purports to do so, its orders are necessarily amenable to the prerogative writs.[39]

A preclusive clause is ineffective in cases of want of jurisdiction because no "determination" can be said to have been made by the tribunal.[40] The matter is *coram non judice,*[41] a nullity,[42] so that "there remains nothing for the privative clause to protect".[43] An inquiry not held under the authority of and in accordance with the empowering legislation is outside the ambit of protection,[44] in that the order in which it culminates has no existence in contemplation of law.[45]

The basic distinction reflected in this strand of judicial opinion is that between error involving jurisdiction and error pertaining to a matter within jurisdiction.[46] With regard to the former situation, it is clear that an inferior tribunal is entitled to err in fact or in law

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35. *Service Employees International Union, Local No. 333* v. *Nipawin District Staff Nurses Association* (1975) 41 DLR (3d) 6, 11 (S.C.C.).

36. *Magrath* v. *Goldsbrough Mort & Co. Ltd* (1932) 47 CLR 121, 135 (H.C.A.); *R.* v. *Justices of Rankine River, ex parte Sydney and Pluto* (1963) 3 F.L.R. 215, 217 (S.C. of Northern Territory, Aust.).

37. *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer* [1924] N.Z.L.R. 689, 699 (N.Z.S.C.).

38. *R.* v. *Ontario Labour Relations Board, ex parte Taylor* (1964) 41 DLR (2d) 456, 462 (Ont. H.C.).

39. *Re Lunenburg Sea Products Ltd; Re Zwicker* (1947) 3 DLR 195 (S.C.N.S.); *Bruton* v. *Regina City Policemen's Association, Local 55* (1945) 3 DLR 437 (Sask. C.A.).

40. *Ex parte Bridges, Re Russell* (1955) 73 W.N. (N.S.W.) 115, 116 (S.C.N.S.W.).

41. *Parisienne Basket Shoes Pty Ltd* v. *Whyte* (1938) 59 CLR 369, 389 (H.C.A.).

42. *Samajima* v. *R.* [1932] 4 DLR 246, 248(S.C.C.).

43. *R.* v. *Will and Toon, ex parte Visona* [1960] Qd. R. 123, 131 (S.C. of Qd.).

44. *Ex parte Brent* (1955) 3 DLR 587, 595 (Ont. C.A.); *R.* v. *Chairman of General Sessions at Hamilton, ex parte Atherby* [1959] V.R. 800, 808 (S.C.Vict.).

45. *Re Taraire Block No.1, J. No.2* [1916] N.Z.L.R. 46, 55, (N.Z.S.C.).

46. *R.* v. *Labour Relations Board of Saskatchewan, ex parte Tag's Plumbing and Heating Ltd* (1962) 34 DLR (2d) 128, 132 (Sask. S.C.); *Jarvis* v. *Associated Medical Services Ltd* (1964) DLR (2d) 407, 412 (S.C.C.).

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within the assigned area of its *vires*.[47] Since the statute cannot be construed as giving the tribunal jurisdiction only if its decisions are correct,[48] errors within the scope of jurisdiction are incapable of being reached by the prerogative writs.[49] While the superior court cannot substitute its opinion for that of the tribunal in respect of matters entrusted to the jurisdiction of the latter,[50] the legality of the tribunal's proceedings, as opposed to the merits of its findings, may be tested by resorting to the writs.[51]

The terminology evolved in this regard by Commonwealth courts is founded on the dichotomy between the *res judicanda*,[52] the very essence[53] or subject-matter[54] of the inquiry, and issues which are "collateral, preliminary or jurisdictional".[55] In the context of claims for compensation against public authorities, the courts of New Zealand have been prepared to regard questions of time limitation as collateral with the merits and therefore reviewable.[56]

The jurisdictional criterion, although entrenched in modern Commonwealth law as the pivot of judicial review, involves considerable complexity in application. The distinction between want or excess of jurisdiction and error within jurisdiction is tenuous in many statutory and factual contexts in which *certiorari* or prohibition is sought. Similarly, the difference between declining jurisdiction and wrongful exercise of jurisdiction is crucial[57] in applications for mandamus, the basis of which is restricted to the former context. Refusal to hear evidence or to permit cross-examination and disregard of evidence

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47. *Re Galloway Lumber Co. Ltd and British Columbia Labour Relations Board* (1965) 48 DLR (2d) 587, 589 (S.C.C.).

48. *Acme Home Improvements Ltd* v. *Workmen's Compensation Board* (1958) 11 DLR (2d) 461, 465 (C.A. of B.C.).

49. *Re Ontario Labour Relations Board, Bradley et al.* v. *Canadian General Electrical Co.* (1957) 8 DLR (2d) 65, 82 (Ont. C.A.).

50. *R.* v. *Saskatchewan Labour Relations Board, ex parte Construction and General Labourers' Local Union No.180* (1966) 57 DLR (2d) 163, 179 (Sask.Q.B.).

51. *Labour Relations Board of Saskatchewan* v. *Dominion Fire, Brick and Clay Products Ltd* (1947) 3 DLR 1, 6-7 (S.C.C.).

52. *Hami Paihana* v. *Tokerau District Maori Land Board* [1955] N.Z.L.R. 314, 323 (N.Z.S.C.).

53. See the case cited at note 47, *supra*.

54. *Labour Relations Board and Attorney-General for British Columbia* v. *Traders' Service Ltd.* (1958) 15 DLR (2d) 305, 321 (S.C.C.).

55. See the case cited at note 47, *supra*.

56. *Sullivan* v. *Mayor of Masterton* (1909) 28 N.Z.L.R. 921 (N.Z.S.C.); *Manawatu-Oraua River Board* v. *Barber* [1953] N.Z.L.R. 1010, 1034-1035 (N.Z.C.A.).

57. *R.* v. *Alberta Public Utilities Board, ex parte Swan Swanson Holdings Ltd* (1970) 9 DLR (3d) 376, 385-386. (Alta. S.C.., App. Div.).

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tendered have been considered tantamount to failure to exercise jurisdiction.[58] But it is clear that questions of degree are involved in wrongful refusal to receive evidence which does not invariably amount to declining jurisdiction.[59]

In any event, the jurisdictional criterion has not been accorded absolute validity in Commonwealth decisions. The effect of a privative clause, it has been judicially recognized, is sometimes to exclude review notwithstanding partial or even total lack of jurisdiction in the inferior tribunal.[60] Effect can sometimes be given to a privative clause only by treating the words "award, order or determination" as meaning acts in fact done by the tribunal in the supposed exercise of statutory powers.[61] It has been considered the clear intention of the legislature, when it uses the words "purporting to be made" in a preclusive clause, to deny review although the order was made in the absence of, or in excess of, jurisdiction.[62] Consequently, "the border cannot be simply jurisdiction."[63]

A notable feature of New Zealand legislation consists of express reference to lack of jurisdiction as a ground of review, unaffected by a deprivatory clause. This is exemplified by statutory provisions which preclude review "except upon the ground of lack of jurisdiction"[64] and by the statutory declaration that a privative clause is inapplicable to an order "made without or in excess of jurisdiction".[65] This limitation on the scope of privative clauses places beyond doubt the preservation of a residual supervisory jurisdiction in the courts.

The Effect of Privative Clauses: Alternative Approaches

Two conflicting theories as to the dimension of preclusive clauses emerge from the Commonwealth authorities.

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58. *R. ex rel. Woolworth Co. Ltd and Slabick* v. *Labour Relations Board of Saskatchewan* (1954) 4 DLR 359, 386 (Sask. C.A.).

59. For aggravating factors which enable this equation to be made, see *Toronto Newspaper Guild* v. *Globe Printing Co.* (1953) 3 DLR 561, 582 (S.C.C.).

60. *Re Biel* (1893) 18 VLR 456 (Vict.S.C.).

61. *Australian Coal and Shale Employees Federation* v. *Aberfield Coal Mining Co. Ltd* (1942) 66 CLR 161, 182(H.C.A.).

62. *R.* v. *Commissioner of Police for the Northern Territory, ex parte Holroyd* [1966] A.L.R. 243, 246 (S.C. of Northern Territory, Austr.).

63. *Ex parte Kolotex Pty Ltd; Re Permanent Trustee Co. of N.S.W. Ltd* (1961) S.R. (N.S.W.) 189, 193 (S.C. of N.S.W.).

64. Public Works Act 1928, s.45: Fair Rents Act 1936, s.20; Transport Act 1962, s. 164.

65. Maori Land Act 1931, s.50.

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(a) The first view is that the writs have "no necessary ongoing life in relation to all matters for which (they) could be used, if competent excluding legislation is enacted".[66] The substance of this approach is that supervisory jurisdiction may be invoked only in the absence of explicit legislative provision to the contrary. Once the legislative intention finds valid and clear expression[67] in a privative clause, controlling jurisdiction is excluded.[68] The Supreme Court of Canada thought review inappropriate where it found "a positive and clear enactment that the jurisdiction of the board shall be 'exclusive' – and nothing to warrant a refusal to give to that word its full effect".[69]

(b) According to the second view, control on jurisdictional grounds is necessarily unimpaired by a privative clause,[70] however sweeping[71] or encyclopaedic[72] the purported ambit of the clause may be.

> "Even if it wished, the legislature could not declare the absurdity that a (tribunal) which acts without jurisdiction can be immunized against the application of a writ... Its decision is null, and no text of a statute can give it any validity or decide that, in spite of its nullity, that decision should nonetheless be recognized as valid and carried into effect."[73]

While the legislature by suitable words may forestall review in other contexts, such as error of law on the face of the record,[74] it could not do so where the inferior tribunal had acted without or in excess of jurisdiction.[75] In other words, the intrinsic power of superior courts to quash the proceedings of administrative tribunals on the basis of a vital[76] or manifest[77] defect of jurisdiction is impregnable. This

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66. *Pringle* v. *Fraser* (1972) 26 DLR (3d) 28, 32 (Ont. C.A.).

67. *Beaton* v. *Sjolander* (1903) 9 BCR 439, 441 (S.C. of B.C.); *Re Richards* (1945) 3 DLR 87, 90 (S.C. of P.E.I.).

68. *Jarvis* v. *Associated Medical Services Ltd* (1964) 44 DLR (2d) 407, 412 (S.C.C.).

69. *Dominion Canners* v. *Costanza* [1923] 1 DLR 551, 563 (S.C.C.); *Brown* v. *Maxted Construction Co. Ltd* (1956) 3 DLR (2d) 144 (Ont. H.C.).

70. *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd* (1948) 4 DLR 673, 682-683 (P.C.).

71. *R.* v. *Public Service Labour Relations Board, ex parte New Brunswick Teachers' Federation* (1970) 17 DLR (3d) 72, 86 (S.C. of N.B., App. Div.).

72. *Re International Brotherhood of Electrical Workers, Local Union 105 and Electrical Construction Association of Hamilton* (1973) 35 DLR (3d) 54, 60 (Ont. H.C.).

73. *L' Alliance des Professeurs Catholiques de Montreal* v. *La Commission des Relations Ouvrieres de la Province de Quebec et la Commission des Ecoles Catholiques de Montreal* (1953) 4 DLR 161, 175 (S.C.C.).

74. *Att-Gen.* v. *Car Haulaways (N.Z.) Ltd* [1974] 2 N.Z.L.R. (N.Z.C.A.).

75. See the case cited at note 49, *supra*.

76. *R.* v. *Flood* (1922) 70 DLR 310, 311 (S.C.P.E.I.).

77. *Re Richards* (1945) 3 DLR 87, 90 (S.C.P.E.I.).

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conclusion may be supported on the footing that any other view would enable the tribunal to enlarge its powers capriciously and in effect to stultify imperative provisions of the enabling legislation.[78]

The suggestion is made in some Canadian cases that this construction of privative clauses is convincingly reconcilable with legislative intent, since legislatures during the last five decades have passively accepted the restrictive interpretation placed on such clauses by the courts.[79] However, the suggestion founded on legislative acquiescence is implausible. The strict attitude of the courts to the application of preclusive clauses derives from an overriding postulate of policy – that the acts of a creature of statute outside the confines of its limited jurisdiction must be held to be devoid of any semblance of legality.

Circumstances Involving Want of Jurisdiction and Consequent Ineffectiveness of Privative Clauses

Situations in which superior courts in the Commonwealth have retained vestigial control of administrative tribunals, despite comprehensively phrased preclusive statutory provisions, on the ground of fundamental jurisdictional defects in the tribunals fall naturally into several groups.

(i) *Improper constitution of the tribunal*

Australian,[80] Canadian[81] and New Zealand[82] courts have conceded that the protection of a privative clause does not attach to the decisions of an administrative tribunal which is invalidly[83] constituted. The privative clause is deprived of force by the circumstance that the proceedings and decision are not those of the tribunal contemplated by the legislative provision.[84]

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78. *Kuchma* v. *Tache* (1945) 2 DLR 13, 16-17 (Man. C.A.).

79. *Toronto Newspaper Guild* v. *Globe Printing Co.* (1953) 3 DLR 561, 572 (S.C.C.); *Capital Cab Ltd* v. *Canadian Brotherhood of Railway Employees and Other Transport Workers, Div. 186* [1950] 1 DLR 184, 187 (Sask. K.B.).

80. *R.* v. *Hibble* (1920) 28 C.L.R. 456 (H.C.A.).

81. *Nanaimo Community Hotel* v. *Board of Referees* [1945] 3 DLR 225 (C.A.B.C.).

82. See the case cited at note 37, *supra*.

83. The defect in constitution must be "one of real substance": *Re Atlantic Baptist Senior Citizens' Home Inc. and Spencer Memorial Home, R.N. Staff Association* (1974) 50 DLR (3d) 748, 751 (S.C.N.B., App. Div.).

84. *R.* v. *Murray, ex parte Proctor* (1949) 77 CLR 387, 402 (H.C.A.).

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(ii) *Legitimate scope of functions exceeded*

Where the conclusion is reached on the basis of the governing legislation that the tribunal has jurisdiction to adjudicate only on questions subsumed in the legal relationship between employer and employee, and where this relationship did not exist in the particular circumstances, the tribunal is bereft of jurisdiction.[85] A board entrusted with functions concerning the coal mining industry has no jurisdiction to order the reinstatement of a person whose employment was not in that industry.[86] The phrase designating the relevant industry has been construed as one of "final limitation"[87] on the powers and responsibilities of the statutory tribunal. A purported award which is not incidental to the settlement of an industrial dispute as to wages, loss of labour or conditions of work is extrinsic to an "industrial matter" within the meaning of the empowering provisions, and therefore transgresses the limits of jurisdiction.[88]

The principle sustaining supervisory jurisdiction in this context is that the tribunal is bound to perform its functions "according to the scheme and purpose of the statute".[89] *Certiorari* has been issued to an inferior tribunal which misconstrued a phrase defining jurisdiction contained in its charter.[90] Judicial intervention has been considered justifiable if the tribunal had acted "not in pursuance of, but contrary to, (its) statutory authority".[91]

A type of order or action not envisaged by the enabling legislation is *ultra vires* the tribunal. A fair rents board which purported to impose a penalty when it was authorized only to make a "determination" was held amenable to prohibition.[92]

(iii) *Absence of* locus standi *in the person invoking the jurisdiction of the tribunal*

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85. *R.* v. *Labour Relations Board* [1951] 4 DLR 227 (S.C.N.S.).

86. *R.* v. *Central Reference Board, ex parte Thiess (Repairs) Pty. Ltd* (1948] 77 CLR 123 (H.C.A.).

87. *R.* v. *Hickman, ex parte Fox* (1945) 70 CLR 598, 618 (H.C.A.).

88. *R.* v. *Judges of the Commonwealth Industrial Court and Others, ex parte Cocks* (1969–70) 121 CLR 313 (H.C.A.).

89. *R.* v. *Ontario Labour Relations Board, ex parte Taylor* (1964) 41 DLR (2d) 456, 463 (Ont. H.C.).

90. *Ex parte Herman, Re Mathieson* [1961] N.S.W.R. 1139 (S.C. N.S.W.).

91. *Re Yee Foo* (1925) 56 OLR 669, 670 (Ont. S.C.).

92. *Ex parte Bridges, Re Russell* (1955) 73 W.N.(N.S.W.) 115 (S.C.N.S.W.).

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A deficiency in the status of an applicant for relief militates against jurisdiction in the tribunal.[93] Despite a preclusive clause directed to the identical matter, the order of a board has been quashed in Canada partly because the applicant for certification was not a trade union, as required by the Act.[94] A privative clause has operation only in relation to a tribunal dealing with "authorised applications of the required description".[95]

(iv) *Non-fulfilment of a condition precedent*

Where the presence of a quorum was an essential condition of the valid exercise of its functions by a local reference board, which purported nonetheless to act without a quorum, prohibition was granted by the High Court of Australia.[96] The violation of a statutory condition, that a labour relations board should refrain from exercising jurisdiction in respect of any matter which was the subject of litigation, has been held in Canada to require restraint of the board by prohibition.[97] The omission to serve prescribed statutory notices prior to the commencement of proceedings by the tribunal has been regarded in New Zealand as an adequate basis for *certiorari.*[98] A privative clause is nugatory in these circumstances, provided that the condition contravened diminishes *ipso facto* the area of authority with which the tribunal is invested and is therefore to be looked upon as not merely directory but mandatory or imperative.[99]

An Australian court has remarked: "It seems ... absurd to suggest that a power which the legislature gives ... under a strict and express condition is to be validated when that condition has not been observed."[100] Observance of statutory preconditions goes to the root of jurisdiction,[101] and their violation implies removal of the basis of

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93. *Boulus* v. *Broken Hill Theatres Pty Ltd* (1949) 78 CLR 177 (H.C.A.).
94. *Re Canadian Fish Handlers' Union* [1952] 2 DLR 621 (S.C.N.B.).
95. *Boulus* v. *Broken Hill Theatres Pty Ltd* (1949) 78 CLR 177, 195-196 (H.C.A.).
96. See the case cited at note 84, *supra.*
97. *British Columbia Hotels Association* v. *Labour Relations Board* [1954] 3 DLR 85 (C.A.B.C.).
98. *McPherson* v. *Andrew Lees Ltd* [1926] N.Z.L.R. 523 (N.Z.S.C.).
99. *R.* v. *Ontario Labour Relations Board, ex parte Hannigan* (1967) 64 DLR (2d) 117 (Ont. C.A.); *cf. Industrial Union of Employers* v. *Tyndall* [1944] N.Z.L.R. 43 (N.Z.S.C.); *Wright* v. *New Zealand Woolpack and Textiles Ltd* [1948] N.Z.L.R.130 (N.Z.S.C.).
100. *Clugston* v. *Montague* [1936] VLR 172, 180 (Vict. S.C.).
101. *Bethune* v. *Bydder* [1938] N.Z.L.R. 1, 30 (N.Z.C.A.).

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statutory authority,[102] with consequent voidness[103] of the tribunal's action. In Canada[104] and New Zealand,[105] failure to adhere to a mandatory condition precedent has been explicitly equiparated with want of jurisdiction.

(v) *Deviation from prescribed procedure*

The High Court of Australia issued prohibition in a case where an administrative official, authorized to exercise jurisdiction only upon an application made to him, purported to act *ex mero motu*.[106] Departure from regular procedure enjoined on the tribunal by the statute creating it has been assailed as "analogous to a defect of jurisdiction".[107]

(vi) *Contravention of the rules of natural justice*

One of the recurring themes of judicial pronouncements in the Commonwealth is that statutory bodies, as a condition of the legality of their decisions, are required to comply with the rules of natural justice[108] in the absence of explicit[109] legislative provision to the contrary. Despite lingering doubts,[110] the consensus of judicial opinion in the Commonwealth is that breach of natural justice vitiates jurisdiction.[111] This applies to neglect of the requirement of a hearing,[112] its content and scope suitably modified according to the circumstances,

102. *R.* v. *Connell, ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 (H.C.A.).

103. *Whitfield's Motor Service Ltd* v. *Matthews* [1932] N.Z.L.R. 1414, 1419.

104. *de Marigny* v. *Langlais* [1948] S.C.R. 155, 159 (N.Z.S.C.).

105. *Duncan* v. *Graham* [1941] N.Z.L.R. 535, 551 (N.Z.C.A.).

106. *R.* v. *Commonwealth Rent Controller, ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361, 370 (H.C.A.).

107. *R.* v. *Chairman of General Sessions at Hamilton, ex parte Atterby* [1959] V.R. 800, 806 (Vict. S.C.).

108. *R.* v. *Picariello* (1922) 68 DLR 574 (Alta. C.A.); *Ex parte Yuen Yick Jun* [1940] 2 DLR 432, 437 (C.A.B.C.); *Hlookoff* v. *City of Vancouver* (1968) 67 DLR (2d) 119, 128 (S.C.B.C.); *R.* v. *Venables, ex parte Jones* (1970) 15 DLR (3d) 355, 359 (S.C.B.C.).

109. See the case cited at note 73, *supra*.

110. *James Aviation Ltd* v. *Air Services Licensing Appeal Authority* [1979] 1 N.Z.L.R. 481, 500-501 (N.Z.S.C.).

111. *Re Fairfield Modern Dairy* [1942] O.W.N. 579 (Ont.S.C.); *Re Brown and Brock* [1945] O.R. 554 (Ont.S.C.); *Jim Patrick Ltd* v. *United Stone and Allied Products Workers of America, Local 189 and Labour Relations Board* (1959) 29 W.W.R.592 (Sack. C.A.).

112. *Lapointe* v. *L'Association de Bienfaisance de Retraite de la Police de Montreal* [1906] A.C. 535, 540 (P.C.); *Re Ashby* [1934] 3 DLR 565 (Ont. C.A.); *Mantha* v. Montreal [1939] 4 DLR 425, 431-432 (S.C.C.).

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as well as to infraction of the rule against bias.[113] In the latter context, the caveat is necessary, within the framework of administrative decisions, that proof of emphatic opinions entertained by the official or board whose decision is impugned does not necessarily suffice.[114]

The central importance of the requisites of natural justice as the irreducible elements of administrative fairness has entailed the corollary that a tribunal which infringes these rules cannot be considered to act under its statutory powers.[115] Consequently, a privative clause is ineffective in the face of denial of natural justice.[116]

(vii) *Fraud*

Manifest fraud[117] inducing the order of an inferior tribunal has been uniformly treated by Commonwealth courts as equivalent to,[118] or as an example of,[119] lack of jurisdiction. A causal nexus between the fraud perpetrated and the relief obtained has been adverted to as an indispensable element.[120] The decided cases indicate a cleavage of opinion on the question whether perjury, *per se,* amounts to fraud in this context, but the balance of authority suggests an affirmative answer.[121]

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113. *R.* v. *Justices of Rankine River, ex parte Sydney and Pluto* (1963) 3 FLR 215, 219 (S.C. of Northern Territory, Aust.); *cf. Dickson* v. *Edwards* (1910) 10 CLR 243 (H.C.A.).

114. *R.* v. *Molesworth* (1898) 23 VLR 582 (Vict. S.C.).

115. *Nanaimo Community Hotel* v. *Board of Referees* [1945] 3 DLR 225, 235 (C.A.B.C.); *cf. National Trust Co.* v. *Christian Community* [1941] 3 DLR 529 (S.C.C.).

116. *R.* v. *Minister of Finance for British Columbia, ex parte Executors of Woodward Estate* (1970) 17 DLR (3d) 583, 588 (S.C.B.C.).

117. *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417 (P.C.).

118. *R.* v. *Commissioner of Police for the Northern Territory, ex parte Holroyd* [1966] ALR 243, 246 (S.C. of Northern Territory, Aust.).

119. *Re Cox and Velleman* [1948] OWN 721 (Ont. S.C.); *cf. Pateriki Hura and Ngaroimata Mootu* v. *The Native Minister and Aotea District Maori Land Board* [1940] NZLR 259, 263-264 (N.Z.S.C.).

120. *R. ex. rel. Retail, Wholesale and Department Store Union and Gilbery* v. *Labour Relations Board of Saskatchewan and Main* (1969) 69 WWR 81 (Sask. Q.B.).

121. *MacDonald* v. *Pier* [1923] 1 WWR 376 (Alta. S.C.); *R.* v. *Safruk* [1923] 2 WWR 1126 (Alta. S.C., App. Div.); *Re Edlund and Scott* [1944] 2 WWR 39 (Sask. S.C.); *sed contra:* the case cited at note 21, *supra.*

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(viii) *Wrong question asked or improper test applied*

There is clear authority in Canada that a subordinate tribunal, by asking itself the wrong question[122] or omitting to address itself to the right question,[123] denudes its decision of validity. The identical consequence, it has been suggested, attaches to the use of any improper test or predilection.[124]

(ix) *Improper purposes and irrelevant considerations*

In defiance of clear privative provisions, Canadian courts have characterized as void the decisions of an inferior tribunal actuated by an improper motive.[125] Similarly, a tribunal which directed its attention to extraneous issues has been controlled by *certiorari*.[126]

(x) *Insufficiency of evidence or inconsistency of the finding with evidence received*

A privative clause has been held to confer no protection[127] on the determination of an administrative body which acts "in the teeth of evidence".[128] But this conclusion has been repudiated on the ground that "the idea that the sufficiency of evidence has any relation to jurisdiction is entirely novel and against principle".[129] However, a decision altogether unsupported by evidence involves direct conflict

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122. *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers, Local 796* (1970) 11 DLR (3d) 336, 344 (S.C.C.).

123. *Re Fraser and Pringle* (1971) 19 DLR (3d) 129, 140 (Ont. C.A.).

124. M. Cohen, "Labour Law: Public Policy" (1952) Can. Bar Rev. 408, 423.

125. *Kuchma* v. *Tache* [1944] 2 DLR 41, 55 (Man.C.A.).

126. *Re C.S.A.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association* (1972) 2 OR 498, 504 (Ont.S.C.).

127. *R. ex rel. Woolworth Co. Ltd and Slabick* v. *Labour Relations Board of Saskatchewan* [1954] 4 DLR 359, 371 (Sask.C.A.).

128. *Canada Safeway Ltd* v. *Labour Relations Board* [1953] 1 DLR 48 (S.C.B.C.).

129. *Canadian Transport (U.K.) Ltd* v. *Alsbury* (1952) 7 WWR (N.S.) 49, 73 (C.A.B.C.).

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with the rudiments of procedure containing judicial characteristics.[130] In New Zealand, a privative clause has been given force in circumstances where "some grounds"[131] arising from the evidence could be urged in support of the tribunal's finding.

(xi) *Imposition of a superfluous requirement*

Where a statutory board refuses certification of an employee organization on a basis which entails the superimposition of a requirement not set out in, or capable of reasonable inference from, the empowering provision, the board, according to Canadian authority,[132] exceeds its jurisdiction and may be reached by *certiorari*, notwithstanding a privative clause.

(xii) *Misapprehension of evidentiary principles*

By application of a test of unusual severity, the courts in Canada have inclined towards the view that "material errors as to the laws of evidence"[133] deprive an inferior tribunal of jurisdiction and afford grounds for quashing its decisions.

(xiii) *Extreme abuse of jurisdiction*

The Supreme Court of Canada has suggested, by implication, that degrees of abuse of its jurisdiction by the inferior tribunal are relevant to the conclusion that it has transcended the ambit of its *vires* demarcated by statute.[134]

An Evaluation of Categories of Want of Jurisdiction in the Light of Policy Objectives

Constitutional provisions in Australia and Canada have the effect of curtailing the applicability of privative clauses embodied in principal

130. *Re Nelson* [1935] OWN 562 (Ont. S.C.).

131. *Wright* v. *New Zealand Woolpack and Textiles Ltd* [1948] NZLR 130, 134 (N.Z.S.C.).

132. *R.* v. *Public Service Labour Relations Board, ex parte New Brunswick Teachers' Federation* (1970) 17 DLR (3d) 72 (S.C.N.B., App. Div.); *cf. Smith & Rhul Ltd* v. *R. ex rel. Andrews* [1953] 3 DLR 690 (S.C.C.).

133. *Re Sisters of Charity, Providence Hospital and Labour Relations Board* [1951] 3 DLR 735 (Sask. C.A.).

134. *R.* v. *Archer and White* (1956) 1 DLR (2d) 305, 309 (S.C.C.).

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and delegated legislation. The entrenchment of the High Court's jurisdiction to award mandamus, prohibition or an injunction against an "officer of the Commonwealth"[135] by the Constitution of Australia brings about a bifurcation of the legal principles governing the validity of privative clauses in the federal and state spheres.[136] In Canada, the operation of preclusive clauses embedded in provincial legislation is restricted by limitations imposed by the British North America Act 1867 on the competence of provincial legislatures.[137] In particular, Imperial legislation incorporating the Constitution of Canada controls drastically the authority of provincial legislatures to constitute tribunals invested with judicial power.[138] Thus, the jurisdiction of Canadian courts to decide whether a particular administrative agency established by a provincial statute is or is not "a superior, district or county court" within the meaning of the Canadian Constitution[139] presents them with a resilient device for the supervision of tribunals.

Subject to the operation of rules which are part of the constitutional instrument, Commonwealth legislatures are free to circumscribe, by the enactment of privative provisions, the scope of judicial review of administrative action. A group of judicial decisions reflects resolute commitment to safeguarding supervisory jurisdiction by resisting the literal construction of privative clauses.[140] This strand of judicial opinion is typified by consistent emphasis on values pertaining to the freedom of the individual[141] and the subordination of administrative discretion to the rule of law.[142] The hostile response to deprivatory clauses, indicative of judicial paternalism, is inspired by considerations of history and usage. The interpretation of statutes and the enforcement of rudimentary standards in respect of procedures entailing potential jeopardy to invididual rights have long been considered integral to the judicial function.[143] The instinctive security engendered by judicial

135. s. 75(v.) of the Commonwealth Constitution.

136. See, generally, D.G.Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971), p. 249.

137. s. 96; *cf. Farrell* v. *Workmen's Compensation Board* (1962) 31 DLR (2d) 177, 181 (S.C.C.).

138. British North America Act 1867, s.96, 99 and 100.

139. *ibid.* s. 96.

140. *Re Yellow Cab Ltd and Board of Industrial Relations* (1979) 105 DLR (3d) 469, 473 (Alta. C.A.); *cf. Canadian Union of Public Employees, Local 963* v. *New Brunswick Liquor Corporation* (1978) 21 NBR (2d) 441 (C.A.N.B.).

141. *McCarthy* v. *Grant* [1959] NZLR 1014, 1019 (N.Z.S.C.).

142. J.F. Garner, *Administrative Law* (4th ed., 1974), p.62.

143. *O' Malley* v. *Chief Commissioner of Police* [1961] V.R. 729, 730 (Vict.S.C.); *Ex parte Blackwell: Re Hateley* [1965] NSWR 1061, 1064 (S.C. of N.S.W.).

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surveillance is an inarticulate premise of current judicial approaches to preclusive provisions. The assumption that a privative clause, by suppressing judicial remedies, makes the redress of grievances exclusively a matter of legislative responsibility,[144] is not entirely valid, since parliamentary initiative, however beneficial its impact may be for the future, does not, unless it is retrospectively operative, furnish the particular litigant with a remedy against unlawful administrative action.

The countervailing considerations of policy stem from the doctrine of legislative sovereignty and the relationship between Parliament and the courts which is fundamental to British constitutional theory. The literal acceptance of privative clauses is founded on judicial subservience to the will of the legislature.[145] The courts have shown sensitivity and perception in recognizing that privative clauses, by ensuring the inviolability of a distinct regime which aspires to greater informality and simplicity in rapidly developing fields of public policy, often promote socially desirable objectives.[146] Legislative resolve to clothe with finality the decision of an administrative tribunal is entitled to judicial respect, particularly when judges, by their training, aptitude and experience, are not uniquely equipped to adjudicate on the subject-matter of the inferior tribunal's determination, and there is evident merit in curial deference to the opinion of a tribunal especially conversant with the relevant subject.[147]

The cogency of these factors is enhanced if the statutory regime purporting to supplant the supervisory jurisdiction of regular courts makes provision for alternative remedies of equal efficacy, and seeks to reduce delay, expense and technicality disproportionate to the positive aspects of regular adjudication.[148] Traditionally, the courts have evinced distaste for active involvement in areas dominated by

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144. *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 DLR 561, 573 (S.C.C.).

145. In *re Biel* (1893) 18 VLR 456, 459 (Vict. S.C.); *cf. Minister of Labour and Industry (N.S.W.)* v. *M.L.C. Assurance Co. Ltd* (1922) 30 CLR 488 (H.C.A.).

146. *R.* v. *Metal Trades Employers' Associations, ex parte Amalgamated Engineering Union, Australian section* (1950-51) 82 CLR 208, 248 (H.C.A.); *Ex parte Transport Workers' Union of Australia (N.S.W.Branch), Re Gallagher* (1964) 82 W.N (Pt.2) (N.S.W.) 58, 68 (S.C. of N.S.W.); *Bakery and Confectionery Workers' International Union of America, Local 468* v. *Salmi; White Lunch Ltd* v. *Labour Relations Board of British Columbia* (1966) 56 DLR (2d) 193, 201 (S.C.C.).

147. *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson* (1924) 34 CLR 482, 526 (H.C.A.); *McLeod* v. *Egan* (1974) 46 DLR (3d) 150, 159 (S.C.C.).

148. *R.* v. *Bindon* (1879) 5 VLR(L) 93, 96 (Vict.S.C.); *Dominion Canners Ltd.* v. *Costanza* [1923] 1 DLR 551, 557 (S.C.C.).

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expediency,[149] although social and economic policy is sometimes seen overtly to permeate judicial attitudes to privative clauses.[150] Judges have been reluctant to disturb the delineation of legislative and judicial functions by resorting to tortuous concepts as vehicles of judicial review in violation of clearly expressed statutory imperatives. The mainstream of judicial decision in the Commonwealth suggests continual awareness of the risk which such a course involves for the security and stability of established institutions.

It is apparent from this survey of the competing ideals infusing the relevant body of law that no absolute choice can be made, *a priori*, between the literal and stringent approaches to privative clauses. The options available, in any event, present the appearance of a spectrum rather than of a split. The solution preferred by a court is necessarily dependent on its assessment of the priorities inherent in a given statutory and factual setting.

This conclusion underlines the importance of a critical evaluation of the categories of lack of jurisdiction spelt out or implied in the decided cases as warranting judicial review despite a privative clause. The ultimate need is for flexible criteria capable of accommodating different facets of modern public policy. Once it is accepted that a privative clause, while not precluding judicial review absolutely, renders invulnerable non-jurisdictional error[151] and confines the judicial supervisory function to demarcation of *vires*, [152] the submission may be made that want of jurisdiction should comprise such categories as defective constitution of the tribunal overstepping, of the limits of its authority (whether by entertaining an application it is disentitled to receive, by infringing a condition precedent, by dealing with subject-matter outside its purview, by making an unauthorized type of order or by flagrant breach of procedural requirements), failure to comply with the rules of natural justice and fraud, but ought not in principle to extend to situations involving, for instance, paucity of the evidence on which the tribunal's decision is based, misinterpretation by the tribunal of the laws of evidence (by which it is not always bound) and extreme abuse of jurisdiction in miscellaneous contexts.

149. *Canadian Pacific Express Co.* v. *Kindzierski* [1954] 2 DLR 715, 718-719 (Man. C.A.).

150. See, *e.g. Labour Relations Board* v. *Speers and Regina Undertakers Employees' Federal Union* [1948] 1 DLR 340 (Sask.S.C.); *Regina Grey Nuns Hospital Employees' Association* v. *Labour Relations Board* (1950) 4 DLR 775 (Sask.S.C.).

151. *R.* v. *Ontario Labour Relations Board, ex parte Metropolitan Life Insurance Co.* (1969) 68 DLR (2d) 109 (Ont. H.C.).

152. *Toronto Newspaper Guild* v. *Globe Printing Co.* [1953] 3 DLR 561, 572 (S.C.C.).

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From a pragmatic standpoint, it is submitted, the former category is convincingly distinguishable from the latter. The gist of a privative clause is that, at the very least, questions like the adequacy of evidence sustaining the conclusions reached by the tribunal are entrusted solely and finally to the judgment of the latter; and if this minimal effect were withheld it would seem that a privative clause expressed in one of the conventional forms is almost wholly illusory. To substitute the opinion of a superior court for that of the tribunal as to sufficiency of the evidence tendered by a party in support of his case is, plainly, incompatible with the legislative intention manifested in the enactment of a privative clause. It is submitted that a criterion of lack of jurisdiction which embraces so amorphous a ground lacks balance and is unacceptable. Similarly, the intrinsic vagueness of the notion of "extreme abuse of jurisdiction" as a basis of review applicable to contexts not subsumed in other heads of review more specifically formulated, deprives this residual conception of value. The trends associated with these categories are reinforced by the idea of "jurisdictional fact" which, as exploited in some Canadian judgments,[153] has expanded too flexibly the foundations of judicial review.

The tests relating to improper motives and irrelevant considerations, to the formulation of erroneous issues and the application of deficient criteria, call for similar comment. These factors are within the range of considerations ordinarily encompassed by judicial review of administrative action. But one of the ways in which a privative clause cuts down the scope of judicial review is by excluding these criteria as bases for the exercise of supervisory jurisdiction.

There is room for the suggestion that recent judicial trends in England indicate excessive boldness in broadening the frontiers of judicial review. The effect of contemporary English law is that "Any error of law that could be shown to have been made (by administrative agencies) in the course of reaching their decision on matters of fact or of administrative policy would result in their having asked themselves the wrong question with the result that the decision they reached would be a nullity".[154] However, if any error of law can be represented as symptomatic of an excess of jurisdiction by appropriate manipulation

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153. *R.* v. *Schoppelrei* (1919) 31 CCC 255 (Man.C.A.); *R.* v. *Lantalum* (1921) 35 CCC 295 (C.A.N.B.); *Re Milka Singh* (1931) 56 CCC 211 (C.A.B.C.).

154. *Re Racal Communications Ltd* [1980] 3 WLR 181, 187 (H.L.) *per* Lord Diplock, commenting on *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 (H.L.).

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of phraseology,[155] privative clauses cannot but be denied their legitimate effect generally.

It is submitted, for this reason, that the avenues of development of modern English law should not be emulated uncritically in Commonwealth jurisdictions – particularly in those where a federal constitutional structure, and its repercussions on the judicial function, introduce a special dimension. it is of interest to note that a recent *cursus curiae* in Canada, representing a useful counterpoise to the indefensibly broad tests as to lack of jurisdiction foreshadowed in previous authorities, adopts the view that "jurisdiction is typically to be determined at the outset of the inquiry".[156] A privative clause, consistently with this approach, precludes judicial review in circumstances where an inferior tribunal, originally invested with jurisdiction, is alleged to have lost jurisdiction in the course of its inquiry because it asked itself the wrong question, applied the wrong test, acted from an improper motive or was influenced by an irrelevant consideration.

The Australian Solution: An Imaginative Compromise

The essence of the principle of legality, applied to administrative law, is the rigid subjection of administrative agencies to the limits of their authority, as defined in the empowering legislation. This doctrine has a compelling rationale, in terms of the protection of individual liberty, in an age epitomized by organized authority in government, industrial management, trade unions and in most other walks of life. The Australian High Court has considered it axiomatic that

> If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons and in respect of all subject-matters and without observance of any conditions which the legislature has attached to the exercise of the powers.[157]

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155. *Pearlman* v. *Keepers and Governors of Harrow School* [1979] Q.B. 56, 78-80.

156. *Jackmain* v. *Attorney-General of Canada* [1978] 2 SCR 15 (S.C.C.); *Majestic Neckwear Ltd.* v. *City of Montreal* (1979) 97 DLR (3d) 653 (S.C.C.); *cf* K. Norman, "The Privative Clause: Virile or Futile?" (1969) 34 Sask. L.R. 33; P.C. Weiler, "The Slippery Slope of Judicial Intervention: The Supreme Court and Canadian Labour Relations 1950-70(1970) 9 Osgoode Hall L.J.1.

157. *R.* v. *Commonwealth Rent Controller, ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361, 369 (H.C.A.).

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On the other hand, in the setting of privative clauses, the courts have been disposed to interpret generously the jurisdiction of inferior tribunals. They are indisputably entitled to make decisions of law incidental to their administrative functions.[158] This right has been conceded as a matter of implication from the enabling provision.[159] Judicial circumspection is signified by the comment that intervention is warranted only when "the grounds are exceedingly strong."[160] In particular, a court is inhibited from reviewing a tribunal's findings of fact[161] or from embarking on an examination of facts in regard to which controverted evidence was adduced before the tribunal.[162]

Viewed in the perspective of disparate postulates of the law, the initiative of the Australian courts in evolving a means of giving privative clauses substantial effect[163] without acquiescing in the total abrogation of their supervisory jurisdiction presents a fresh point of departure. The Australian approach derives from assessment of (i) the degree of the tribunal's deviation, objectively considered, from its statutory function; and (ii) the subjective purpose and intention of the tribunal in exceeding the limits of its authority. These aspects warrant separate treatment.

(i) In recognizing gradations as to excess of jurisdiction, the courts of Australia have distinguished deliberately between decisions made "wholly without power"[164] or acts done completely[165] or altogether[166] outside any possible jurisdiction, on the one hand, and acts "reasonably capable of reference to a power belonging to the board and relating wholly to a subject-matter of that power",[167] on the other. The former envisages "so manifest a departure from the authority of the

158. *R.* v. *Ontario Labour Relations Board, ex parte Taylor* (1964) 41 DLR (2d) 456, 462 (Ont. H.C.).

159. *Board of Prince Albert School Unit No. 56* v. *National Union of Public Employees' Local Union No.832* (1962) 35 DLR (2d) 361, 363 (Sask.S.C.).

160. *Segal* v. *Montreal* [1931] 4 DLR 603, 615 (S.C.C.).

161. *Wells* v. *Carew* (1900) 19 NZLR 349 (N.Z.S.C.).

162. *McKellar* v. *Land Board of Otago* (1908) 27 NZLR 811, 825 (C.A.); *White* v. *Kuzych* [1951] 3 DLR 641 (P.C.); *Bell* v. *Ontario Human Rights Commission* (1971) 18 DLR (3d) 1, 19 (S.C.C.).

163. *Foster* v. *Aloni* [1951] V.L.R. 481, 483 (Vict.S.C.) – a case of delegated legislation.

164. *Magrath* v. *Goldsbrough Mort & Co. Ltd* (1932) 47 CLR 121, 128 (H.C.A.).

165. *The Coal Miners' Industrial Union of Workers of Western Australia* v. *Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 446 (H.C.A.).

166. *ibid*, p. 448.

167. *R.* v. *The Members of the Central Sugar Cane Prices Board, ex parte The Maryborough Sugar Factory Ltd* (1959) 101 CLR 246, 255 (H.C.A.).

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statute that reasonable men acting in good faith could not believe it to be within the scope of that authority".[168] In this type of case, a serious[169] lack of jurisdiction is plainly[170] or patently[171] demonstrable. The latter category, by contrast, comprises orders of an inferior tribunal which, although made marginally in excess of its jurisdiction in the particular circumstances,[172] are yet "of the kind which in a proper case it was within (its) jurisdiction to make".[173]

The crux of this refinement is the emphasis placed on quantitative criteria which militate against the construction of privative clauses by reference to an inflexible norm. The Australian approach attaches due weight to the legislative will by reducing the intensity of judicial review. Thus, acts of inferior tribunals "bearing on their face every appearance of an attempt to pursue the (statutory) power"[174] have been held immune from judicial superintendence. Confronted with privative provisions, Australian courts have displayed natural disinclination to probe fastidiously below the surface.[175]

(ii) The subjective *animus* of the tribunal in performing an act outside the ambit of its jurisdiction has conditioned judicial attitudes in Australia to the application of privative clauses. An attempt by the administrative body bona fide,[176] honestly[177] or genuinely[178] to exercise its statutory authority has been considered entitled to protection from challenge. The solution worked out in the Australian case law caters for a difference between jurisdiction unwittingly exceeded in trivial respects and a conscious or calculated extension of *vires* not sanctioned by the law.

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168. *Morgan* v. *Rylands Brothers (Australia) Ltd* (1927) 39 CLR 517, 524 (H.C.A.).

169. *Ex parte Farley and Lewers Ltd; Re Transport Workers' Union of Australia (N.S.W.Branch)* (1966) 84 W.N. (Pt.2) (N.S.W.) 31, 32 (S.C.N.S.W.).

170. *Ex parte Wurth: Re Tully* (1954) 55 S.R. (N.S.W.) 47, 54 (S.C.N.S.W.).

171. *Foster* v. *Aloni* [1951] VLR 481, 484 (Vict. S.C.).

172. *Re Bell, ex parte The Marine Board of Victoria* (1892) 18 VLR 432, 440 (Vict. S.C.); *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex parte Grant* (1950) 81 CLR 27, 55 (H.C.A.).

173. *Ex parte Kolotex Pty. Ltd, Re Permanent Trustee Co. of N.S.W. Ltd* [1961] S.R. (N.S.W.) 189; 194 (S.C.N.S.W.).

174. *R.* v. *Hickman, ex parte Fox* (1945) 70 CLR 598, 616 (H.C.A.); *Baxter* v. *New South Wales Clickers' Association* (1909) 10 CLR 114, 148 (H.C.A.).

175. *R.* v. *Metal Traders Employers' Association; ex parte Amalgamated Engineering Union, Australian section* (1950-51) 82 CLR 208, 249 (H.C.A.).

176. *R.* v. *Connell, ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 (H.C.A.).

177. *R.*v. *Murray, ex parte Proctor* (1949) 77 CLR 387, 400 (H.C.A.).

178. *Foster* v. *Aloni* [1951] VLR 481, 484 (Vict.S.C.).

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A group of Canadian decisions embodies elements of the Australian approach.[179] The courts of New Zealand have distinguished between defects of form and defects of substance for a comparable purpose.[180]

The major criticism levelled against the solution favoured by the Australian courts is that it is constructed on "a very vague principle ... productive of uncertainty and differences of judicial opinion".[181] But this objection is hardly insuperable. The difficulty of precise definition has not prevented fundamental concepts in many branches of law from retaining their viability and value. The chief merit of the Australian approach consists of its realistic and practical tenor which enables emphasis and priorities to be differently evaluated in widely varying statutory contexts.

Conclusion

Broadly, three approaches are possible to the impact of privative statutory provisions on the scope of supervisory jurisdiction.

(i) An Australian writer has commented:

> The apparent inconsistency between particular provisions delimiting the jurisdiction of a tribunal and a general privative provision exists only if the particular provisions are first read as being subject to final interpretation by a superior court. Once this attitude is adopted, it becomes necessary to read down the privative clause. But if the approach is made from the opposite direction, as I submit it should be, the privative clause would be read first as removing the tribunal from the control of the superior court, and the particular provisions are then seen as directions to the administrative tribunal only, not to the superior court at all.[182]

This suggestion requires nothing less than the unqualified abdication of supervisory jurisdiction by the courts in the face of preclusive

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179. *Quebec Labour Relations Board* v. *Pascal Hardware* [1965] Que. R. 791, 798 (Que. Q.B.); Francois Nolin Ltee v. *Commission des Relations de Travail du Quebec* [1978] S.C.R. 168, 171 (S.C.C.); Barvi Ltée v. *Tribunal de Travail* [1972] Que. R. 58, 66 (Que. S.C.).

180. *Hami Paihana* v. *Tokerau District Maori Land Board* [1955] N.Z.L.R. at pp. 322-323 (N.Z.S.C.).

181. R. Anderson, "*Parliament* v. *Court:* The effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals through the Prerogative Writs" (1950) 1 U Queensland L.J. 39, 45-46.

182. *ibid.* p. 50.

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statutory provisions. The literal approach to the construction of privative clauses, carried to this extent, is hard to reconcile with the fundamental importance which the doctrine of *ultra vires* has acquired in English and Commonwealth administrative law. As a rule, Commonwealth courts have been inclined to look upon the applicability of privative clauses to tribunals of limited jurisdiction as involving, logically, a contradiction in terms. This attitude is reflected in the remark by a New Zealand judge: "I think the courts of general jurisdiction should be slow to hold that, when establishing a ...tribunal of limited jurisdiction, Parliament meant it to have authority to determine conclusively for the purposes of any given case the meaning of provisions in the Act by which it is constituted and under which it operates."[183] There is little likelihood, in view of the historical and cultural background of the legal system, that Commonwealth courts could be prevailed upon to regard privative provisions and any manner or degree of judicial review as mutually exclusive in all circumstances.

(ii) At the other end of the spectrum of possible attitudes to the problem is the view of a leading English authority: "To exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. It is no exaggeration, therefore, to describe this as an abuse of the power of Parliament, speaking constitutionally."[184] He continues:

> Judicial control, particularly over discretionary power, is a constitutional fundamental. In their self-defensive campaign the judges have almost given us a constitution, establishing a kind of entrenched provision to the effect that even Parliament cannot deprive them of their proper function. They may be discovering a deeper constitutional logic than the crude absolute of statutory omnipotence.[185]

This view is implied by the antithesis stressed by a New Zealand court between "the variable content of contemporary legislation"[186] and "the firm foundation of the common law".[187]

Whatever may be the position within the framework of constitutions

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183. *New Zealand Engineering, Coachbuilding and Aircraft, Motor and Related Trades Industrial Union of Workers* v. *Court of Arbitration* [1976] 2 NZLR 283, 301, *per* Cooke J. (N.Z.C.A.).

184. H.W.R. Wade, *Constitutional Fundamentals* (1980), p.66.

185. *ibid.* p.68.

186. *McCarthy* v. *Grant* [1959] NZLR 1014, 1022, *per* Gresson J. (N.Z.S.C.).

187. *ibid.*

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founded on the American model, the view that the courts enjoy in the administrative field an entrenched supervisory jurisdiction which cannot be reached by legislative action clearly goes against the grain of the British constitutional system. The incidence of supervisory jurisdiction does not represent an irrefragable doctrine but offers only tentative protection which must give way to legislative supremacy. The contrary view is not supportable by reference to canons of statutory construction, nor is it proper in this context to call in aid ethical values derived from natural law. The central element of judicial attitudes should be respect for the legislative allocation of responsibility rather than the desire to carve out the maximum area of jurisdiction.

Except where the supervisory jurisdiction of regular courts is specifically entrenched by provisions of the Australian and Canadian constitutions, the invariable practice of Commonwealth courts, following English usage, has been to preserve supervisory jurisdiction *via* the presumption against curtailment. But to elevate this presumption, inapplicable as it is in the absence of ambiguity, to an inviolable constitutional postulate is to put in danger of disintegration the cement which binds together the organs of government within the established constitutional fabric.

(iii) The assumption that, in applying a preclusive clause, "either the court may always interpose for any excess of jurisdiction by the (tribunal) as to subject-matter, or it may never interpose, whatever the (tribunal) may in fact award, however it may exceed the most obvious bounds of the statute",[188] is neither necessary nor justifiable. The divergent elements of policy pervading this area of the law cannot be reconciled by conceding priority in the abstract to one set of values. The crucial considerations are those of context and balance.

The function of the court is to give effect to the terms of the privative provision while retaining, whenever practicable, supervisory jurisdiction within a narrower compass. The treatment of lack of jurisdiction as a phenomenon which makes inapplicable a privative clause is sound in principle. Judicial trends in all three jurisdictions surveyed in this chapter embody this common approach, although the scope of jurisdictional taint is variously defined – much more broadly in Canada than in Australia and New Zealand. Too amorphous an approach tends to assimilate some types of error within jurisdiction with error entailing excess of jurisdiction, with the consequence that a privative clause receives an appreciably more restricted interpretation

188. *Morgan* v. *Rylands Brothers (Australia) Ltd* (1927) 39 CLR 517, 524 (H.C.A.).

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than it warrants. The essential feature of balance lies in containing the concept of lack of jurisdiction appropriately. The criteria foreshadowed in the Australian decisions allow scope for a wide range of nuances and, developed further by the case law technique, are of particular value in formulating guidelines for attaining the required balance between the different objectives of the law.

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THE DIMENSIONS OF CROWN PRIVILEGE IN COMMONWEALTH LAW: A COMPARATIVE STUDY

Introduction

A STRIKING example of the function of law in modern society, of reconciling the conflict of individual, public and social interests,[1] is provided by the legal principles governing the exclusion of evidence on the ground of jeopardy to the State interest. The cardinal aspects of public policy which come into conflict in this area are (a) the public interest that harm should not be done to the nation or to the public service; and (b) the public interest that the administration of justice should not be frustrated by the withholding of documents which must be produced if justice is to be done.[2] The body of evidentiary law which has been evolved in this regard by the Anglo-American legal tradition is founded on a compromise between divergent objectives of social policy. The purpose of this chapter is to offer a critical analysis of the foundations on which the prevailing doctrines and attitudes in Commonwealth jurisdictions are based.

The Juridical Character of The Doctrine of Exclusion

The branch of the law dealing with State interest as a basis of exclusion of evidence has no strict bearing on the concept of privilege.[3] The distinct character of the rules governing the former area is demonstrable in several ways: (i) the objection to reception of evidence, based on public policy, may be invoked by any person and, indeed, should be taken by the judge *ex mero motu;*[4] (ii) unlike a plea of privilege, the objection of State interest cannot be waived

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1. See generally, E. Ehrlich, *Fundamental Principles of the Sociology of Law* (translation by W.L. Moll), pp.489-506; *cf.* R. Pound, "Sociology of Law and Sociological Jurisprudence" (1943-4) 5 University of Toronto Law Journal 1.

2. S. L. Phipson, *The Law of Evidence* (12th edition, 1976), p.231. para. 562.

3. In *Conway* v. *Rimmer* (1968) A.C. 910 every member of the House of Lords, with the exception of Lord Morris, assailed the nomenclature of 'Crown privilege' and expressed a preference for the phrase 'public policy'. The term 'Crown privilege' has been described as "wrong" (*Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388 at p: 400, *per* Lord Reid), "misleading" (*D.* v. *National Society for the Prevention of Cruelty to Children* [1978] A.C. 171 at p.190, *per* Lord Denning M.R.) and "not accurate, though sometimes convenient" (*Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388 at p. 406, *per* Lord Pearson).

4. *Hennessy* v. *Wright* (1888) 21 Q.B.D. 509; *Chatterton* v. *Secretary of State* (1895) 2 Q.B. 189.

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by the Crown or by any other person;[5] (iii) the rule of exclusion deriving from public policy encompasses primary and secondary evidence without discrimination;[6] (iv) the objection of State interest cannot be rejected on the ground that the document in question came into existence in pursuance of some criminal or fraudulent purpose.[7]

In view of these special features characterizing the relevant legal principles, they cannot be assimilated with the notion of privilege in evidentiary law and are better conceived of as an aspect of broader considerations of public policy which control the admissibility of evidence in judicial proceedings.

The Scope of The Exclusionary Rule

The exclusionary rule, although generally invoked in respect of documents,[8] applies also to real[9] and oral[10] evidence. An English court has declared: "It cannot be laid down that all public documents ... are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest that there must be a limit to the duty or power of compelling the production of papers which are connected with acts of State."[11]

The general rule of disclosure is sustained by two major considerations. The first is that "Each party enjoys as an incident of his right to a fair trial the right to present as part of his case all the relevant and material evidence which supports or tends to support that case".[12] The second consideration, closely allied to the first, is

5. *Spong* v. *Spong* (1914) V.L.R. 77; *Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388.

6. *Hughes* v. *Vargas* (1893) 9 T.L.R. 92; *Gain* v. *Gain*(1961) 1 W.L.R. 1469.

7. *R.* v. *Cox and Railton* (1885) 14 Q.B.D. 153; *O'Rourke* v. *Darbishire* (1920) A.C. 581.

8. In its application to documents the principle based on State interest is not confined to documents in the possession of the Crown or to documents which the Crown has brought into existence. It extends to documents which are not in the custody of the Crown and which are brought into existence by another party if the documents contain confidential information supplied by the Crown, production of which would be harmful to the public interest; *Asiatic Petroleum Co. Ltd* v. *Anglo-Persian Oil Co. Ltd* (1916) 1 K.B. 822.

9. *Marconi's Wireless Telegraph Co. Ltd* v. *Commonwealth (No. 2)* (1913) 16 C.L.R. at p. 185.

10. *Duncan* v. *Cammell Laird & Co.* (1942) A.C. 624 at p. 643.

11. *Beatson* v. *Skene* (1860) 5 H & N. 838.

12. *Australian National Airlines Commission* v. *The Commonwealth of Australia* (1975) 132 CLR 554 at p.593, *per* Mason J.: *Haseltine Research Inc.* v. *Zenith Radio Corporation* (1965) 7 F.L.R. 339.

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that "The withholding from parties of relevant and material documents, unless justified by the strongest considerations of public interest, is apt to undermine public confidence in the judicial process".[13] The New Zealand courts have emphasized that "It is vital for the court to be as fully informed as reasonably possible of the facts and issues".[14] "Indeed, in some cases, the only prospect the injured person has of recovering damages lies in his being able to obtain in court information from (an official) file."[15]

The High Court of Australia has envisaged the principle of nondisclosure as "embracing a group of 'exceptional bases' in which the public interest in the proper administration of justice has been outweighed by a superior public interest of a self-evident and overwhelming kind".[16] The basis of non-disclosure, according to one strand of judicial opinion, is that a confidential relationship exists and that production of the evidence is in breach of some ethical or social value involving the public interest.[17] The privilege against disclosure springs from a confidential communication, coupled with a paramount public interest in permitting the secrecy surrounding the communication or its contents to be maintained.[18] Although the categories of public interest are not closed[19] and the courts show "willingness to extend established principles by analogy and legitimate extrapolation",[20] extension of the principle of non-disclosure is effected with restraint and circumspection.[21]

Lord Denning has identified confidentiality as the essential basis

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13. *ibid.* cf. *Attorney-General* v. *Mulholland: Attorney-General* v. *Foster* (1963) 2 Q.B. 477.

14. *Fiordland Venison Ltd* v. *Minister of Agriculture and Fisheries* (1978) 2 N.Z.L.R. 341.

15. *Hinton* v. *Campbell* (1953) N.Z.L.R. 573 at p. 575, *per* North J.

16. *Australian National Airlines Commission* v. *The Commonwealth of Australia* (1975) 132 C.L.R. 554 at p. 593, *per* Mason J.

17. *D.* v. *National Society for the Prevention of Cruelty to Children* (1977) 2 W.L.R. 201 at p. 232, *per* Lord Edmund-Davies; *cf. R.* v. *Cheltenham Justices; Ex parte Secretary of State for Trade* (1977) 1 W.L.R. 95 at p. 100, *per* Lord Widgery C.J. See also *British Steel Corporation* v. *Granada Television Ltd* (1980) 3 W.L.R. 818 at p.826, *per* Lord Wilberforce, and at p.836, *per* Viscount Dilhorne.

18. *R.* v. *Snider* (1954) 109 C.C.C. 193.

19. *In re D. (Infants)* (1970) 1 W.L.R. 559; *Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388.

20. *D.* v. *National Society for the Prevention of Cruelty to Children* (1977) 2 W.L.R. 201 at p.215, *per* Lord Hailsham of St. Marylebone.

21. *McGuiness* v. *Attorney-General of Victoria* (1940) 63 C.L.R. 73 at p. 104, *per* Dixon J.

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of exclusion of evidence on the ground of public policy.[22] However, this does not represent the prevailing view of the relationship between confidentiality and public interest. Confidentiality, though not coeval with public interest, is a "significant element"[23] of the latter concept. Still, it is neither "a satisfactory basis for testing whether relevant evidence should be withheld"[24] nor "a separate head of immunity".[25] The view countenanced by modern authority is that "where the subject matter is clearly of public interest, the *additional* fact (if such it be) that to break the seal of confidentiality would endanger that interest will in most (if not all) cases probably lead to the conclusion that disclosure should be withheld".[26] This approach is predicated on the assumption that public interest requires to be "extrinsically established"[27] or accepted as a matter of inference.[28] The element of public interest is adequately demonstrable in the context of communications for the purpose of marriage conciliation.[29] The effect of the existing law is that, although confidentiality furnishes no independent justification for withholding evidence in the public interest, it may have an important bearing on the latter issue, in so far as the range of factors by reference to which the divergent elements of public policy need to be evaluated, will generally include the confidentiality of documents or other evidence.[30]

The least controversial application of the principle of non-disclosure is in the sphere of national security which includes national defence and the conduct of foreign relations. When the defendants, acting

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22. "The true question is whether the court will compel a person to break a confidence" *(D.* v. *National Society for the Prevention of Cruelty to Children* (1978) A.C. 171 at p. 190).

23. *D.* v. *N.S.P.C.C.* (1978) A.C. 171 at p. 199, *per* Scarman L.J.

24. *D.* v. *N.S.P.C.C.*(1978) A.C. 171 at p.237, *per* Lord Simon of Glaisdale.

25. *id.*, at p.230, *per* Lord Hailsham of St. Marylebone.

26. *id.*, at p.246, *per* Lord Edmund-Davies.

27. *id.*, at p.239, *per* Lord Simon of Glaisdale; cf. *Lord Diplock,* at p.220. The existence of "any general privilege protecting communications given in confidence" has been denied *(Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388 at p. 408, *per* Lord Simon of Glaisdale).

28. *Theodoropoulas* v. *Theodoropoulas* (1964) P. 311 at pp. 313-4.

29. *McTaggart* v. *McTaggard*(1959) P. 94; *Mole* v. Mole (1951) P. 21; *Henley* v. *Henley* (1955) P. 202.

30. The English Court of Appeal has recently adopted the approach that confidentiality, the need for candour and the desirability of cooperation are all factors to be weighed in the balance: *Neilson* v. *Laugharne* (1981) 2 W.L.R. 537 at p.544, *per* Lord Denning M.R.

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under the direction of the Board of Admiralty, refused to produce a letter to their agent on the ground that it contained information concerning the Government's plans with regard to one of the Middle Eastern campaigns of the First World War, the objection of the defendants was upheld.[31] In the leading case of *Duncan* v. *Cammell Laird & Co. Ltd*[32] the defendants to a claim for damages for negligence in relation to the construction of submarines successfully resisted, on a direction by the Board of Admiralty, the production of numerous documents in their possession in their capacity as government contractors. The design and structure of submarines, especially when the country was at war, was clearly a matter pertaining to national security.

Documents which have been suppressed on the ground of probable injury to State interest include communications between the governor of a colony and its legal or military officers as to the condition of the colony or the conduct of its agents,[33] communications between the governor of a colony and a Secretary of State[34] and communications between a Dominion High Commissioner and the Prime Minister of the Dominion.[35] Similarly, disclosure has been refused in respect of reports of military inquiries[36] and communications of the commander-in-chief of forces abroad with the Government[37] on the ground that national security relates, in a broad sense, to the defence of the nation and the maintenance of good diplomatic relations with foreign States.[38] However, disclosure has been ordered in respect of State pupil record cards.[39]

There is no doubt that the deliberations of Parliament, the proceedings of the Privy Council and State secrets fall within the purview of the exclusionary rule. Thus, the speeches and votes of Members of Parliament may not be divulged except by leave of the

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31. *Asiatic Petroleum Co. Ltd* v. *Anglo-Persian Oil Co. Ltd* (1969) 1 K.B. 822 at p. 830.
32. (1942) A.C. 624.
33. *Wyatt* v. *Gore* (1816) Holt N.P. 299; *Cooke* v. *Maxwell* (1817) 2 Stark 183.
34. *Wright* v. *Mills* (1890) 62 L.T. 558.
35. *Isaacs* v. *Cook* (1925) 2 K.B. 391.
36. *Home* v. *Bentinck* (1820) 2 Brod. & Bing. 130; cf. *St. George* v. *St. George* (1959) Q.W.N. 13.
37. *Chatterton* v. *Secretary of State* (1895) 2 Q.B. 189.
38. *R.* v. *Brixton Prison Governor: Ex parte Soblens* (1963) 2 Q.B. 243; but see *Spitzel* v. *Beck* (1890) 16 V.L.R. 661 at p. 663.
39 *McLean* v. *Moore* (1969) 90 W.N. (Pt. 1) (NSW) 679.

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House.[40] Opinions expressed during discussions at a Cabinet meeting are confidential[41] until such time as their disclosure would not undermine the doctrine of collective Cabinet responsibility.[42] The minutes of an examination of witnesses before the Lords of the Council have been accorded protection from disclosure.[43]

In *Duncan* v. *Cammell Laird & Co, Ltd*[44] where the plaintiff sought discovery of documents relating to the submarine *Thetis* including a contract for the hull and machinery together with plans and specifications, and the First Lord of the Admiralty stated that "it would be injurious to the public interest that any of the said documents should be disclosed to any person", there is little scope to impugn the correctness of the decision by the House of Lords that the documents should be excluded. However, Viscount Simon took the opportunity to deal with the whole question of the right of the Crown to prevent production of documents in litigation, whether the Crown was a party to the proceedings or not.

The exposition of the law in this case leaves no room for doubt that the test of incompatibility with the public interest is satisfied: (a) by having regard to the contents of the particular document; or (b) by the fact that the document belongs to a class which, on the grounds of public interest, must generally as a class be withheld from production. However, the fact that a document is a member of a class of documents ordinarily protected from disclosure, the High Court of Australia has recently held, is not invariably determinative of the issue.[45]

The doctrine requiring virtually guaranteed secrecy for certain classes of documents has received a wide interpretation in the decided cases. Among documents which have been excluded on this ground by the British courts are confidential reports and plans submitted to the Board of Trade,[46] army medical sheets relating to a soldier,[47] reports as to a collision at sea by a naval captain to the Admiralty,[48]

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40. *Plunkett* v. *Cobbett* (1804) 5 Esp. 136; *Chubb* v. *Salomons* (1852) 3 C. & K. 75.
41. *Lanyon Pty. Ltd* v. *Commonwealth of Australia* (1974) 3 A.L.R. 58 at p.60, *per* Menzies J.
42. *Attorney-General* v. *Jonathan Cape Ltd; Attorney-General* v. *Times Newspapers Ltd,* (1976) Q.B. 752.
43. *R.* v. *Layer* (1722) 16 St. Tr. 93.
44. See note 10 *supra.*
45. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505.
46. *Mercer* v. *Denne* (1904) 2 Ch. 534.
47. *Anthony* v. *Anthony* (1919) T.L.R. 559.
48. *The Bellerophon* (1874) 44 L.J. Adm. 5.

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reports by the Inspector-General of Prisons to the Lord Lieutenant of Ireland,[49] police reports under the Irish Crimes Act,[50] documents setting out grounds on which a prisoner received the royal pardon[51] and reports by doctors and prison officers on the mental condition of a prisoner and concerning an assault on a fellow prisoner who claimed damages against the Home Office.[52] Other examples of this category of document are provided by correspondence between an officer of Customs and the Board of Commissioners,[53] a communication by a justice of the peace to the Commissioners of the Great Seal or to another justice,[54] a report by an officer of Inland Revenue to his superiors,[55] documents brought into existence within the Customs and Excise Departments for the purpose of fixing an assessment for liability to purchase tax,[56] communications between the Commissioners of Customs and independent third parties for the same purpose,[57] confidential letters commenting on the character of employees at the Mint[58] and even communications made by or to the Lord Chamberlain in his official capacity as to persons to be invited to court.[59]

On the other hand, documents the exclusion of which, as a class, has not been necessitated by considerations of State interest are exemplified by letters by a private individual to the Postmaster-General complaining of the conduct of a postal official,[60] official books indicating the appointment of a collector of property tax[61] and communications between the keeper of a lunatic asylum and the Commissioners in Lunacy.[62] The effect of a recent Australian decision is that statements of persons who would or might be called as

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49. *M'Elveney* v. *Connellan* (1904) 17 I.C.L.R. 55.
50. *Ashtown* v. *Waterford* (1908) 42 Ir.L.T. 77.
51. *R.* v. *Cobbett* (1804) 2 St. Tr. (N.S.) 789.
52. *Ellis* v. *Home Office* (1953) 2 Q.B. 135.
53. *Anderson* v. *Hamilton* (1816) 2 Brod. & Biz. 156.
54. *Fitzgibbon* v. *Greer* (1858) 9 I.C.L.R. 294.
55. *Hughes* v. *Vargas* (1893) 9 T.L.R. 92.
56. *Crompton (Alfred) Amusement Machines Ltd* v. *Customs and Excise Commissioners (No. 2)* (1973) 3 W.L.R. 268.
57. *ibid.*
58. *Latter* v. *Goolden* (C.A.) 18 November 1894 cited in *Williams* v. *Star Co.* (1908) 24 T.L.R. 297.
59. *West* v. *West* (1911) 27 T.L.R. 189.
60. *Blake* v. *Pilford* (1832) 1 Moo. & Rob. 198.
61. *Lee* v. *Birrell* (1813) 1 M. & S. 482.
62. *Hill* v. *Philp* (1852) 7 Exch. 232.

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who knew, or should have known, that the assailant was unsafe. The Crown successfully claimed privilege for police reports and medical reports on the behaviour of the assailant before the assault. Devlin J., while dismissing the action, said: "I must express my uneasy feeling that justice may not have been done because the material before us was not complete and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done."[68] These judicial observations express doubts whether the exclusion of evidence at the instance of the executive might not have an adverse effect on the administration of justice.

These reservations are justified by the result reached in several cases. For example, in a divorce action[69] the issue was whether the husband had contracted syphilis during military service. Both parties wanted production of his military records, but the court upheld the War Office view that the public interest was best served by not producing them.[70] A liquidator who had taken out a misfeasance summons against directors could not have the balance sheets of the company when they were in the hands of the Inland Revenue authorities.[71]The refusal of the Minister of Transport, in an action for damages against a railway company arising out of a railway accident, to let the plaintiff have access to a report on the accident sent by the defendant was upheld,[72] although his predecessor, the President of the Board of Trade, had never withheld it from litigants.[73] The protests of the judge at the lack of assistance from the Local Government Board were unavailing in an action for nuisance said to have been caused by a smallpox hospital where the report of the inspector of the board was withheld.[74] This trend, which is reflected in some Australian decisions,[75] provides justification for the comment that "It is of obvious importance to ensure generally that claims of Crown privilege are not used unnecessarily to the detriment of the vital need of the courts to have the truth put before them".[76]

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68. Quoted at p. 137 by Singleton L.J.
69. *Anthony* v. *Anthony* (1919) 35 T.L.R. 559.
70. Cf. *King* v. *King* (1944) Q.W.N. 25.
71. *Re Joseph Hargreaves Ltd* (1900) 1 Ch. 347; see also *Honeychurch* v. *Honeychurch* (1943) S.A.S.R. 31.
72. *Ankin* v. *L.N.E. Railway* (1930) 1 K.B 527.
73. *Woolley* v. *N.L. Railway* (1869) L.R. 4 C.P. 602.
74. *Attorney-General* v. *Nottingham Corporation* (1904) 1 Ch. 673.
75. See, for example, *Seeney* v. *Seeney* (1945) Q.W.N. 20.
76. *Broome* v. *Broome* (1955) 1 All E.R. 201 at p. 207, *per* Sachs J.

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witnesses in a preliminary inquiry in committal proceedings before a magistrate are not, as a class, subject to Crown privilege.[63]

The high-water mark of the doctrine which requires the keeping of a class of documents secret, irrespective of their contents, is represented by the case of *Broome* v. *Broome*.[64] A wife petitioned for divorce on the ground of adultery. The husband was a regular soldier of non-commissioned rank. An issue in the case related to the circumstances in which the wife was received by the husband on her arrival at his station in Hong Kong. There had been at Hong Kong a representative of the Soldiers, Sailors and Air Force Families Association. Differences had arisen between the husband and wife, and her good offices were invoked. She had made written reports of the case to her head office. The wife issued a *subpoena ad testificandum* directed to the representative of the Association and a *subpoena duces tecum* addressed to the Secretary of State for War relating to documents concerning attempts to reconcile the spouses made by the S.S.A.F.A. The Minister resisted production of the documents. On the basis of the existing authorities[65] Sachs J. ruled that the principle of exclusion of documents on the footing of State interest could be applied irrespective of where a document originates and in whose custody it is held.

On numerous occasions, however, English courts have expressed misgivings about the extreme width of the exclusionary rule which is entrenched in the decided cases. *Odlum* v. *Stratton*[66] was an action for libel brought by a farmer against the chairman of a War Agricultural Committee. One of the issues related to the plaintiff's efficiency as a farmer. There were several contemporary records and reports made by the Committee and communications between the Committee and the Minister. The Ministry of Agriculture successfully objected to the production of all these documents, but Atkinson J. considered that their disclosure would have been of the utmost assistance in arriving at the truth. In *Ellis* v. *Home Office*[67] a prisoner in gaol was seriously assaulted by a fellow prisoner. The plaintiff alleged that this was due to the negligence of servants of the Home Office

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63. *Attorney-General for New South Wales* v. *Findlay* (1976) 50 A.L.J.R. 637 at p. 638, *per* Barwick C.J.

64. (1955) 2 W.L.R. 401; cf. J.E.S. Simon, "Evidence Excluded by Consideration of State Interest" (1955) Cambridge Law Journal 62.

65. *Ankin* v. *L.N.E. Railway* (1930) 1 K.B. 527; *Moss* v. *Chesham U.D.C.* 16 January 1945.

66. July 21-19, 1949, quoted by J.E.S. Simon, *op. cit.* at p. 73.

67. (1953) 2 Q.B. 135.

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The wide scope of the exclusionary doctrine, as applied to documents considered to belong to a sensitive class, is attributable to the formulation of the relevant principle by Viscount Simon in the *Cammell Laird* case: "The public interest requires a particular class of communications with, or within, a public department to be protected from production on the ground that the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation rather than upon the contents of the particular document itself."[77] Viscount Kilmuir L.C., in a statement in the House of Lords on the grounds which warrant invocation of Crown privilege, expressly distinguished between "contents" and "class" cases. Having set out the first ground that disclosure of the contents of the particular document would injure the public interest, he proceeded: "The second ground is that the document falls within a class which the public interest requires to be withheld from production,"[78] The rationale underlying the second ground was stated to be that "Government decisions should be taken on the best advice and with the fullest information."[79]

A recent judgment of the High Court of Australia suggests that the distinction between "class" and "contents" situations ought not to be regarded as absolute. The comment was made that there was "no reason to extend the umbrella of non-disclosure or non-production to all documents concerned with policy making in government departments"[80] and that, within this area, "a distinction should be drawn between important matters of policy and those which are not".[81] The House of Lords has conceded that the dichotomy between "contents" and "class" cases is "not wholly satisfactory".[82]

Nonetheless, the distinction remains entrenched in English and Commonwealth law. Thus, according to the House of Lords, "a 'class' claim may legitimately be advanced even in respect of documents having *no* contents which it would prejudice the public interest to disclose";[83] nor is a "class" claim deprived of its identity because part of its contents has been divulged.[84] The classification of "class"

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77. (1942) A.C. 624 at p. 635.
78. Statement to the House of Lords on 6th June 1956.
79. *ibid.*
80. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 573, *per* Mason J.
81. *ibid.*
82. *Burmah Oil Co. Ltd* v. *Bank of England* (1979) 3 All E.R. 700 at p. 723, *per* Lord Keith of Kinkel.
83. *id.*, at p. 717, *per* Lord Edmund-Davies.
84. *id.*, at p. 706, *per* Lord Wilberforce.

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and "contents" cases has been adopted authoritatively as "a good working, but not logically perfect, distinction".[85] The essential basis of "class" claims is *"pour encourager les autres"*.[86] This consideration, it has been recognized in Australia, has implications for the burden of proof: "Those who urge Crown privilege for classes of documents, regardless of particular contents, carry a heavy burden".[87]

The unsatisfactory condition of the law, as stated in the *Cammell Laird* case, is due primarily to the failure to take into account the different ramifications of the concept of "public interest" in this area. Viscount Simon relied heavily on the *dictum* of Lord Parker of Waddington that "Those who are responsible for the national security must be the sole judge of what the national security requires".[88] Viscount Simon's substitution of the phrase "national interest" for "national security" suggests that he regarded the two phrases as synonymous. It is clear, however, that "national interest" is a significantly wider concept than "national security", in that it covers not only the safety of the country but other types of interest, including commercial interests. The distinction between these concepts has been recognized in judicial pronouncements of impeccable authority.[89]

It has been aptly observed by a New South Wales court that "There are no absolutes in this field".[90] "In each case it is a matter of weighing the detriment supposed to flow from production against the prejudice to the administration of justice which may result from a refusal to order production."[91] However, the metaphor of balancing is not altogether appropriate. "Here the process is to consider fairly the strength and value of the interest in preserving confidentiality and the damage which may be caused by breaking it; then to consider whether the objective – to dispose fairly of the case – can be achieved without doing so, and only in a last resort to order discovery. This

85. *id.*, at p. 732, *per* Lord Scarman.
86. *Lonrho Ltd* v. *Shell Petroleum Ltd* (1980) 1 W.L.R. 627 at p.638, *per* Lord Diplock.
87. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 545, *per* Stephen J.
88. *The Zamora* (1916) 2 A.C. 77 at p. 107.
89. See *Chandler* v. *Director of Public Prosecutions* (1962) 3 W.L.R. 694.
90. *Ex parte Attorney-General; Re Cook* (1967) 86 W.N. (Pt. 2) (N.S.W.) 222 at p. 239, *per* Holmes, J.A.; cf. *Attorney-General* v. *Clough* [1963] 1 Q.B. 773 at p. 788, *per* Lord Parker C.J.; *Isbey* v. *New Zealand Broadcasting Corporation (No. 2)* (1975) 2 N.Z.L.R. 237 at p. 238, *per* Cooke J.
91. *Australian National Airlines Commission* v. *The Commonwealth of Australia* (1975) 132 C.L.R. 554 at p. 592, *per* Mason J.

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is a more complex process than merely using the scales; it is an exercise in judicial judgment."[92]

It is inevitable that the role of the judiciary in this regard should entail a predominant element of policy and creativity, "as the range of issues which engage the attention of the executive government is infinite and as the manner in which those issues are considered varies from case to case".[93] It is a striking feature of the development of the law that extension of State activity in the spheres of business and commerce has presaged liberal invocation of Crown privilege.[94] This phenomenon, in due course, encouraged a spirit of judicial circumspection which finds expression in the recent comment by the Supreme Court of New Zealand: "The activities of the State were not withering but expanding, and it therefore could no longer hold its very special position in the courts."[95]

Evaluation of the public interest cannot be governed in all contexts by a uniform and immutable principle. The complexity of the concept and the diversity of the situations in which it becomes relevant as a possible basis for the exclusion of evidence render an inflexible approach of minimal value. Broadly, the proposition is maintainable that the considerations which apply in contexts where national defence and good diplomatic relations are thought to be imperilled, can be distinguished convincingly from those relevant to situations where evidence is sought to be excluded on the basis that its reception is injurious to some other element of the public interest. For example, it can scarcely be suggested that comparable considerations come into play in a case where publication of the design of a submarine is claimed to endanger the public safety[96] and in a case where reception of the medical sheets of a soldier[97] or of evidence relating to attempts at reconciling a soldier with his estranged wife[98] is objected to on the ground of transgression of the public interest.

Gradations and refinements must necessarily be recognized in relation to the component elements of the public interest. An essential

92. *Science Research Council* v. *Nasse: Leyland Cars (B.L. Cars Ltd)* v. *Vyas* (1979) 3 W.L.R. 762 at p. 771, *per* Lord Wilberforce.

93. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 574, *per* Mason J.

94. See, for example, *Wadeer* v. *East India Co.* (1856) 44 E.R. 360 at p. 363.

95. *Arataki Honey Ltd* v. *Minister of Agriculture and Fisheries* (1979) 2 N.Z.L.R. 311 at p. 316, *per* Jeffries J.

96. *Duncan* v. *Cammell Laird & Co.* (1942) A.C. 624.

97. *Anthony* v. *Anthony* (1919) 35 T.L.R. 559.

98. *Broome* v. *Broome* (1955) 1 All E.R. 201.

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feature of the concept is that it comprises several facets, the relative importance of which cannot be determined in the abstract but depends on the nature of the interest which is alleged to be threatened and the extent to which jeopardy to that interest is evident in a given case. The public interest in the due administration of justice is no less vital than the public interest in the protection of the State by the non-disclosure of potentially hazardous information. The subordination of the former interest to the latter needs to be justified by compelling considerations. The central problem in these circumstances is to assess competing interests and to decide which interest should be accorded priority in the light of the exigencies of a particular situation.

There are many cases where the nature of the injury which would or might be done to the nation or to the public service is of so grave a character that no other interest, public or private, including the interest in the administration of justice on the basis of uninhibited access to relevant evidence, can be allowed to prevail over it. With regard to such cases it is a proper approach that production or discovery of the document in question would put the interest of the State in jeopardy. However, there are many other cases where the possible injury to the public service is less significant in character or in degree. In these contexts it is altogether appropriate to evaluate closely the public interests involved.[99] Consequently, it is not a valid principle that the smallest probability of injury to the public service must invariably outweigh the gravest impediment to the administration of justice.

Indeed, contemporary judicial trends in Australia and in England call for satisfaction of stricter tests than those emerging from the traditional law, before relevant evidence may justifiably be excluded on grounds of public policy. There did exist a *cursus curiae* which favoured State papers (a category of documents encompassing Cabinet

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99. Cf. *Conway* v. *Rimmer* (1968) A.C. 910. *Cf.* the treatment of "national security" and "other national interests" by J.A. Gobbo, D. Byrne and J.D. Heydon, *Cross on Evidence* (2nd Australian edition, 1979) pp. 293-294, and by D.L. Mathieson, *Cross on Evidence* (3rd New Zealand edition, 1979), pp. 286-287.

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minutes, dispatches from ambassadors and minutes of discussions involving ministers) being accorded absolute protection.[100] But current judicial attitudes in Australia are hostile to the recognition of State papers as a homogeneous class governed by an indiscriminate principle of total immunity from disclosure. The High Court of Australia is committed to the empirical approach that "The subject matter with which the papers deal will be of great importance, but all the circumstances have to be considered in deciding whether the papers in question are entitled to be withheld from production, no matter what they individually contain".[101] The gist of this approach is that Cabinet decisions and papers, far from requiring the application of special principles, "stand fairly and squarely within the area of (the general) rule".[102] The House of Lords, rejecting the contention that a claim for immunity from production in respect of documents of this category is conclusive,[103] has asserted "the residual power to inspect and to order disclosure".[104] "Something must turn on the nature of the subject matter, the persons who dealt with it and the manner in which they did so".[105]

The unequivocal purport of prevailing Australian law is that recourse should be had to the 'balancing' process throughout the range of State documents, irrespective of the level at which the decisions or consultations they embody have been taken or held. The foundation of the law is "a recognition of the existence of the competing aspects of the public interest, their respective weights and hence the resultant balance varying from case to case".[106] The criteria by reference to which the court accords priority to one of the competing elements of the public interest in this specific context are those derived from the general body of law pertaining to Crown privilege: "In a particular case the court must balance the general desirability that documents

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100. *R.* v. *Turnbull* (1958) Tas. S.R. 80; *Re Grosvenor Hotel, London (No. 2)* (1965) Ch. 1210 at pp. 1247, 1255; *Conway* v. *Rimmer* (1968) A.C. 388 pp. 952, 973, 979, 987 and 993; *Rogers* v. *Home Secretary* (1973) A.C. 388 at p. 412; *Lanyon Pty. Ltd* v. *Commonwealth* (1974) 3 A.L.R. 58 at p. 60 (subject, however, to a qualification envisaging "very special circumstances", *per* Menzies J.); *Australian National Airlines Commission* v. *Commonwealth* (1975) 132 C.L.R. 582 at p. 591; *Barty-King* v. *Minister of Defence* (1979) 2 All E.R. 80.

101. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 528, *per* Gibbs A.C.J.

102. *id.*, at p. 571, *per* Mason J.

103. *Burmah Oil Co. Ltd* v. *Bank of England* (1979) 3 All E.R. 700.

104. *id.*, at p. 733, *per* Lord Scarman.

105. *id.*, at p. 725, *per* Lord Keith of Kinkel.

106. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 546, *per* Stephen J.

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of that kind should not be disclosed against the need to produce them in the interests of justice."[107]

The present condition of Australian and English jurisprudence, then, cannot be reconciled with a 'two-tier' theory of Crown privilege which requires the application of disparate principles to documents relating to decisions and deliberations in the higher and in the inferior echelons of government, respectively. Still, the especial sensitivity and vulnerability of the former class of documents may well render appropriate differences of emphasis in the application of substantially uniform legal principles. Notwithstanding the assertion by the High Court of Australia that the protection conferred even on this category of documents "does not endure for ever",[108] it is not difficult to conceive of circumstances in which it is desirable that the protection given should "continue to operate beyond the time span of a particular episode".[109] Extended protection, in point of time, is defensible in cases where "to reveal what advice was *then* sought and given and the mechanism for seeking and considering such advice might well make the process of government more difficult now".[110] However, the fundamental consideration, stressed by the High Court of Australia[111] as well as by the House of Lords,[112] is that in this area, no less than in others, "A claim to Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim".[113]

The unwarranted extension of the scope of the exclusionary rule in contexts which do not impinge on national security is to be imputed, in the main, to the facile assumption that, the contrast in these cases necessarily being between the interest of the individual litigant and the interest of the community as a whole, the latter interest is entitled to precedence. This approach is reflected in the

107. *id.*, at pp. 529-30, *per* Gibbs A.C.J.

108. *id.*, at p. 529, *per* Gibbs A.C.J.

109. *Burmah Oil Co. Ltd* v. *Bank of England* [1979] 3 All ER 700 at p.707, *per* Lord Wilberforce.

110. *ibid.*

111. See note 14, *infra.*

112. "The immunity is a rule of law; its scope is a question of law; and its applicability to the facts of a particular case is for the court, not the minister, to determine": *Burmah Oil Co. Ltd v Bank of England* [1979] 3 All ER 700 at p. 732, *per* Lord Scarman. Cf. *Lonrho Ltd* v *Shell Petroleum Ltd* [1980] 1 WLR 627 at p. 638, *per* Lord Diplock.

113. *Sankey v Whitlam* (1978) 21 ALR 505 at p. 542, *per* Stephen J.

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assertion that "The public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation".[114] A similar attitude finds expression in the comment that "The public interest must be considered paramount to the individual interest of a suitor in a court of justice".[115]

The fallacy inherent in this approach lies in the identification of the interest in the proper administration of justice as an individual interest. "If the private interest is an interest in securing an adequate remedy for a tort whether committed by a civil servant or otherwise, then it is also the public interest that justice should be administered so that the innocent are compensated for the wrongs done to them by their fellows."[116] It is apparent, then, that the supposed dichotomy between the individual interest and the public interest in this context is misconceived. The integrity of political institutions and the exposure of organs of govenment to public scrutiny indisputably transcend the range of individual interests and form an integral aspect of the public interest.

Although it is incontrovertible that there is a public interest in the general security and in public safety which is of an overriding character,[117] this interest must be contained within its legitimate ambit. The relegation of a crucial facet of the public interest – that pertaining to availability of the entirety of the relevant evidence to the courts as a foundation for achieving justice between individuals and between the individual and the State – has resulted in an imbalance in the weight assigned to the diverse elements of public policy. It is submitted that some of the deficiencies which have marred the evolution of the case law of England can be supplied by the formulation of distinct rules catering to different branches of the public interest.

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114. *Duncan v Cammell Laird & Co.* [1942] A.C. 624 at p. 643, *per* Viscount Simon.

115. *Beatson v Skene* (1860) 5 H. & N. 853.

116. H. Street, "State Secrets: A Comparative Study" (1951) 14 Modern Law Review 121 at pp. 130-131.

117. R. Pound, "A Survey of Social Interests" (1943) 57 Harvard Law Review 1 at p.17; cf. *Dufresne Construction Co. Ltd* v. *R.* (1935) Ex. 77 at p. 85, *per* Angers J.

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Responsibility for Determining the Issue of Public Interest

In the *Cammel Laird* case[118] the House of Lords laid down the proposition that an objection validly taken to production on the ground that it would be detrimental to the public interest is conclusive. Accordingly, it was stated that the court should not require to see the documents for the purpose of judging whether disclosure would in fact harm the public interest.

However, even within the British Isles,[119] this view has not been followed consistently. A different approach has been adopted for Scots law, in respect of which Viscount Simon said: "We have had the advantage of an exhaustive examination of the relevant law from the earliest times, and it has left me in no doubt that there always has been and is now in the law of Scotland an inherent power of the court to override the Crown's objection to produce documents on the ground that it would injure the public interest to do so."[120] Although there are decisions by the Scottish courts[121] which are in line with the *Cammell Laird* ruling, the contrary view is supported by the balance of judicial authority in Scotland.[122]

The *Cammell Laird* ruling on this point has not found favour in most Commonwealth jurisdictions.

The Canadian courts, despite some prevarication,[123] have asserted that the certificate by the executive is subject to judicial scrutiny.[124]

In Australia the view has been expressed that "A ministerial objection taken in proper form is conclusive",[125] but this does not represent the consensus of judicial opinion in Australia. In the leading

118. See note 32 at p. 278, *supra,*

119. *Re Grosvenor Hotel (No. 2)* (1965) Ch. 1233; *Merricks* v. *Nott-Bower* (1965) 1 Q.B. 57; *Wednesbury Corporation* v. *Minister of Housing and Local Government* (1965) 1 W.L.R. 261.

120. *Glasgow Corporation* v. *Central Land Board* (1956)S.C.(H.L.) 1 at p.11.

121. *Earle* v. *Vass* (1822) 1 Shaw's App. 229; *Admiralty Commissioners* v. *Aberdeen Steam Trawling and Fishing Co.* (1909) S.C. 335.

122. See *Henderson* v. *M'Gown* (1916) S.C. 821 and the cases cited in the judgment.

123. *Green* v. *Livermore* (1939) O.W.N. 429; *Murray* v. *Murray* (1947) 3 D.L.R. 236; *Weber* v. *Pawlik* (1952) 2 D.L.R. 750.

124. *Lengyel* v. *Swanson and Calgary Power Co. Ltd* (1947) 2 W.W.R. 648; *Pocock* v. *Pocock* (1950) O.R. 734; *Re Geldart's Dairies, Ltd.* (1950) 3 D.L.R. 141; *R.* v *Snider* (1953) 2 D.L.R. 9. But see note 75 at p. 294, *infra.*

125. *Nash* v. *Commissioner for Railways* (1863) 80 W.N. (Part 1) (N.S.W.) 460 at p.464, Herron A.C.J. and McClemens and Brereton JJ; *cf. Foran* v. *Derrick* (1892) 18 V.L.R. 408; *Ex parte Falstein, Re Maher* (1948) 49 S.R. (N.S.W.) 133.

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case of *Robinson* v. *South Australia State*[126] the State Government had assumed the function of acquiring and marketing all wheat grown in the State and distributing the proceeds to the growers. An action was brought alleging negligence in carrying out this function. The Privy Council remitted the case to the Supreme Court of South Australia with the direction that "It is a proper one for the exercise by that court of its power of itself inspecting the documents for which privilege is set up in order to see whether the claim is justified".[127] A similar conclusion has been reached in other Australian decisions. Where a police officer who had given evidence before a magistrate on a charge of illegal betting declined on the direction of his superiors to produce vouchers directly relating to his evidence, and where an affidavit from the Chief Secretary of Victoria was tendered to the Magistrate in which the Minister objected to the production of the document, the Supreme Court of Victoria endorsed the reasoning in *Robinson's* case.[128] The courts of Queensland have taken the same view.[129] It has been declared to be "the simple duty of the court"[130] to protect the privilege where it exists.

In New Zealand, despite the contrary view taken in some decisions,[131] the established trend is inimical to investing the certificate by the executive with conclusive effect.[132] The courts of New Zealand, it has been asserted unequivocally, possess the power to disallow a ministerial objection to the production of documents in respect of which Crown privilege is claimed if they think it right to do so.[133] This has been received by writers in New Zealand as a "a definite and welcome advance in the law" [134] In several cases[135] a claim of Crown privilege was upheld only after independent judicial

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126. (1931) A.C. 704.

127. At p. 723.

128. *Bruce* v. *Waldron* (1963) V.R. 1; *Cowan* v. *Stanhill Estates Pty. Ltd.* (1966) V.R. 604.

129. *Queensland Pine Co.* v. *Commonwealth of Australia* (1920) St. R. Qd. 121.

130. *Commonwealth* v. *Kreglinger & Fernau Ltd; Commonwealth* v. *Bardsley* (1926) 37 C.L.R. 393 at pp. 422, 430, *per* Isaacs and Starke JJ.; *cf. Lloyd* v. *Wallach* (1915) 20 CLR 299 ; *Parker* v. *Parker* (1935) 52 W.N. (N.S.W.) 217; *Kleimeyer* v. *Clay* (1965) Q.W.N. 26

131. *Carrol* v. *Osburn* (1952) N.Z.L.R. 763 at p.765, *per,* Northcroft J.; cf. *Hinton* v. *Campbell*(1953) N.Z.L.R. 573, *per* North J.

132. *Gisborne Fire Board* v. *Lunken* (1936) N.Z.L.R. 894.

133. *Corbett* v. *Social Security Commission* (1962) N.Z.L.R. 894.

134. See R.B. Cooke in (1962) *New Zealand Law Journal* 534 at p. 538.

135. *Coe and Simmonds* v. *Simmonds (No. 2)* (1911) 30 N.Z.L.R. 488; *Transport Ministry* v. *Alexander* (1978) 1 N.Z.L.R. 306.

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investigation. Nevertheless, a more qualified approach does emerge from some New Zealand decisions. Thus, it has been said that the judge may inspect the document "in any doubtful case"[136] or "when the Minister's certificate is not sufficiently informative to enable him to say that the privilege applies."[137] Judicial scrutiny has been thought to be excluded in circumstances where the Minister's reasons were not within the purview of judicial experience.[138] The Court of Appeal of New Zealand has conceded that there are some classes of cases where the Minister's statement should be treated as decisive.[139]

From the standpoint of the doctrine of *stare decisis,* the question has arisen whether the opinion of the Privy Council in *Robinson* v. *South Australia State* has been deprived of authority by the subsequent decision of the House of Lords in the *Cammell Laird* case. Further difficulty has been caused by the ruling of the High Court of Australia that it would follow decisions of the House of Lords even if this course involves overruling its own decision.[140] There is some authority that a decision of the Privy Council ceases to be binding in colonial and dominion courts when it has been expressly rejected as erroneous by the House of Lords.[141] However, substantial support for the contrary view may also be found.[142] In principle, the Australian courts have expressed an emphatic preference for the latter strand of authority.[143]

Judicial attitudes in the Commonwealth probably influenced the decision in *Conway* v. *Rimmer*[144] where the House of Lords unanimously distinguished the *Cammel Laird* case. This was an action for malicious prosecution brought by a former police probationer

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136. *Meates* v. *Attorney-General* (unreported, 18th February, 1976), *per* Beattie J.

137. *Elston* v. *State Services Commission* (unreported, 28th June 1977), *per* Richardson J.

138. *Pollock* v. *Pollock and Grey* (1970) N.Z.L.R. 771 at p. 772, *per* Moller J.; *cf. Tipene* v. *Apperley* (1977) 1 N.Z.L.R. 100 at p. 105, *per* Beattie J.

139. *Konia* v. *Morley* (1976) 1 N.Z.L.R. 455 at p. 461, *per* McCarthy P.

140. *Piro* v. *Foster & Co. Ltd* (1943) 68 C.L.R. 313.

141. *Will* v. *Bank of Montreal (1931) 3 D.L.R. 526 at pp. 536-537; Carroll* v. *Osburn* (1952) N.Z.L.R. 763.

142. *Gannon* v. *White* (1886) 12 V.L.R. 589 at p. 595; *Re Lobb* v. *Nixon* (1926) 2 D.L.R. 819; *Houston* v. *Stone* (1943) 43 S.R. (N.S.W.) 118 at p. 123; *Christie* v. *Ford* (1957) 2 F.L.R. 202.

143. *Bruce* v. *Waldron* (1963) V.R. 1 at p. 8, *per* Lowe, Smith and Gowans, JJ. Since *Parker* v. *R.* (1963) 111 C.L.R. 610 the Australian High Court has chosen to follow its own decisions rather than those of the House of Lords.

144. (1968) 1 All E.R. 874; *cf. Homestake Mining Co.* v. *Texasgulf Potash Co.* (1977) 76 D.L.R. (3d) 521 at p. 528.

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who had been charged with, and acquitted of, theft, against his former superintendent who had caused the charge to be brought. Contrary to the wishes of both parties, the Home Secretary objected to the production of the five reports mentioned in the defendant's list of documents. Four of these reports related to the plaintiff's conduct as a probationer, and the other was made to the Chief Constable for transmission to the Director of Public Prosecutions in connection with the charge of theft. The House of Lords ordered production of the documents for inspection by them and, after inspection,[145] they ordered production to the plaintiff.

The *ratio decidendi* underlying the separate opinions of the five Law Lords is contained in the statement by Lord Morris: "Whenever an objection is made to the production of a relevant document, it is for the court to decide whether or not to uphold the objection. The power of the court must include a power to examine documents privately, there being no difference in principle between contents cases and class cases."[146] This decision, by releasing the English courts from the thraldom of "the Simon dragnet doctrine",[147] has "brought back into legal custody a dangerous executive power".[148] The decision in *Conway* v. *Rimmer* has been applied unreservedly by Commonwealth courts.[149]

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145. As to the propriety of private inspection, the High Court of Australia has declared: "Once a court has decided, notwithstanding the opposition of a Minister, that on balance the document should probably be produced, it will sometimes be desirable, or indeed essential, to examine the document before making an order for production" *(Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at pp. 531-2, *per* Gibbs A.C.J.). The caution enjoined upon a court in relation to this step is underscored in the comment by Lord Wilberforce: "As to principle, I cannot think that it is desirable that the court should assume the task of inspection except in rare instances where a strong positive case is made out, certainly not on a bare unsupported assertion by the party seeking production that something to help him may be found, or on some unsupported, viz. speculative, hunch of its own" *(Burmah Oil Co. Ltd* v. *Bank of England* (1979) 3 All E.R. 700 at p.711). Private inspection by a court is legitimate where the court feels that "it cannot properly decide on which side the balance falls without privately inspecting the documents" *(Burmah Oil Co. Ltd* v. *Bank of England, supra,* at p.726, *per* Lord Keith of Kinkel), Private inspection by the court should not be undertaken "lightly or ill-advisedly" *(Gaskin* v. *Liverpool City Council* (1980) 1 W.L.R. 1549 at p. 1555, *per* Megaw L.J.) in any circumstances, and only "very rarely" in 'class' cases *(Neilson* v. *Laugharne* (1981) 2 W.L.R. 537 at p. 545, *per* Lord Denning M.R.).

146. At p. 900.

147. C.K. Allen in (1964) 80 Law Quarterly Review at p. 159.

148. H.W.R. Wade in (1968) 84 Law Quarterly Review at p.173.

149. See, for example, *McFarlane* v. *Sharp* (1972) N.Z.L.R. 64.

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The crucial issue is whether it is the executive or the judiciary which should bear the responsibility for determining the question of public interest. Various considerations have been urged in support of the conclusion, reached in the *Cammell Laird* case, that this function falls within the purview of the executive. Firstly, it has been contended that a judge could only consider this matter in public and that argument in open courts as to the admissibility of the document would vitiate the very objectives which are sought to be attained by exclusion of the evidence. Nevertheless, prior to the *Cammell Laird* decision, no impropriety was thought to attach to examination of documents in the judge's chambers.[150] Secondly, it has been said that if the judge sees documents without their being shown to the parties, this would amount, when the Crown is a party, to communicating with one party to the exclusion of the other. This objection is devoid of merit. "Where a document has not been prepared for the information of the judge, it seems to be a misuse of language to say that the judge 'communicates with' the holder of the document by reading it."[151]Thirdly, the argument has been used that, where "policy" is concerned, "it is for Ministers and not for the courts to judge and the Ministers must discharge their responsibilities under the control of Parliament."[152] The danger here is that the word "policy" will be used as a blanket justifying the executive claim to a monopoly of discretionary decisions by reliance on the constitutional canon of political responsibility.[153]

In terms of an assessment of conflicting policy objectives, it is evident that acceptance of the certificate by the executive as conclusive is fraught with considerable danger to the freedom of the individual, especially in the light of rules of practice which are currently entrenched. Although the rule was originally formulated in England[154] and in New Zealand[155] that the decision to object should be taken by the Minister who is the political head of the department and that

150. *Asiatic Petroleum Co. Ltd.* v. *Hocken* (1933) 50 T.L.R. 87; *Spigelmann* v. *Hocken* (1933) 50 T.L.R. 87.

151. *Conway* v. *Rimmer,* supra, per Lord Reid.

152. See the speech by the Attorney-General during the second reading of the Crown Proceedings Bill, 1947, in the House of Commons (Hansard, volume 439, No. 135, column 1691); for a comparable statement by a New South Wales court, see *Ex parte Attorney-General: Re Cook* (1967) 86 W.M. (Pt. 2) (N.S.W.) 222 at p.240, *per* Holmes J.A.

153. *Cf.* H. Street, "State Secrets: A Comparative Study" (1951) 14 Modern Law Review 121 at p. 133.

154. *Duncan* v. *Commell Laird & Co. Ltd, supra.*

155. *Hiroa Mariu* v. *Hutt Timber and Hardware Co. Ltd* (1950) N.Z.L.R. 458.

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he should himself have seen and considered the contents of the documents and formed the view that on grounds of public interest they ought not to be produced, greater latitude has been conceded to the executive recently. Thus, it has been considered sufficient if the affidavit is made "by anyone else of sufficient authority and responsibility to be entrusted with the task".[156] The position in Australia is that "There is no rule that the objection must be taken by the responsible Minister ... but where it is thought desirable, the Court may require proof that the responsible Minister has given the matter his personal attention and has formed the opinion that production would be injurious to the public interest".[157] The effect of the English approach, modified to some extent in Australia, is to confer on the executive a measure of discretion, the magnitude of which cannot but result in erosion of interests which represent vital component elements of public policy in this area.

The acceptable method of arriving at equilibrium between conflicting aspects of the public interest is to allocate final responsibility to the judiciary, subject to perceptively defined qualifications. Except in cases where detriment to national defence or to the conduct of diplomatic relations is alleged,[158] the interest of the State in non-disclosure should be viewed as one aspect of the public interest the totality of which requires to be assessed comprehensively by the courts in a given factual context. The validity of this approach is reinforced by the consideration that the view of the executive may frequently be taken from a narrow departmental angle and could, therefore, quite easily assume an insular quality.

It is a satisfying solution that the courts should hold the balance between the public interest, as perceived by a Minister, in withholding documents or other evidence and the public interest in ensuring the proper administration of justice. This does not entail the attachment

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156. *Crompton (Alfred) Amusement Machines, Ltd* v. *Customs and Excise Commissioners (No.2)* (1972) 2 Q.B. 102 at p. 113, *per* Lord Denning M.R.; *cf. Ronnfeldt* v. *Phillips* (1918) 34 T.L.R. 556.

157. *Hubbard* v. *Hubbard* (1948) V.L.R. 480 at pp. 481-2, *per* Gavan Duffy J. The Australian High Court has stressd that "An affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed, so as to enable the court to evaluate the competing interests" *(Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 572, *per* Mason J.) In the *Burmah Oil Co.* case, *supra,* the House of Lords adverted to the circumstance that "The Minister has read and applied his mind to each of the documents, ... The Minister has not merely repeated a mechanical formula... The certificate is specific and motivated" (at p. 704, *per* Lord Wilberforce).

158. *Konia* v. *Morley* (1976) 1 N.Z.L.R. 455 at p. 461, *per* McCarthy P.

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of trifling weight to the view of the executive. The view has been taken in England that, although the Minister's affidavit is not conclusive, the court will rely on it greatly.[159] In the United States it has been expressly recognized that the opinion of the departmental head will carry great weight.[160] In New Zealand the judicial power to disallow a plea of Crown privilege has been characterized as a power to be held in reserve and not to be exercised lightly.[161] In Australia this power is resorted to "sparingly and in rare cases"[162] and only if "some real ground"[163] for overruling the ministerial objection is demonstrable.

The differences between the ramifications of the concept of "public interest", in their practical application, indicate the desirability of spelling out distinct criteria facilitating a solution which derives from the balancing of competing interests in divergent contexts. In this respect, the structural framework of codified Asian systems founded on the Indian Evidence Act of 1872 is seen to be of intrinsic value.

The sections of the Evidence Ordinance of Sri Lanka[164] which provide for the exclusion of evidence under the head of "Affairs of State and Allied Matters", place the relevant principles in three distinct groups:

(i) There is an absolute prohibition (section 123) against the production of unpublished official records relating to "affairs of State", except with the permission of the appropriate executive authority.

(ii) A public officer has the right to withhold from evidence communications made in official confidence when the public interest would suffer by their disclosure (section 124);

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159. *Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388. English courts have consistently held that the judge should normally accept the affidavit claiming immunity: *Westminister Airways Ltd* v. *Kuwait Oil Co. Ltd* (1950) 2 All E.R. 596. The English judicial attitude is typified by the observation of Lord Wilberforce in the *Burmah Oil Co.* case, *supra,* that the court, in rejecting the view of the executive, should have "something positive or identifiable to put into the scales" (at p.711). A realistic appraisal of the conflicting considerations must necessarily take into account that "judicial review is not a *bonum in se,* it is part, and a valuable one, of democratic government in which other responsibilities coexist" *(ibid).*

160. *Pollen* v. *Ford Instrument Co.* (1939) 26 F. Supp. 583.

161. *Corbett* v. *Social Security Commission* (1962) N.Z.L.R. 878.

162. *Ex parte Brown: Re Tunstall* (1966) 67 S.R. (N.S.W.) 1 at p. 12.

163. *Ex parte Attorney-General: Re Cook* (1967) 86 W.N. (Pt. 2) (N.S.W.) 222 at p. 239.

164. No. 14 of 1895

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(iii) Certain "law enforcement officers" have the right to withhold the source of information as to the commission of offences (section 125).

This mode of formulating the applicable law serves the purpose of emphasizing the operation of two distinct principles. So far as section 123 is concerned, the statement or document must be necessarily excluded if the objection, properly phrased, is taken by the appropriate authority. The court has no jurisdiction to inquire into the sufficiency of the grounds alleged. But the position is otherwise under section 124. When a public officer objects to the production of a document on the ground that it is a communication made in official confidence, the court has jurisdiction, under section 124 read with section 162(2), to inspect the document and to admit it in evidence if it is of opinion (a) that the communication was not made in official confidence, or (b) that the public interest would not suffer by the disclosure of the communication.[165] The second question can arise for determination only after the court accepts that the communication was made in official confidence, but the issue as to prejudice to the public interest is one which the court is entitled to decide for itself.

It would seem that section 123 envisages a limitation of the court's inquiry to the question whether the record pertains to "affairs of State". Once this question is answered in the affirmative, a certificate from the appropriate authority deprives the court of its right of inspection.

In the setting of the principle embodied in section 123, then, judicial control of executive discretion is rigidly circumscribed. This residual control, however, has been exercised effectively by the courts of Sri Lanka. The question has been considered whether registers prepared under the Waste Lands Ordinance relate to "affairs of State".[166] It has been held that the record of a speech made in public by a candidate for election or his agent is not an unpublished official record relating to "affairs of State".[167] The fact that it is taken down by a police officer and forwarded to his superior or recorded in the information book has been considered not to alter the character of the document.[168]

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165. See the case cited at note 172, *infra*.
166. *Dias* v. *Special Officer* (1928) 30 N.L.R. 129.
167. *Daniel Appuhamy* v. *Illangaratne* (1964) 66 N.L.R. 97.
168. *ibid*.

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The concept of "affairs of State" has been significantly curtailed by the view reflected in Sri Lankan[169] and Indian[170] decisions that "affairs of State" cannot be construed as being synonymous with "State or Government business" and that the phrase denotes exclusively matters relating to diplomacy, statecraft and public administration. In regard to police reports of speeches made at election meetings, there is a *cursus curiae* in Sri Lanka that these reports do not concern "affairs of State" and may be validly produced.[171]

As for section 124 which deals with "communications made in official confidence", it has been held that this expression includes not merely interdepartmental correspondence but also correspondence by members of the public with government officials.[172]

The fundamental contrast offered by English law is that, within the framework of that system, matters provided for by sections 123 and 124 of the Evidence Ordinance of Sri Lanka and the Evidence Act of India are enveloped within the scope of a single principle. Thus, the rule has been formulated for English law that "witnesses may not be asked, and will not be allowed to state facts or to produce documents, the disclosure of which would be prejudicial to the public service; and this exclusion is not confined to official communications or documents but extends to all others likely to prejudice the public interest".[173]

The expedient of stratification of the different elements of public policy-which is a feature of the Asian systems modelled on the Indian Evidence Act-bears comparison with the approach of the American Law Institute to the compilation of the Model Code of Evidence.[174]

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169. *ibid.*

170. *Dinbai* v. *Dominion of India* (1950) A.I.R. East Punjab 228.

171. See, for example, *Illangaratne* v. *de Silva* (1948) 49 N.L.R. 169 at p. 175; *Don Philip* v. *Illangaratne* (1949) 51 N.L.R. 561 at p. 562.

172. *Keerthiratne* v. *Gunawardene* (1956) 58 N.L.R. 62.

173. S.L. Phipson, *Law of Evidence* (9th edition), p.196.

174. Philadelphia, 1942, Rules 227 and 228. It is of interest to note that the Federal Court Act of Canada (S.C. 1970-71, c.1) distinguishes between documents certified by a Minister to belong to a class or to contain information which "on grounds of public interest specified in the affidavit should be withheld from production and discovery to the parties" [Section 41(1)] and documents or their contents which, according to a Minister's certificate, "would be injurious to international relations, national defence or security or to federal – provincial relations or would disclose a confidence of the the Queen's Privy Council for Canada" [section 41(2)]. The latter class, but not the former, is debarred conclusively from examination by the Court: see *Landreville* v. *R. (No. 1)* (1977) 1 F.C. 419; *Attorney-General of Quebec* v. *Attorney-General of Canada* (1978) 87 D.L.R. (3d) 667; *Re Human Rights Commission and Solicitor-General of Canada* (1978) 93 D.L.R. (3d) 562.

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A distinction is drawn there between "secrets of State" and "official information". The former is defined as "information not open or theretofore officially disclosed to the public concerning the military or naval organization or plans of the United States, or a State or Territory, or concerning international relations". "Official information" means "information not open or theretofore disclosed to the public relating to internal affairs of a State of the United States acquired by a public official in the course of his duty".[175] Unless the head of a department consents to its disclosure, a secret of State must not be disclosed, and a judge is bound to prevent its disclosure on the ground of lack of departmental consent even if both parties are willing.[176] "Information" is not to be disclosed if the judge finds that it is "official information" and, in addition, if its disclosure will be harmful to the interests of the government of which the witness is an officer in its governmental capacity". The distinction between "secrets of State" and "official information" is supportable on the basis that it permits judicial surveillance over executive discretion in varying degrees, depending on the context in which the problem arises.

The cardinal merit of the approach typified by the Indian Evidence Act and the American Model Code of Evidence, as contrasted with the structural framework of English law, is that an amorphous head of public policy governed by a uniform principle of exclusion of evidence has been valuably replaced by a combination of rules which are conducive in greater degree to differences of approach and emphasis being accommodated in dissimilar factual contexts.

Techniques for Restricting the Scope of the Exclusionary Doctrine

A major impetus towards restricting the dimensions of the exclusionary rule is provided by the realization that "A court which abdicates its inherent function of determining the facts upon which

175. *ibid.*
176. H. Street, *op. cit.*, p. 134.

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the admissibility of evidence turns will furnish to bureaucratic officials too ample opportunities for abusing the privilege".[177] In pursuit of the objective of demarcating the confines of the exclusionary rule based on State interest, judicial initiative has involved the employment of several techniques:

(i) It used to be thought that proof of a direct connection between the claim to exclusion and the central government was a necessary requirement for non-disclosure of evidence. Where, for instance, the validity of a notice requisitioning a house was in issue, the English courts showed no reluctance in rejecting the corporation's claim to exclude their interdepartmental communications in the public interest.[178] Despite the existence in England, as in many other countries, of large public bodies such as British Railways and the National Coal Board, the efficient functioning of which has an immediate bearing on the public interest, the Attorney-General stated in his submissions to the House of Lords in *Conway* v. *Rimmer*[179] that Crown privilege was not, and could not be, invoked to prevent disclosure of similar documents made by them or their servants, even if it were maintained that this was required for the proper and efficient functioning of that public service.

Recent judicial decisions have crucially expanded the scope of the exclusionary rule in this regard. The identity of an informant who had communicated in confidence with an organization dedicated to the welfare of children-an objective of paramount concern to the State-has been held to fall within the purview of the rule of non-disclosure.[180] It was aptly pointed out that a link with the central government formed no part of the rationale underlying exclusion: "The police,[181] the local authority[182] and the society[183] stand on the

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177. J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd edition, 1940), volume 8, p.799.

178. *Blackpool Corporation* v. *Locker* (1948) 1 K.B. 349 at p. 379.

179. *Supra.*

180 *D.* v. *National Society for the Prevention of Cruelty to Children* (1978) A.C. 171.

181. *Conway* v. *Rimmer, supra.*

182. *In re Infants* (1970) 1 W.L.R. 599.

183. *D.* v. *National Society for the Prevention of Cruelty to Children, supra.*

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same footing. The public interest is identical in relation to each. The guarantee of confidentiality has the same and not different values in relation to each."[184] Information supplied to a statutory gaming board may be likewise protected. The crucial question was said to be whether "the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties".[185] In Australian law, too, a nexus with central government is not indispensable, the exclusionary doctrine founded on public policy not being confined to "strict and static classes".[186]

The effect of Australian and English judicial opinion that the Crown or the State, for this purpose, embraces "the whole organization of the body politic for supreme civil rule and government-the whole political organization which is the basis of civil government",[187] is sustained by compelling considerations of policy involving the variety and complexity of the functions of tne modern State. The recurrent transfer of functions among central, local and statutory organs of government, which is a regular feature of public administration today, constitutes a factor of particular relevance.[188] The sole intrinsic significance of some connection with departments or officials of the central government, perhaps, is that their involvement "in practice may affect the cogency of the argument against disclosure".[189]

In view of the rapid proliferation of public corporations and comparable institutions in recent times, especially in Asian and African countries which are in the process of evolving a mixed economy, this development of the law signifies a beneficial response to changes in political structures and in social and economic circumstances.

(ii) The question arises whether the distinction between documentary evidence and oral testimony may properly be exploited as a means of enhancing the manoeuverability available to the courts in

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184. *id.*, at p. 230, *per* Lord Hailsham of St. Marylebone.

185. *Rogers* v. *Secretary of State for the Home Department* (1973) A.C. 388 at p.401, *per* Lord Reid: cf. Lord Morris of Borth-y-Gest, at p. 405: Lord Simon of Glaisdale, at p. 408.

186. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 543, *per* Stephen J.

187. *D.* v. *National Society for the Prevention of Cruelty to Children* (1978) A.C. 171 at pp. 235-6, *per* Lord Simon of Glaisdale. This English Court of Appeal has recently reasserted that it is necessary for the proper functioning of the child care service that the confidentiality of documents should be preserved: *Gaskin* v. *Liverpool City Council* (1980) 1 W.L.R. 1549 at p.1554, *per* Megaw L.J.

188. *ibid.*

189. *id.*, at p. 245, *per* Lord Edmund-Davies.

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circumstances where the rules applicable to one of these categories are thought to be characterized by excessive rigidity.

In the *Cammell Laird* case Viscount Simon entertained no doubt that a distinction could not be made for this purpose between oral and documentary evidence: "The same principle must apply to the exclusion of oral evidence, which, if given, would jeopardize the interests of the community."[190] Nevertheless, in *Broome* v. *Broome*[191] the rule of exclusion applicable to documentary evidence was held not to inhibit the reception of oral testimony, except possibly secondary oral evidence of excluded documents. However, this aspect of the decision in *Broome* v. *Broome* should be considered *per incuriam*, since no reference was made to previous judicial authority to the contrary.[192] The need to recognize a distinction between documentary evidence and oral evidence in this context was felt by *Sachs J.*, because, at the time *Broome's* case was decided, the *Cammell Laird* ruling was fully operative and the English courts considered the endeavour worthwhile to repudiate, in regard to oral evidence, a fetter which had been compulsorily imposed as to the reception of documentary evidence in a manner which stultified balanced value-judgments on the part of courts as the basis for reconciling conflicting elements of public policy. The usefulness of this distinction has been eliminated by the decision of the House of Lords in *Conway* v. *Rimmer* which resuscitates the doctrine of judicial control of the admissibility of evidence in these cases. The principle is settled today that, where documentary evidence is excluded on the ground of repugnance to the State interest, oral evidence of any kind-whether it relates to the excluded documents or to other matters-is equally barred.

No distinction is defensible from the standpoint of policy between types of secondary evidence-namely, secondary evidence of documents the production of which is incompatible with the public interest and oral testimony of other facts the proof of which is precluded on the identical footing. It is anomalous in principle to recognize a rule which, while excluding evidence of the former, acquiesces in reception of proof of the latter. The invalidity of the distinction is demonstrable in the light of the consideration that it is generally not the document

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190. (1942) A.C. 624 at p. 643.

191. *Supra.*

192. *R.* v. *William Cobbett* (1831) 2 St. Tr. (N.S.) 789, *per* Lord Tenterden; *R.* v. *Baynes* (1909) 1 K.B. 285 was convincingly distinguished on the facts.

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the disclosure of which harms the public interest but the facts stated therein.[193]

In regard to secondary oral evidence of documents there is unassailable authority, that, if the original document falls within a class of document which is excluded by public policy, a copy is equally excluded.[194] Moreover, if copies of documents are excluded from evidence on the ground of public policy, there is no justification, either in principle or on authority, for the application of a different rule to oral testimony in respect of their contents. The law takes no cognizance of degrees of secondary evidence. Accordingly, once secondary evidence of a document is admissible, a party is entitled to adduce any type of secondary evidence,[195] including oral testimony and circumstantial or presumptive evidence.[196] In conformity with this principle it has been held that, where the original document was excluded on a certificate that its production would be prejudicial to discipline and to the interest of the Inland Revenue, the evidence of clerks in the office who had seen the report was necessarily excluded.[197] This attitude finds consistent support in the case law.[198]

The condition of the present law is characterized by internal consistency and symmetry, in that formal distinctions-whether between documentary evidence and oral evidence or between types of secondary evidence-do not detract from the applicability of a uniform approach.

(iii) In his argument addressed to the House of Lords in *Conway* v. *Rimmer* the Attorney-General made the surprising concession that, even in accordance with the principle enunciated in the *Cammell Laird* case, the courts possessed power to override an objection by the executive (i) taken in bad faith, or (ii) actuated by an irrelevant consideration, or (iii) founded on a false factual premise.[199] As the

193. J.E.S. Simon, *op. cit.*, p. 69.

194. *Ankin* v. *L.N.E. Railway* (1930) 1 K.B. 527; *Duncan* v. *Cammell Laird & Co.* (1942) A.C. 624; *Moss* v. *Chesham U.D.C. January 16, 1945, before Lynskey J. See J.E.S. Simon, op.cit., p. 68.*

195. *Brown* v. *Woodman* (1834) 6 C. & P. 206, *Doe* v. *Ross* (1840) 7 M. & W. 102; *Hall* v. *Hall* (1841) 3 M. & Gr. 242.

196. *R.* v. *Fordingbridge (1858)* 27 L.J.M.C. 290

197. *Hughes* v. *Vargas* (1893) 9 T.L.R. 551.

198. *Chatterton* v. *Secretary of State for India* (1895) 2 Q.B. 189 at p. 195; *Moss* v. *Chesham U.D.C.* January 16, 1945 before Lynskey J.; see, for Australian law, *Coonan* v. *Richardson* (1947) Q.W.N. 19; *R.* v. *Bryant (No. 2)* (1956) Q.S.R. 570; *Blundell* v. *Guerin* (1968) S.A.S.R. 39; cf. for Canadian law, *Clemens* v. *Crown Trust Co.* (1952) 3 D.L.R. 508.

199. (1968) 1 All E.R. 874 at p. 891.

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decided cases suggest,[200] these grounds, considered cumulatively, will result in a significant erosion of the conclusive effect which the certificate by the executive had been declared to possess. The comment has been aptly made that the attractiveness of these heads of review for the courts consists of their virtually untrammelled flexibility in determining, in relation to any given power of an administrative body, the matters that are and are not to be taken into account and thereby in facilitating an oblique assessment of the reasonableness of the decision under review.[201] The plenitude of this discretion available to the courts, according to the argument of the Attorney-General, would have whittled down substantially the impregnable position of the executive in matters involving State interest, in terms of the *Cammell Laird* doctrine. However, the usefulness of these formulas as modes of revivifying the postulate of judicial control is reduced by the practical reversal of the *Cammell Laird* opinion, in so far as it purported to expound the general law relating to the topic, by the unanimous conclusion of the House of Lords in *Conway* v. *Rimmer*.

(iv) A drastic method of precluding expansion of the scope of the exclusionary doctrine has been suggested in some decided cases. In ***Broome*** **v.** ***Broome***, Sachs J. wondered whether the development of Crown privilege on the ground of public interest "might not now be regarded by the courts in the same light as development of new heads of public policy invalidating contracts, and new heads of criminal charges against individuals of acting to the public mischief; the tendency in each of these matters being for the courts not to develop fresh heads but to leave them to the legislature".[202] A similar approach to the problem seems to have commended itself to Lord Upjohn in *Conway* v. *Rimmer*.[203]

On this point identical reasoning is not contained in the speeches of the five Law Lords in *Conway* v. *Rimmer*. If the view of Lord Upjohn were to prevail, *Conway* v. *Rimmer* would supersede the *Cammell Laird* doctrine not only to the extent of abrogating the principle of unqualified executive responsibility but in the further sense that, outside the traditional classifications such as national

200. See *Franklin* v. *Minister of Town and Country Planning* (1948) A.C. 87; *Smith* v. *East Elloe R.D.C.* (1956) A.C. 736; *Auten* v. *Rayne* (1958) 1 W.L.R. 1300.

201. D.H. Clark, "The Last Word on the Last Word" (1969) 32 Modern Law Review 142 at p. 151; cf. *Roberts* v. *Hopwood* (1925) A.C. 578; *Prestcott* v. *Birmingham Corporation [1955] Ch. 210; Taylor* v. *Munrow* (1960) 1 W.L.R. 151.

202. [1955] 2 W.L.R. 401 at p. 408.

203. [1968] 1 All E.R. 874 at p. 915.

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defence, the conduct of foreign policy and "high level interdepartmental communications",[204] other classes of documents would be held intrinsically incapable of exclusion because of the predominant public interest in their adduction as relevant evidence. But the pendulum has not swung so far in the opposite direction. Lords Reid, Hodson and Morris seem by implication to have rejected Lord Upjohn's approach.

The principle suggested by the tenor of the speeches of the majority is that classification of documents *in limine* is not supportable and that an empirical assessment of the competing elements of public policy, against the background of the particular case, cannot be dispensed with. Despite the support which the innovative suggestion by Lord Upjohn has received from writers,[205] it is submitted that the adoption of this proposal will deprive the law of essential malleability and resilience and that the recognition of closed categories impedes unjustifiably the development of new heads of public policy in response to changing requirements and conditions.

Factors Conditioning the Exercise of Judicial Discretion

In the absence of an *a priori* classification which governs absolutely the reception or non-disclosure of evidence, the discretion of the court is the operative criterion. Naturally, the result of the exercise of discretion in peripheral areas cannot be predicted, but a tentative identification of the *indicia* relating to the exercise of judicial discretion in this area may be usefully attempted.

(i) It is clear that the public interest requiring the non-disclosure of information which might be useful to those who organize or participate in criminal activities is generally entitled to priority over the countervailing principle that all evidence relevant to the cause subject to adjudication should be available to the court. Consistently with this attitude, the identity of informers has usually been protected from disclosure.[206] In an action for penalities under the Excise Acts, an English court has refused to allow a witness for the Crown to answer the question whether he gave the information which led to the institution of proceedings.[207] The view has been taken that an

204. At p. 910.
205. D.H. Clark, *op. cit.*
206. *R.* v. *Hardy* (1794) 24 St. Tr. 199 at p. 208, *per* Eyre C.J.
207. *Attorney-General v. Briant* (1846) 15 M. & W. 169.

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Assistant Director of Public Prosecutions cannot be required to produce a letter which he had written to the Director[208] and that a conversation between a private solicitor and the Director of Public Prosecutions is privileged.[209] The stability of this principle has received emphasis: "This rule of public policy is not a matter of discretion: It is a rule of law and, as such, should be applied by the judge at the trial."[210] Although in a case of murder tried in the middle of the last century, Cockburn C.J. allowed a police officer to disclose the names of persons who had given him the information which led to the discovery of a phial containing poison,[211] this attitude is at variance with a paramount objective of public policy: "If the police were bound to answer that sort of question, the ultimate and undoubted effect would be to discourage information and to make the protection of the public very much more difficult than it is."[212]

This principle has been extended, with manifest justification, to ensure the protection of persons who supply valuable information to a gaming board. In *Rogers* v. *Secretary of State for the Home Department*[213] a company of which Rogers was a director sought the gaming board's consent to the grant of licences in respect of bingo halls to be managed by Rogers. The board was obliged to take into account Rogers' character. They made inquiries of the Sussex police, and in reply, the Assistant Chief Constable of Sussex wrote a letter to the board, which later refused the consent sought. Rogers began proceedings for criminal libel regarding the contents of the letter. The Home Secretary claimed privilege in respect of the letter and a copy. The House of Lords upheld the claim. Lord Reid placed emphasis on the consideration that the board required the fullest information it could obtain in order to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming establishment and that many would refuse to speak unless assured of absolute secrecy.

(ii) The probative value of the evidence, the reception of which is resisted on the footing of public policy, may affect the attitude of the court. The predilection of English courts during the last century that the rule of inclusion "embraces not only documents directly

208. *R.* v. *Benson* (1900) 151 C.C.C. Sess. Pap. 705.

209. *R.* v. *Carpenter* (1911) 156 C.C.C. Sess. Pap. 298.

210. *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494 at p. 498, *per* Lord Esher M.R.

211. *R.* v. *Richardson* (1863) 3 F. & F. 692.

212. Lord MacDermott, *Protection from Power under English Law*, Hamlyn Lectures for 1957, pp. 103-104.

213. [1973] A.C. 388.

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relevant but also documents which may well lead to a relevant train of enquiry",[214] has given way gradually to a more rigorous approach. The disposition of judges today is to exclude evidence "of merely vestigial importance"[215] which is likely to have adverse repercussions on State interest. The principle has been formulated that "unless its evidentiary value is clear and cogent, the balancing exercise may well lead to the conclusion that the public interest would best be served by upholding the objection to disclosure".[216]

(iii) It probably makes a difference whether the party who claims to be prejudiced by non-disclosure incurs the risk, in the proceedings in question, of forfeiting a right at that time vested in him, or whether the proceedings have as their object the conferment on him of a privilege which he did not enjoy previously. Thus, in *Rogers* v. *Secretary of State for the Home Department,* the House of Lords took into account the fact that the documents which were eventually excluded came into existence only because the applicant was asking for a privilege and was submitting his character and reputation to scrutiny, and that the documents were not used to deprive him of a pre-existing legal right.

(iv) The culpability or lack of blameworthiness of the party who is adversely affected by reception of the evidence is a material consideration.

In *Norwich Pharmacal Co.* v. *Customs and Excise Commissioners* [217] the appellants were owners and licensees of a patent for a chemical called furazolidone. The patent was being infringed by illegal imports of the substance. The appellants instituted proceedings against the Commissioners to obtain the names and addresses of the importers. The Commissioners made a claim for privilege in an affidavit. This claim was rejected by the House of Lords. The primary ground on which the Chairman of the Commissioners sought to resist disclosure was that the good relations and mutual confidence which usually existed between the officers of the Customs and traders would be seriously impaired if it became known that any information of a confidential nature obtained from traders under statutory powers might have to be disclosed by the Commissioners otherwise than under provisions of a statute enabling them to disclose it. One of

214. *Compagnie Financière Commerciale du Pacifique* v. *Peruvian Guano Co.* (1882) 11 Q.B.D. 55.

215. *Burmah Oil Co. Ltd* v. *Bank of England* [1979] 3 All E.R. 700 at p. 718 *per* Lord Edmund-Davies.

216. *id.*, at p. 721 *per* Lord Edmund-Davies.

217. [1973] 1 All E.R. 943.

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the reasons emerging from the speeches in the House of Lords for the rejection of the claim by the Commissioners was that apprehensions of this kind would be entertained only by dishonest traders.[218]

This case may be contrasted with *Alfred Crompton Amusements Machines Ltd* v. *Customs and Excise Commissioners*.[219] An issue arose between the company and the Commissioners as to the correct assessment for purchase tax on certain machines made by the company. The Commissioners claimed privilege for certain documents containing information supplied by third parties. The House of Lords upheld the claim. Distinguishing the *Norwich Pharmacal* case, Lord Cross of Chelsea remarked: "There it was probable that all the importers whose names were disclosed were wrongdoers and the disclosure of the names of any, if there were any, who were innocent would not be likely to do them any harm at all. Here, on the other hand, one can well see that the third parties who have supplied this information to the Commissioners because of the existence of their statutory powers would very much resent its disclosure by the Commissioners to the appellants."[220] A New Zealand judge has commented: "There is, in my view, a clear distinction between a member of the public volunteering information and fearing reprisal and the statement of an apprehended receiver who confessed his guilt."[221]

(v) The degree of likelihood or improbability of the harm which is envisaged as a consequence of reception of the evidence is a relevant factor. In the *Norwich Pharmacal* case one of the objections to disclosure was that traders who did not wish to have their names disclosed might be tempted to concoct false documents and thereby hamper the work of the Customs. Lord Reid pointed out that this required at least a conspiracy between the foreign consignor and the importer, and that such a contingency was in the highest degree improbable.

(vi) The circumstance that the objection in a case is not primarily to prevent production but to secure suppression of documents which had already been lodged by one of the parties in proceedings before the court diminishes the merit of the objection. Where the letter which the Minister sought to suppress had been produced in process previously, Crown privilege was rejected by a English courts.[222]

218. See, in particular, *per* Lord Cross of Chelsea.
219. [1973] 2 All E.R. 1169.
220. At p. 1185.
221. *Tipene* v. *Apperley* [1977] 1 N.Z.L.R. 100 at p.107, *per* Beattie J.
222. *Whitehall* v. *Whitehall* [1957] S.C. at p.39 *per* Lord Clyde.

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Similarly, the executive's claim was unsuccessful in an Australian case where the police prosecutor had elicited evidence in respect of which Crown privilege was claimed subsequently,[223] and in New Zealand in circumstances where the statements in question had been shown to the accused.[224]

(vii) The purpose for which disclosure of the document or reception of the oral testimony is objected to, is pertinent to exercise of the court's discretion. In *Conway* v. *Rimmer* Lord Reid said: "Even where the full contents of a report have already been made public in a criminal case, Crown privilege is still claimed for that report in a civil case ... not to protect the document-its contents are already public property-but to protect the writer from civil liability, should he be sued for libel or other tort."[225] Lord Reid, while expressing disapproval of this course, did not assail its validity. It is submitted, however, that an ulterior purpose should militate decisively against acceptance of the claim by the executive.

Where production of documents was sought in the context of criminal proceedings involving charges that Ministers of the Crown had conspired together, under colour of their office, to accomplish unlawful objectives, the High Court of Australia was of opinion that disclosure was favoured by a preponderant equity. The court showed sensitivity to the consideration that "to accord privilege to such documents as a matter of course is to come close to conferring immunity from conviction upon those who may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices".[226]

The English courts, on the whole, have felt less difficulty in upholding a plea of Crown privilege in relation to documents which were sought to be used merely to impugn the credibility of a witness than in circumstances where the documents constituted substantive evidence which would ordinarily have been admissible.[227]

(viii) It has been asserted that "Government servants are reluctant

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223. *Ex parte Brown; Re Tunstall* (1966) 67 S.R. (N.S.W.) 1; cf. *Lake George Mines Ltd* v. *Gibbs, Bright & Co.* (1903) 3 S.R. (N.S.W.) 440; *Celebrity Pictures Pty. Ltd* v. *Turnbull* (1929) 46 W.N. (N.S.W.) 121; cf. *Sankey* v. *Whitlam, supra,* at p.531, *per* Gibbs A.C.J.

224. *R.* v. *Church* [1974] 2 N.Z.L.R. 116.

225. [1968] 1 All E.R. 874 at 882.

226. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 540, *per* Stephen J.

227. *R.* v. *Cheltenham Justices; Ex parte Secretary of State for Trade* [1977] 1 W.L.R. 95 at p.99, *per* Lord Widgery C.J.; *Attorney-General* v. *Briant* (1846) 15 L.J. Ex. 265.

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to put their observations into writing if they are likely to be produced in a court of law".[228] But the argument based on candour lacks cogency. Lord Hodson has trenchantly commented that "It is strange that civil servants alone are supposed to be unable to be candid in their statements made in the course of duty without the protection of an absolute privilege denied to their other fellow subjects".[229] Lord Pearce has gone so far as to suggest that a police officer, for instance, far from being deterred from candour by the thought that a judge might read his notes, "would rather be put on his mettle to make sure that his observations were sound and accurate, and be stimulated by the thought that he might prove to be the one impartial recorder on whom justice between the parties might ultimately turn".[230] Evidence of conversations between departmental officers and persons concerned in the adoption of a child has been admitted in New Zealand, notwithstanding the risk that candour might be discouraged.[231]

Juxtaposed with emphatic judicial disapproval in England of the argument based on candour as "grotesque"[232] and refutation of its premise by the suggestion that access to fuller information is "likely to lead not to captious or ill-informed criticism but to criticism calculated to improve the nature of the working (of government)",[233] there exists an opposing strand of opinion that "If, as a ground (candour) may at one time have been exaggerated, it has now received an excessive dose of cold water"[234] and that there certainly are contexts in which disclosure "could well deter frank and full expression in similar cases in the future".[235] In similar vein the High Court of

228. Sir Thomas Inskip, "Proceedings by and against the Crown" (1930) 4 Cambridge Law Journal 1 at p.10; *cf. Sayers* v. *Perrin* [1965] Qd. R. 221. The argument based on candour has appealed to Canadian courts; see *M.N.R.* v. *Die Plast Co. Ltd* (1952) 2 D.L.R. 808 at p. 815; *Reese* v. *R.* (1955) 3 D.L.R. 691 at p. 701; *Re Lew Fun Choue, re Low Sui Jim* (1955) 112 C.C.C. 264 at p. 267; *Croft and Croft* v. *Munnings and the Director, the Veterans' Land Act* [1957] O.R. 211 at p. 216; *Gronlund* v. *Hansen* (1968) 64 W.W.R. 74.

229. *Conway* v. *Rimmer* [1968] A.C. 910 at p. 967. The Australian courts have declined to recognize a rule of public policy which requires that all official communications between Ministers of the Crown and senior civil servants should be protected from disclosure; *R.* v. *Turnbull* [1958] Tas. S.R. 80.

230. *Conway* v. *Rimmer* [[968] A.C. 910 at p. 985.

231. *Pollock* v. *Pollock and Grey* [1970] N.Z.L.R. 771 at p. 773, *per* Moller J.; contrast the reasoning of the South Australian court in *Lock* v. *Lock* [1966] S.A.S.R. 246.

232. *Burmah Oil Co. Ltd* v. *Bank of England* [1979] 3 All E.R. 700 at p. 724, *per* Lord Keith of Kinkel.

233. *id.*, at p. 725, *per* Lord Keith of Kinkel.

234. *id.*, at p. 707, *per* Lord Wilberforce.

235. *ibid.*

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Australia has characterized the argument predicated on candour and confidentiality as "not altogether unreal."[236]

The sharp conflict of judicial attitudes on this point is the product of fundamentally dissimilar values and assumptions which pervade the reasoning of different judges-a cleavage of opinion entirely natural in this area of the law. It would seem that the desirability of frankness in official communications is a relevant, but not decisive, consideration which calls for assessment in relation to other factors.

(ix) Among the relevant *indicia* is the degree of detachment and objectivity shown to exist on the part of the person resisting disclosure. "Since not only justice itself but also the appearance of justice is of considerable importance, the balancing exercise is bound to be affected to some degree where the party objecting to discovery is not a wholly detached observer of events in which he was in no way involved."[237] In the *Burmah Oil Co.* case the appellant sought discovery in respect of ten documents with a view to establishing that the price at which a compulsory sale to the Bank of England was effected, represented a substantial undervalue of its stock and that the bargain was manifestly inequitable. Lord Edmund-Davies, dealing with the plea of Crown privilege invoked by the Bank at the behest of the government, observed: "It cannot realistically be thought that the government is wholly devoid of interest in the outcome of these proceedings. On the contrary, it has a very real and lively interest, for were (the appellant) to succeed it could only be on the basis that the Bank behaved unconscionably, and the evidence indicates that the Bank was acting throughout in accordance with government instructions.[238] This circumstance warrants exceptionally close judicial scrutiny of the basis on which the claim to privilege is asserted.

(x) Although any party to an action is entitled to resist diclosure on the ground of Crown privilege,[239] the fact that the State, having considered the question specifically, declines to support the plea, will ordinarily carry some weight with a court. Where the plea of Crown privilege was taken by a former Prime Minister, the High Court of Australia remarked: "The court must be strongly influenced by the circumstance that the Commonwealth, having examined the documents and having considered the public interest, has made no objection to production."[240]

236. *Sankey* v. *Whitlam* (1978) 21 A.L.R. 505 at p. 527, *per* Gibbs A.C.J.
237. *Burmah Oil Co. Ltd* v. *Bank of England, supra,* at p.720.
238. *ibid.*
239. *Pavey* v. *Furrie* (1979) 106 D.L.R. (3d) 425.
240. *Sankey* v. *Whitlam, supra* at p. 575, *per* Mason J.

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(xi) Lord Cross of Chelsea has suggested: "In a case where the contentions for and against disclosure appear to be fairly evenly balanced, the court should uphold a claim for privilege on the ground of public interest and trust to the head of the department concerned to do whatever he can to mitigate the ill effects of nondisclosure."[241] The validity of this approach is controversial. The opposite view that, in cases of doubt, the public interest in the due administration of justice should prevail, has commended itself to courts in Commonwealth jurisdictions[242] and may be supported in principle.

Special Considerations Applicable to Criminal Proceedings

The principle has been recognized generally that the interest of the State in the exclusion of documents or other evidence of a confidential or sensitive nature must give way to the overriding need to provide a defendant in criminal proceedings with every opportunity of vindicating his innocence.[243] Viscount Kilmuir L.C., in his statement to the House of Lords on the scope of Crown privilege, said: "If medical documents, or indeed other documents, are relevant to the defence in criminal proceedings, Crown privilege should not be claimed."[244]

In at least one reported case[245] disclosure of the name of an informant has been ordered. But the principle is not entirely free from doubt in view of a *cursus curiae* which has resisted the divulging of information advantageous to the defence.[246] For Canadian law the view has been taken that, where evidence contained in a tax return

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241. *Alfred Crompton Amusement Machines Ltd* v. *Customs and Excise Commissioners* [1973] 2 All E.R. 1169 at p. 1185.

242. See for instance, *Elston* v. *State Services Commission* 28th June, 1977 *per* Richardson J. (New Zealand).

243. *Cf. Rogers* v. *Secretary of State for the Home Department* [1973] A.C. 388 at p. 407, *per* Lord Simon of Glaisdale; see for Australian law, *R.* v. *Salter* (1938) 34 Tas. L.R. 16.

244. Statement in the House of Lords on 6 June 1956. For recognition of this principle in Australia, see *Ex parte Ross: Re Pvm* (1953) 70 W.N. (N.S.W.) 174; *R.* v. *Crajanin* [1965] Qd. R. 324 at p. 330. For Canadian law, *cf. R.* v. *Blain* (1960) 31 W.W.R. 693.

245. *R.* v. *Richardson* (1863) 3 F. & F. 693; *cf. Webb* v. *Catchlove* (1866) 3 T.L.R. 159.

246. *R.* v. *Watson* (1817) 32 St. Tr. 1: *R.* v. *Cobbett* (1831) 2 St. Tr. (N.S.) 789; *R.* v. *O'Connor* (1846) 4 St. Tr. (N.S.) 935; *Attorney-General* v. *Briant* (1846) 15 L.J. ex. 265.

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is pertinent as evidence on a criminal charge, the magistrate before whom the charge is tried, is a person legally entitled to the information.[247] The Australian courts have pointed out that "It is a cogent consideration that, unless some means is available of obtaining access to documents such as witnesses' statements, a defendant, in a preliminary examination before a magistrate, may be quite unable to establish vital discrepancies where they do in fact occur".[248] This consideration, which is underscored in a strong line of authorities,[249] has culminated in the marked reluctance of the prosecution in England to claim exclusion of evidence on the ground of State interest in criminal proceedings.[250] An analogous principle has found favour in Australia where, however, the courts have been emphatic in their characterization of this as a rule of practice rather than as the recognition of a right vested in the accused.[251]

The priority accorded to the interest of the defendant in criminal proceedings is embedded in the rule that, if the evidence of a Crown witness is contradictory of a previous statement made by him, the prosecution should make the statement available to counsel for the defence as a basis for cross-examination.[252]

In the United States of America the special protection conferred on a person accused of crime has been made to rest on a theory of implied waiver. The American courts have held that, if the government is instituting criminal proceedings, the accused is entitled to production of the government files and documents.[253] It is considered repugnant to rudimentary concepts of equity and fair dealing that the accused should be denied access to material which the government has used in preparing its case.[254] Learned Hand J., has observed: "While we must accept it is lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal proceeding founded upon those

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247. *Ship* v. *R.* (1945) 95 Can. C.C. 143.

248. *Maddison* v. *Goldrick* [1976] 1 N.S.W.L.R. 651 at p.666, *per* Samuels J.A.

249. *R.* v. *Clark* (1930) 32 Cr. App. Rep. 58; *Mahadeo* v. *R.* [1936] 2 All E.R. 813; *R.* v. *Hall* (1958) 43 Cr. App. Rep. 29; *R.* v. *Xinaris* (1955) 43 Cr. App. Rep. 30(n).

250. *Rogers* v. *Secretary of State for the Home Department, supra;* cf. *Marks* v. *Beyfus* (1890) 25 Q.B.D. 494.

251. *R.* v. *Charlton* [1972] V.R. 758; *Attorney-General for New South Wales* v. *Findlay* (1976) 50 A.L.J.R.637.

252. *R.* v. *Clarke* (1930) 22 Cr. App. Rep. 58; cf. *Dallison* v. *Caffery* [1965] 1 Q.B. 348.

253. *U.S.* v. *Krulewitch* (1944) 145 F. 2nd 76.

254. *U.S.* v. *Beekman* (1946) 155 F. 2nd 580 at p. 584.

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very dealings to which the documents relate and whose criminality they will, or may, tend to exculpate."[255]

In terms of a strictly conceptual analysis the dichotomy between the application of the exclusionary rule in civil and in criminal proceedings has been considered awkward.[256] Lord Reid has commented on the supposed illogicality of the prevailing law: "We have the curious result that 'freedom and candour of communication' is supposed not to be inhibited by knowledge of the writer that his report may be disclosed in a criminal case, but would still be supposed to be inhibited if he thought that this report might be disclosed in a civil case."[257]

It is submitted, however, that the dichotomy is supportable from the standpoint of policy. "Freedom and candour of communication" is a relevant element of public interest which may be worthy of protection in competition with such other aspects of the public interest as are of comparable importance, but it must yield to paramount considerations of public policy to which the object of candour in official communications can appropriately be regarded as subordinate. This heightens the significance of a relative assessment, *ad hoc,* of the competing interests involved in a particular case.

Procedural Aspects

Objection to disclosure may be taken on oath either orally or by affidavit.[258] The State is entitled to be represented by counsel in regard to the claim for privilege.[259]

The procedure in cases where documentary evidence is objected to is quite settled. The affidavit in support of the claim for exclusion should set out with sufficient particularity the nature and identity of the documents which it is desired to withhold, and the grounds on which a claim to do so is based.[260] Where the claim for privilege is not made in the proper manner, the judge is entitled to exercise his own discretion.[261]

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255. *U.S.* v. *Andolschek* (1944) 142 F. 2nd 503.

256. A.L. Goodhart, "The Authority of Duncan v. Cammell Laird & Co." (1963) 79 Law Quarterly Review 153 at p.159.

257. *Conway* v. *Rimmer, supra.*

258. *Re Hargreaves* [1900] 1 Ch. 347.

259. *Wilkinson* v. *Wilkinson* (1901) 1 S.R. (N.S.W.) Eq. 285; *Constable* v. *Constable and Johnson* [1964] S.A.S.R. 68.

260. *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners, supra.*

261. *Spigelman* v. *Hocken* (1933) 150 L.T. 256.

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A more complex procedure may be required when oral evidence is sought to be excluded on the ground that its reception is injurious to State interest. Sachs J., confronted with this difficulty in *Broome* v.*Broome,*[262] said: "Any certificate in a 'blanket form' which stopped a witness going into the witness box seems contrary in principle to those portions of the decided cases which enjoin Ministers, before giving a certificate as regards documents, to examine each in turn in the light of the issues arising in the case." The force of this argument is evident. The inevitable result of conceding the claim asserted by the Crown in *Broome's* case would be to give the Crown power to prevent certain classes of witnesses, for example, civil servants, from having to give evidence in court.[263]

At the same time it cannot be denied that oral testimony may be no less detrimental to State interest than documentary evidence in some contexts. What is called for, then, is a procedure which, although capable of application to oral evidence, furnishes the court with adequate opportunity to disallow arbitrary or capricious claims by the executive.

The outline of a procedure consistent with these objectives emerges inferentially from the judgment in *Broome* v. *Broome.* In the first place, it is essential that the Minister's affidavit should delineate the precise scope of the evidence to which objection is taken. Moreover, the court would derive assistance from a statement by the Minister as to the way in which the offensive evidence injures the public interest. Secondly, emphasis has been placed on the need to secure the attendance in court of counsel on behalf of the Minister to listen to the questions and to object to them, if necessary. By these means the court should be able to ensure that the ambit of the exclusionary rule is restricted as narrowly as is consistent with protection of the State interest.

Conclusion

Three basic approaches may be formulated to the allocation of responsibility for the exclusion of evidence on the ground of injury to the State interest: (i) The decision of the executive should entail complete immunity from judicial review. (ii) The executive's view, although entitled to due consideration, does not relieve the courts of responsibility for the ultimate decision. (iii) The relevant principle

262. *Supra.*

263. J.E.S. Simon, *op. cit.*, pp.71-72.

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should enable imputation of responsibility, variously, to the executive and to the judiciary, depending on the specific area of governmental policy involved. The theoretical premise of proposition (i), that the considerations pertaining to the applicability of Crown privilege are alien to judicial aptitude and experience and fall properly within the purview of the executive branch of government, is unconvincing. The basis of this argument is strengthened by confining it, in the manner suggested by proposition (iii), to limited sectors of consultation and decision making within the administrative process, in respect of which special protection is thought to be required by exceptional sensitivity.

In conceptual terms a bifurcation of responsibility controlled by criteria which envisage degrees of vulnerability of the State interest, is neither anomalous nor unique. Yet societal and political *mores* which mould prevailing attitudes to government-strikingly mirrored, in fact, in the emergent spirit of intrepidity characteristic of judicial decisions during the last decade-include, as a central element, vigorous hostility to opaque or inscrutable functioning of the machinery of government. In consequence, the entrenchment of unqualified executive discretion even in restricted circumstances by use of the expedient of division of responsibility lacks support in judicial decisions, despite its adoption by the legislatures of Canada[264] and New South Wales.[265] A compelling factor which militates against the dual approach, linked with distinctions between strata of governmental activity, is the difficulty of classifying *a priori* the categories of matters governed by the respective principles. The reference in the Canadian formulation, for instance, to "documents...injurious...to federal-provincial relations"[266] allows scope for, perhaps, unduly wide operation of an absolute exclusionary doctrine over an amorphous range of matters.

The courts have been consistently responsive to legitimate claims to confidentiality proffered by the executive, but the assignment of final responsibility to the judiciary has not been the precursor of limitations on the ambit of Crown privilege. On the contrary, the significantly expanding frontiers of the rule of non-disclosure are exemplified by the recent reversal of a trend which confined Crown privilege to organs of the central government, distinguished from local authorities and statutory boards. It is submitted that an active

264. Federal Court Act, S.C. 1970-71, c. 1, sections 41(1) and (2).
265. Evidence (Amendment) Act, No. 40 of 1977, sections 60(1) and 61(1).
266. See note 75 at p. 94, *supra*.

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judicial role in determining the merits of claims to Crown privilege is supportable from the standpoint of contemporary policy and that the tests emerging from the decided cases- which lend themselves to further development by means of the case law technique-provide a firm foundation for the exercise of judicial discretion.

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THE DOCTRINE OF LOCUS STANDI IN COMMONWEALTH ADMINISTRATIVE LAW

Introduction

IN 1981, Lord Diplock described the progress towards a comprehensive system of administrative law as the greatest achievement of the English courts in his judicial lifetime.[1] It is undeniable, however, that the law governing *locus standi* is the least durable element of the imposing edifice constructed by the courts of England and the Commonwealth in the course of the last century. The comment has been made, quite justifiably, that "In administrative law the question of *locus standi* is the most vexed of all".[2] Recent statutory and other changes, which have been effected throughout the Commonwealth, make a complete re-examination of the subject timely. Contemporary innovations have simplified procedural aspects of the law, but the decided cases remain the chief repository of the substantive principles which determine standing. The purpose of this chapter is to survey the major currents of authority in the common law, to assess against this background the reforms of the last decade and to make some tentative suggestions regarding avenues of development for the future.

Prerogative Remedies

(a) *Certiorari*

The basic rule governing *locus standi* is that a person who has a particular grievance of his own is entitled to *certiorari ex debito justitiae,* while the grant of the remedy to a "stranger" is purely discretionary.[3]

A particular grievance invests the applicant with the character of an "aggrieved person" to whom the first limb of this principle is applicable. The Canadian decisions have differentiated expressly among an "interested party", an "aggrieved party" and a "total stranger" Entitlement to adduce evidence is the essential attribute of an "interested party",[4] who, however, may not be treated as an "aggrieved

1. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed* [1981] 2 WLR 722, 737 (H.L.).
2. J.F. Garner, *Administrative Law* (1974), p. 144.
3. *R.* v. *Thames Magistrates' Court, ex p. Greenbaum* (1957) 55 LGR 129.
4. *Re Martin and Robertson Ltd* v. *Labour Relations Board* [1954] DLR 622 (S.C. of British Columbia).

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party" if he has not been affected adversely by the denial of a hearing.[5] A "total stranger", in this context, is one who has no specific grievance to assert.[6]

According to the stricter view embodied in Canadian judicial pronouncements, an "aggrieved person" is necessarily capable of demonstrating the infringement of an interest "over and above the interest which any member of the public has in seeing that justice is properly administered".[7] Similarly, the English courts have excluded from the ambit of a particular grievance, one which is complained of "in common with the rest of the public".[8] The Supreme Court of New Zealand has refused to issue *certiorari* on the ground that, if there had been a violation of the plaintiffs' rights, it was "an interference with statutory rights which electors in a large district have had conferred upon them".[9] In a zoning case, an applicant for *certiorari* failed because he had "no special interest that is not shared by the public at large".[10] In these circumstances, applications for *certiorari* have been considered in New Zealand "with the closest scrutiny".[11]

The essence of the reasoning reflected in this strand of judicial decisions is that an interest which devolves on an individual solely by virtue of his membership of a group or community is insufficient to support *locus standi* in the setting of *certiorari*. This restrictive approach finds expression in the limitation of standing to applicants complaining of unwarranted conviction in criminal proceedings,[12] deprivation of an office[13] or proprietary right,[14] or the opportunity

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5. R.F. Reid and H. David, *Administrative Law and Practice* (1978), p. 368.

6. *R.* v. *Ontario Labour Relations Board, ex p. Dunn* [1963] 2 OR 301 (H.C. of Ontario).

7. *Young* v. *Attorney-General of Manitoba* (1960) 25 DLR (2d) 352, 365-366 (C.A. of Manitoba); cf. *Re Civil Service Association of Alberta and Farran* (1976) 68 DLR (3d) 338 (A.D. of Alberta).

8. *R.* v. *Nicholson* [1899] 2 QB 455, 471.

9. *Turkington* v. *Phelon* [1929] NZLR 764, 777 (S.C.).

10. *Lamond* v. *Barnett* [1964] NZLR 195, 204 (S.C.).

11. *Hyland* v. *Phelan* [1941] NZLR 1096, 1108 (S.C.).

12. *R.* v. *Stipendiary Magistrate at Cloncurry and Corbett, ex p. Page* [1959] Qd. R. 75 (S.C. of Queensland); *R.* v. *Stipendiary Magistrate at Toowoomba and Jessen, ex p. McAllister* [1965] Qd.R. 195 (S.C. of Queensland).

13. *Arthur* v. *Commissioners of Sewers for Yorkshire* (1724) 8 Mod. 331.

14. *Cheatley* v. *R.* (1972) 127 CLR 291, 299 (H.C.); *R.* v. *Bedfordshire County Council, ex p. Sear* [1920] 2 K.B.465.

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of engaging in a business or vocation.[15] In line with this group of decisions it has been observed in Canada that "An employee whose individual rights have been vitally affected by an award, such as in the case of dismissal, has the right or sufficient status"[16] to apply for *certiorari*.

The rationale for insistence on a peculiar grievance in the applicant "apart from his interest as a member of the general public"[17] is that the range of actionability would be extended indiscriminately by the acceptance of a tenuous interest shared by the community at large as adequate to sustain a cause of action. This consideration permeates, in particular, the judicial assessment in Canada of problems of standing in matters connected with commercial rivalry. One of the central elements of marked judicial reluctance to recognize standing in cases of this kind[18] has been awareness of the public interest in competitive trade relationships.[19]

Consistently with this stringent approach to standing, a ratepayer has been denied *locus standi* in New Zealand to impugn *ultra vires* action of a local authority in respect of disbursement of funds[20] or provision of amenities,[21] unless his interests have been contravened in a more significant and immediate manner than those of other ratepayers.[22] Residence within a licensing district, *per se*, does not provide *locus standi* to challenge the decisions of a licensing committee.[23] The general body of consumers,[24] unlike wholesale and retail dealers,[25] has no standing to assail the administrative regulation

15. *R.* v. *Racing Commission, ex p. Heatley* [1975] Tas. S.R.149 (S.C. of Tasmania); *cf. Banks* v. *Transport Regulation Board* (1968) 119 CLR 222 (H.C. of Australia). for New Zealand, see *N.Z. Dairy Board* v. *Okitu Co-operative Dairy Co. Ltd* [1953] NZLR 366 (C.A.).

16. *Re Gordon and East Side Plating Ltd* (1972) 26 DLR (3d) 34, 40 (H.C. of Ontario); *cf. Hoogendoorn* v. *Greening Metal Products and Screening Equipment* [1968] S.C.R.30 (S.C. of Canada).

17. *Smith* v. *Bay of Plenty Licensing Committee* (1908) 27 NZLR 513, 523 (S.C.); *cf. Ryan* v. *Waikato-Maniopoto Maori Land Board* [1927] NZLR 24 (S.C.).

18. *Robertson* v. *City of Montreal* (1915) 52 SCR 30, 32 (S.C. of Canada).

19. *Re Rothmans of Pall Mall Canada Ltd and Minister of National Revenue* (1976) 67 DLR (3d) 505, 513 (Fed. Ct. of Appeal of Canada).

20. *Collins* v. *Lower Hutt City Corporation* [1961] NZLR 250 (S.C.).

21. *Stowell* v. *Geraldine County Council* (1890) 8 NZLR 720 (S.C.).

22. *Palmerston North Borough* v. *Palmerston North-Kairanga River Board* [1916] NZLR 919 (S.C.).

23. *Ex p. Frethey, in re O'Driscoll's Application* (1902) 21 NZLR 317 (S.C.).

24. *Hyland* v. *Phelan* [1941] NZLR 1096 (S.C.).

25. *New Zealand United Licensed Victuallers' Association of Employers* v. *Price Tribunal* [1957] NZLR 167 (S.C.).

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of prices of goods. Similarly, a taxpayer is not entitled to challenge executive action relating to expenditure of the national revenue.[26]

The chief modes by which the exacting criteria spelt out in these decisions have contributed to drastic curtailment of *locus standi,* are the following:

(i) Elastic interpretation of the requisites of standing has been scrupulously confined to administrative and quasi-judicial inquiries,[27] and attempts to enlarge the scope of *locus standi* in other contexts – such as applications challenging the legality of proceedings in courts of criminal jurisdiction – have been resisted.[28] This stratification of approaches impairs the coherence of the law.

(ii) Departing from the suggestion, made with specific reference to the prerogative remedies, that "Every person has a legal right to have his name cleared in respect of alleged dishonourable conduct",[29] a Canadian court has asserted: "An interested party cannot be 'aggrieved' by the verdict of a coroner's jury; hence he has no *locus standi* to invoke *certiorari* to set aside such a verdict, regardless of irregularities in the conduct of the inquest, even though it may reflect serious misconduct on his part."[30] The basis of this ruling was that the proceedings of a coroner's jury were investigative, rather than accusatorial, in character. This approach, however, involves the implication that *locus standi* for the purpose of vindicating the applicant's reputation may not be claimed validly in impugning, by means of *certiorari,* the proceedings of a tribunal whose verdict lacks a binding quality and does not constitute a final adjudication of existing rights or liabilities.

(iii) Conceptual and terminological refinements have impinged crucially on the dimensions of standing. Indicative of this trend is the use, in this area of law, of a dichotomy between "right" and "privilege" and of a distinction between vested and contingent rights. These distinctions are integral to the reasoning contained in a series of Australian decisions. Thus, a Tasmanian court, disallowing an application for *certiorari* by a bookmaker whose request for the renewal of his licence was refused, commented: "It is the case of a person seeking to obtain a privilege."[31] The view was expressed in

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26. *Walsh* v. *Social Security Commission* [1959] NZLR 1113 (S.C.).
27. *Wolfe* v. *Robinson* (1962) 31 DLR (2d) 233, 358 (C.A. and Ontario).
28. *ibid.*, 360.
29. *Tippett* v. *International Typographical Union, Local 226* (1975) 63 DLR (3d) 522, 534 (S.C. of British Columbia).
30. *Wolfe* v. *Robinson, supra,* at p.245.
31. *R.* v. *Betting Control Board* [1948] Tas. S.R.4, 11 (S.C. of Tasmania).

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another Tasmanian decision: "The fact that a man who has a driving licence uses his car for the purpose of his business does not in any way give him a vested right to it. In each case there is an application for a privilege, and no question of a vested right arises."[32] In Australia, a distinction has been drawn expressly between an application for the issue of an original licence and an application for the renewal of an existing licence, the former being designated a privilege and the latter an accrued right.[33]

These decisions, it is submitted, are difficult to reconcile with the policy objectives of the law. The artificiality attendant on reasoning of this kind is exposed by the Privy Council's suggestion that, where a minister had transgressed the rules of natural justice by dissolving a municipal council without granting a hearing, the minister's order was voidable at the instance of the council but not at the election of the mayor, *suo nomine*.[34] The conception of a "person aggrieved" which emerges from this decision is unconvincingly narrow.

(iv) With regard to the burden of proof, the High Court of Australia has pointed out that the onus as to standing must be allocated to the applicant and that, in the event of an unresolved doubt, relief is necessarily withheld.[35]

Opposed to these trends which cumulatively impose significant constraints on *locus standi* is a vigorous judicial predilection, discernible throughout the Commonwealth, which favours enlargement of the purview of standing. The Judicial Committee of the Privy Council has declared that "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation".[36] In Canada, it has been recognized that a person "aggrieved" by the award of a statutory arbitrator need not be a party to the submission of the dispute to arbitration proceedings.[37] A Comparable approach is reflected in the statement by the Supreme Court of New Zealand that "The plaintiffs, although not immediately interested parties, have a status to seek an order for a writ of *certiorari*."[38] In New Zealand,

32. *R.* v. *Oldham, ex p. Registrar of Motor Vehicles* [1966] Tas. S.R.80, 84-85 (S.C. of Tasmania).

33. *Re Holden* [1957] Tas. S.R. 16 (S.C. of Tasmania).

34. *Durayappah* v. *Fernando* [1967] 2 A.C. 337.

35. *Permanent Trustee Co. of New South Wales* v. *Council of the Municipality of Campbelltown* (1960) 105 CLR 401 (H.C. of Australia).

36. *Attorney-General of the Gambia* v. *N'Jie* [1961] A.C. 617, 634, *per* Lord Denning; *cf. Maurice* v. *London County Council* [1964] 2 QB 362, disapproving of dicta by Salmon J. in *Buxton* v. *Minister of Housing and Local Government* [1961] 1 QB 278.

37. *Re Warde and Pulp & Paper Workers of Canada, Local Union No.8* (1971) 23 DLR (3d) 593, 595 (C.A. of British Columbia).

38. *Johns* v. *Westland District Licensing Committee* [1961] NZLR 35,45 (S.C. of N.Z.).

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moreover, there has been direct allusion to the applicant's bona fides as an element of his capacity to intervene effectively by resorting to prerogative remedies.[39] It has been suggested, in keeping with the Australian authorities, that the sole requirement of standing is "some sufficient stake in the matter".[40] These developments are reinforced by the rule as to the burden of proof, entrenched in Canadian law, that an application to strike out a party should not succeed unless it is shown beyond doubt that the party has no status.[41]

This generous construction of a "particular grievance" or a "party aggrieved" is epitomized in established assumptions in all Commonwealth jurisdictions.

In England, the rules governing standing have been so interpreted as to encompass the user of a thoroughfare objecting to its closure,[42] newspaper proprietors questioning a judicial order restricting reports of proceedings,[43] ratepayers challenging executive action by a local authority,[44] a potential defendant in proceedings sanctioned by a legal aid committee,[45] traders impugning the grant of a licence to rivals[46] and a neighbour objecting to the grant of planning permission.[47]

In Australia, *locus standi* has been conceded to a Transport Commission in connection with a judicial order precluding subsequent suspension of a driver's licence,[48] to a landowner complaining of the establishment of a private hospital in the vicinity,[49] a rival objecting

39. *Re The Committee of the Licensing District of Invercargill North* (1892) 11 NZLR 507, 510

40. D.G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (4th ed., 1971), p. 208.

41. *Re Civil Service Association of Alberta and Farran* (1976) 68 DLR (3d) 338 (A.D. of Alberta); *cf. Cerny* v. *Canadian Industries Ltd* (1972) 30 DLR (3d) 462, 468 (S.C. of Alberta).

42. *R.* v. *Surrey Justices* (1870) LR 5 QB 466.

43. *R.* v. *Blackpool Justices, ex p. Beaverbrook Newspapers Ltd* [1972] 1 WLR 95.

44. *R.* v. *Hendon R.D.C. ex p. Chorley* [1933] 2 KB 696.

45. *R.* v. *Manchester Legal Aid Committee, ex p. Brand & Co.* [1952] 2 QB 413.

46. *R.* v. *Groom, ex p. Cobbold* [1901] 2 KB 157; *R.* v. *Richmond Confirming Authority, ex p. Howitt* [1921] 1 KB 248; *R. (Nicholl)* v. *Belfast Recorder* [1965] N.I. 17.

47. *R. (Bryson)* v. *Ministry of Development* [1967] NI 180; *Murphy & Sons Ltd* v. *Secretary of State for the Environment* [1973] 1 WLR 560; *R.* v. *Hillingdon L.B.C., ex p. Royco Homes Ltd* [1974] QB 720, But see *R.* v. *Bradford-upon-Avon U.D.C., ex p. Boulton* [1964] 1 WLR 1136; *Gregory* v. *Camden L.B.C.* [1966] 1 WLR 899.

48. *R.* v. *Solomon, ex p. Transport Commission* [1968] Tas. S.R. 430 (S.C. of Tasmania).

49. *R.* v. *The Corporation of the Town of Glenelg, ex p. Pier House Pty. Ltd* [1968] SASR 246 (S.C. of South Australia).

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to the grant of a licence to an omnibus company,[50] an adjacent landowner adversely affected by the decision of a town and country planning authority[51] and to an applicant who had been refused registration as an agent by a statutory board.[52]

The Canadian courts have attributed standing to a landowner resisting a basic transformation of the character of the neighbourhood without demonstrating personal loss,[53] to a municipality adjacent to the site of a proposed shopping centre,[54] to an employer in connection with the proceedings of a Labour Relations Board,[55] to a person anticipating the loss of public transportation services[56] and to a member of the public envisaging harm to the community at large in consequence of the actions of a municipality.[57] In New Zealand, a broad view has been taken of *locus standi* to challenge the orders of price tribunals.[58]

A striking feature of many of these decisions is their repugnance to the criterion of a paramount interest exceeding that of the public or a section of it, which derives support from a countervailing strand of authority. In most of the recent Commonwealth decisions, the successful applicant for *certiorari* ostensibly lacked an overriding personal interest of this kind. To this extent, the narrowly circumscribed nature of the test applied in some of the earlier cases has been rendered inappropriate by subsequent judicial attitudes. The liberality of the prevailing view is exemplified by the willingness of an Australian court impliedly to recognize a "right" to consume liquor, protected by the prerogative remedies.[59] The extended scope of standing in contemporary administrative law is entirely in accord with the policy foundations of *certiorari* which emphasize the preoccupation of the

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50. *R.* v. *Public Vehicles Licensing Appeal Tribunal, ex p. Gray's Transport Pty. Ltd* [1968] Tas. S.R. 191 (S.C. of Tasmania).

51. *R.* v. *Town and Country Planning Commissioner, ex p. Scott* [1970] Tas. SR 154, 182 (S.C. of Tasmania).

52. *R.* v. *Agents Board of the Australian Capital Territory, ex p. Greene* (1970) 15 FLR 306 (S.C. of A.C.T.).

53. *L'Association des Proprietaires des Jardins Tache Inc.* v. *Les Enterprises Dasken Inc.* [1974] SCR 2 (S.C. of Canada).

54. *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1975) 7 OR (2d) 717 (H.C. of Ontario).

55. *Martin and Robertson Ltd* v. *Labour Relations Board* (1954) 2 DLR 622 (S.C. of British Columbia).

56. *Gateway Packers* v. *Burlington Northern* [1971] FC 359, 372 (Fed. Ct. of Appeal).

57. *Stein* v. *City of Winnipeg* (1974) 48 DLR (3d) 223 (C.A. of Manitoba).

58. *New Zealand United Licensed Victuallers' Association of Employers* v. *Price Tribunal* [1957] NZLR 167 (C.A.).

59. *R.* v. *McArthur, ex p. Cornish* [1966] Tas. S.R. 157 (S.C. of Tasmania).

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court "principally with public order".[60] An especially valuable aspect of *certiorari*, viewed as a remedy against capricious administrative action, is the flexibility of its attributes which has been perceptively exploited in modern Commonwealth decisions as a means of expanding the doctrine of *locus standi*.

It is inherent in the structural framework of the law that availability of *certiorari ex debito justitiae* is restricted to "person aggrieved", as distinguished from "strangers."[61] Although a residue of discretion is retained in the former context as well,[62] the rule has been formulated expressly in England[63] and in Australia[64] that relief may not be withheld from a "person aggrieved" except for a compelling reason, generally entailing the imputation of blame to the applicant. While there is a *cursus curiae* in support of the grant of *certiorari* to a "stranger" at the court's discretion,[65] the amorphous scope of a "person aggrieved", as interpreted by modern English and Commonwealth courts, greatly reduces the applicability of this principle.

Nevertheless, the case law illustrates the utility of this principle in a restricted category of circumstances where the concept of a "particular grievance", even in the resilient form in which it has been construed by modern judges, cannot be invoked legitimately. In England, the Gaming Board was held to have *locus standi* to resist the production of a police report concerning an applicant for a gaming licence.[66] In Canada, an incorporated association representing farmers has been accorded standing comparable with that of its individual members.[67] The *locus standi* of trade unions has been recognized in England[68] and in Canada[69] on a comparable footing, although there is some

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60. *R.* v. *Fulham Rent Tribunal, ex p. Zerek* [1951] 2 KB 1, 11.

61. *R.* v. *Stafford Justices, ex p. Stafford Corporation* [1940] 2 KB 33.

62. *R.* v. *Herrod, ex p. Leeds City Council* [1976] QB 540; *cf. London Corporation* v. *Cox* (1867) L.R. 2 H.L. 239.

63. *R.* v. *Patents Appeal Tribunal, ex parte Geigy* [1963] 2 QB 728; *R.* v. *Legal Aid Committee, ex parte Foxhill Flats (Leeds) Ltd* [1970] 2 QB 152.

64. *Ex parte Delaney, re Hay* [1963] S.R. (N.S.W.) 137 (S.C. of N.S.W.)

65. *R.* v. *Grove, Wilts Justices* (1893) 57 JP 454; *R.* v. *Butt, ex parte Brooke* (1922) 38 TLR 537; *R.* v. *Brighton Borough Justices, ex p. Jarvis* [1954] 1 WLR 203.

66. *R.* v. *Lewes Justices, ex parte Home Secretary* [1973] A.C. 308.

67. *R.* v. *Ontario Milk Marketing Board, ex p. Channel Islands Breeds Milk Producers Association* (1969) 2 DLR (3d) 346 (H.C. of Ontario).

68. *Minister of Social Security* v. *Amalgamated Engineering Union* [1967] A.C. 725.

69. *R.* v. *Saskatchewan Labour Relations Board, ex parte Construction and General Labourers' Union, Local 180* (1966) 57 DLR (2nd) 163. (Q.B. of Saskatchewan).

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authority to the contrary in the latter jurisdiction.[70] A narrower approach is characteristic of the law of New Zealand where an association of persons has been denied competence to challenge administrative action violating the rights of its members.[71] On the whole, modern courts have been inclined to accord *locus standi* to "diverse classes of (persons) affected",[72] such as rival trade unions.[73] In these cases, the recognition of *locus standi* derives, in the final analysis, from the representative character of the interest asserted by the applicant. The entrenchment of this amorphous category of interest in the modern law enables the accommodation of an applicant having merit in a given factual context, while delineation of the limits of the category is aided by the applicability of the discretionary bars.[74]

A noteworthy feature of the law of New Zealand is the suggestion that procedural restraints predicated on standing may properly be dispensed with in circumstances involving particular types of jurisdictional taint, such as bias[75] and breach of the *audi alteram partem* requirement,[76] and even in respect of error of law on the face of the record.[77] It is submitted, however, that an attempt to distinguish between jurisdictional defects which render administrative action vulnerable at the instance of all and sundry, and those which expose such action to attack only by persons having a substantial interest in the subject-matter, does not contribute to improvement of the law. Quantitative gradations within the concept of jurisdictional taint not only introduce vexed problems of discrimination, towards the solution of which no objective criteria can be called in aid, but also imperil the internal consistency of the law. The preferable approach, it is submitted, is to regard the total range of jurisdictional defects, strictly so designated, as entailing the consequence of voidness of administrative action, provided that this sanction is sought in

70. *Canadian Seamen's Union* v. *Canada Labour Relations Board and Branch Lines* (1951) 2 DLR 356 (H.C. of Ontario).

71. *New Zealand United Licensed Victuallers' Association of Employers* v. *Price Tribunal* [1957] NZLR 167 (S.C.); *cf. Wellington Municipal Officers' Association (Inc.)* v. *Wellington City Corporation* [1951] NZLR 786 (S.C.).

72. *New Zealand Educational Institute* v. *Wellington Education Board* [1926] NZLR 615, 619 (S.C. of N.Z.).

73. *Regina Grey Nuns' Hospital Employers' Association* v. *Labour Relations Board* (1950) 4 DLR 775, 779 (K.B. of Saskatchewan).

74. *Young* v. *Att.-Gen. of Manitoba, Boxall and Fryer* (1960)25 DLR (2d) 352 (C.A. of Manitoba).

75. *Ex parte Frethey, Re O'Driscoll's Application* (1902) 21 NZLR 317 (S.C.).

76. *Smith* v. *Bay of Plenty Licensing Committee* [1908] 27 NZLR 513 (S.C.).

77. *Douglas* v. *Henri Koru Koru* [1920] NZLR 87 (S.C.); but see *New Zealand Sheepowners' Industrial Union of Employers* v. *Tyndall* [1960] NZLR 606 (C.A.).

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appropriate proceedings by a party possessing adequate interest. Accordingly, the rules pertaining to *locus standi* should be applicable, in principle, throughout the gamut of remedies directed against administrative action contrary to law.

(b) *Prohibition*

The principles which regulate *locus standi* in relation to *certiorari* and prohibition substantially converge. In some incidental respects, however, the requirements as to standing are comparatively liberal in the setting of prohibition. This may be ascribed to the availability of prohibition, in the generality of cases, to parties *coram judice,* while *certiorari* is frequently invoked in respect of injury to interests asserted by persons who are not necessarily parties to proceedings of a judicial or quasi-judicial character. The affinity of the remedy of prohibition with the decisions of inferior courts has prompted judges issuing this prerogative order to refrain from examining too rigorously the interest of the person having recourse to them[78] on the theoretical basis that usurpation of jurisdiction encroaches on the Royal Prerogative and must be strenuously suppressed as a contempt of the Crown.[79] The flexibility of approach engendered by this doctrine, which has its roots in the development of the prerogative remedies in English law, has lingered long after the premise of the reasoning has ceased to carry conviction.

A recurring element of the case law on prohibition is the importance of the legal consequences flowing from the distinction between patent and latent error in the order or action impugned. Where the defect is not apparent *ex facie* the proceedings, the availability of discretion to the court in granting prohibition is indisputable[80] and a stranger, naturally, could expect less latitude than a participant in the relevant proceedings.[81]

The legal position applicable to cases of patent error may be expressed in one of three propositions, each of which has reliable judicial antecedents.

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78. *Worthington* v. *Jeffries* (1857) L.R. 10 C.P. 379, 382.

79. S. M. Thio, "*Locus Standi* in Relation to Prohibition" [1965] P.L. 88, 94.

80. *Ex parte South Australian Brewing Co. Ltd* (1908) 8 S.R. (N.S.W.) 361 (S.C. of N.S.W.).

81. *R.* v. *Graziers' Association of New South Wales* (1956) 96 C.L.R. 317, 327 (H.C. of Australia).

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(i) Proof of patent error vitiating jurisdiction makes the grant of prohibition mandatory, irrespective of sufficiency of the interest demonstrated by the applicant in the decision or action. The Supreme Court of New Zealand has baldly asserted that, in these circumstances, "It is not necessary that a plaintiff in prohibition should have any interest in the subject-matter".[82] It has been taken for granted,[83] or expressly decided, in New Zealand[84] and in Australian jurisdictions such as New South Wales,[85] Queensland[86] and South Australia[87] that jurisdictional error apparent on the face of the record entitles even a stranger to prohibition *ex debito justitiae*. This view, reflected in the comment that a stranger may seek prohibition "as of right"[88] in these cases, has been endorsed by the High Court of Australia.[89] There is slender authority to a similar effect in England.[90] The rationale underlying this group of decisions is that "Superior courts guard very jealously their right to prohibit an inferior court from exceeding its jurisdiction".[91] The implication is that the law accords this objective priority over the principle postulating adequacy of interest.

(ii) The countervailing opinion, underscoring the pivotal role of discretion in the conception of the remedy,[92] insists that the jurisdiction is "in all cases discretionary".[93] The Court of Appeal of New Zealand has unequivocally declined to give its assent to the proposition that a stranger to proceedings before an inferior tribunal necessarily has the "right" to seek prohibition on the ground of want or excess of

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82. *Douglas* v. *Henri Koru Koru* [1920] N.Z.L.R. 87, 88 (S.C.).

83. *Solicitor-General* v. *Tokerau District Maori Land Board* (1912-1913) 32 N.Z.L.R. 866, 867 (S.C.)

84. *Cutlen* v. *Howell* (1898) 16 N.Z.L.R. 373, 378 (S.C.).

85. *Honnery* v. *Smith* [1957] S.R. (N.S.W.) 598, 602-603 (S.C. of N.S.W.); *cf. Ex parte Fraser* (1899) 20 L.R. (N.S.W.) 67 (S.C. of N.S.W.).

86. *R.* v. *Knyvett (Cloncurry Licensing Magistrate) ex p. Weber* [1929] Q.S.R. 16 (S.C. of Queensland).

87. *R.* v. *Licensing Court, ex rel. Marshall* [1924] S.A.S.R. 421 (S.C. of S.A.)

88. *Ex parte Fitzgerald, Re Gordon* (1945) 45 S.R. (N.S.W.) 182, 188 (S.C. of N.S.W.).

89. *The Master Retailers' Association of N.S.W. Ltd* v. *Shop Assistants' Union of N.S.W.* (1904) 2 C.L.R. 94 (H.C. of Australia); *Yirrell* v. *Yirrell* (1939) 62 C.L.R. 287 (H.C. of Australia).

90. *R.* v. *Richmond Confirming Authority, ex p. Howitt* [1921] 1 K.B. 248, 256.

91. *The Master Retailers' Association of N.S.W. Ltd* v. *Shop Assistants' Union of N.S.W., supra,* at p. 98 (H.C. of Australia).

92. *R.* v. *Denbighshire Justices* (1853) 17 J.P. 312.

93. *The Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd* (1924) 34 C.L.R. 482, 519 (H.C. of Australia)-a *certiorari* case.

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jurisdiction.[94] Consistently with this view, an applicant lacking substantial interest has been refused prohibition, notwithstanding manifest infraction of the rules of natural justice by an administrative tribunal.[95] English courts, on the whole, have leaned towards the retention of discretion.[96] This approach, which preserves the universality of operation of the discretionary bars, may be reconciled readily with the character and components of the remedy of prohibition.

(iii) An intermediary position which incorporates elements of these competing views has been evolved by the courts of Australia. The essence of this compromise is that, although discretion is not wholly eroded by the manifest quality of the jurisdictional error, the gravity of the defect and the degree of its susceptibility to proof would be treated almost invariably as overriding the cogency of the grounds for refusal of the remedy in the exercise of discretion.[97] In New South Wales[98] and Queensland,[99] this principle has been adopted as a point of departure in formulating the rules which control *locus standi* in applications for *certiorari* and prohibition alike.

Despite the narrower dimension in practice of prohibition, which is issued typically to inferior courts *stricto sensu,* the movement of contemporary law is unmistakably towards assimilation of the rules pertinent to *locus standi* in the contexts of prohibition and *certiorari.* The assumption has been made in Australia[100] that the distinction drawn in a strand of judicial opinion between patent and latent error in relation to prohibition applies to *certiorari* as well. This process of assimilation enhances the symmetry and cohesion of the law, but at the expense of extending to a distinct remedy a refinement which has not proved defensible from a policy standpoint in the limited area in which it has hitherto been applied sporadically. It is submitted that the demands of both policy and consistency are met, and the essential character of the remedy preserved, by acquiescing in the conferment of discretion on the courts with regard to the availability of *certiorari* as well as prohibition, subject to the quantitative differences which would inevitably be apposite between patent and latent error and between a stranger and a party to the proceedings.

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94. *New Zealand Sheepowners' Industrial Union of Employers* v. *Tyndall* (1960) N.Z.L.R. 606, 618 (C.A.).

95. *Greater Wollongong City Council* v. *Dunn* (1973) 1 N.S.W.L.R. 36, 41 (S.C.).

96. *R.* v. *South Holland Drainage Committee* (1838) 8 A. & E. 429; *R.* v. *Manchester and Leeds Railway Co.* (1838) 8 A. & E. 413.

97. *Ex parte Thomas, re Arnold* (1966) 2 N.S.W.R. 197, 199 (C.A.).

98. *ibid.*

99. *R.* v. *More, ex p. Brisbane City Council* [1969] Qd.R. 75, 92 (S.C.).

100. *Ex parte Wurth, re Tully* [1955] S.R. (N.S.W.) 47 (S.C.).

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The competence of the Crown to resort to *certiorari* and prohibition with a view to rectifying defects in the proceedings of inferior judicial tribunals hardly lends itself to controversy.[101] Indeed, in this corrective function, exercised through the jurisdiction of superior courts, lay the origins of the entire body of law relevant to the surveillance of administrative action by means of prerogative orders or equivalent remedies. However, the view expressed in England[102] and in Australia,[103] that prohibition and *certiorari* lie as of course at the instance of the Crown, is open to criticism. This view has since been repudiated on compelling grounds,[104] and the principle is settled in modern law that discretion may be used by the court, albeit with due circumspection, having regard to the procedural privileges and immunities enjoyed by the Crown.[105]

(c) *Mandamus*

Notwithstanding the assertion that the principles regulating *locus standi* in relation to the remedy of mandamus should be equiparated with the rules applicable to other prerogative orders,[106] a more restrictive doctrine has governed applications for mandamus than for orders of *certiorari* and prohibition.[107] The rationale sustaining the stringent approach to standing in the former context, according to an authoritative formulation, is that the court "would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance".[108]

The invocation of a strict test[109] for standing in applications for mandamus is exemplified by insistence on "a legal right",[110] "a

101. See, *e.g. Att.-Gen. of N.S.W.* v. *Dawes* (1976) 1 N.S.W.L.R. 242, 248 (S.C.).

102. *R.* v. *Clace* (1769) 4 Burr. 2458.

103. *R.* v. *Justices of Brisbane, ex p. Treasurer of Queensland* (1901) 11 Q.L.J. 77 (S.C.).

104. *R.* v. *Amendt* [1915] 2 K.B. 276, 281.

105. *ibid., cf. Broad* v. *Perkins* (1888) 21 Q.B.D. 533.

106. S.M. Thio, "*Locus Standi* in Relation to Mandamus" [1966] P.L. 133.

107. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed* [1981] 2. W.L.R. 722, 735 (H.L.), *per* Lord Diplock.

108. *R.* v. *Lewisham Union Guardians* [1897] 1 Q.B. 498.

109. For examples of judicial recommendation of a strict test, see *R.* v. *Commissioners of Customs and Excise, ex p. Cook* [1970] 1 W.L.R. 450; *R.* v. *Hereford Corporation, ex p. Harrower* [1970] 1 W.L.R. 1424.

110. *Water Conservation and Irrigation Commission* v. *Browning* (1947) 74 C.L.R. 492, 499 (H.C. of Australia).

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specific legal right"[111] or "an ascertainable right".[112] Mandamus has been refused on the basis that the respondent owed no correlative legal duty to the applicant.[113] Moreover, the probative burden has been imposed on the applicant to show that he is "in all respects clearly entitled",[114] i.e. "to have the thing sought by (him) done, and done in the manner and by the person sought to be coerced".[115]

Nevertheless, a salient judicial trend towards liberalization of the applicable rules has manifested itself throughout the Commonwealth in several ways:

(i) The content of the requisite "right" in the applicant has been flexibly construed. In contrast with previous decisions postulating legal rights[116] and clearly excluding private equitable rights[117] from the scope of mandamus, the concession has been made that an enforceable right is not necessary.[118] The indispensable elements required by the law have received no precise definition.[119]

(ii) There is no doubt that the concept of legal right is a central feature of early formulations of the prerequisites of mandamus. Lord Mansfield declared that "If there be a right, and no other specific remedy, (mandamus) should not be denied".[120] Lord Ellenborough characterized mandamus as "the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right".[121] Indeed, some Australian decisions,[122] in their quest for a suitable criterion of standing, have incorporated reasoning based on the Hohfeldian connotation of jural rights and duties. But

111. *R.* v. *Registrar of Titles, ex p. Moss* [1928] VLR 411, 418-419 (S.C.); *R.* v. *Russell, ex p. Beaverbrook Newspapers Ltd* [1968] 3 All E.R. 695.

112. *R.* v. *Commonwealth Court of Conciliation and Arbitration, ex p. Ellis* (1954) C.L.R. 55, 64 (H.C. of Australia).

113. *R.* v. *Arndel* (1906) 3 C.L.R. 557 (H.C. of Australia); *R.* v. *Governor of South Australia (1907) 4 CLR 1497 (H.C. of Australia); cf.*, for English law, *R.* v. *Inland Revenue Commissioners, re Nathan* (1884) 12 Q.B.D. 461.

113. *Frankel* v. *City of Winnipeg* (1912) 3 W.W.R. 405, 410 (S.C. of Manitoba).

114. *Karavos* v. *Toronto and Gillies* (1948) 3 D.L.R. 294, 297 (C.A. of Ontario); *cf. Re Cambridge Leaseholder Ltd* v. *City of Toronto* (1973) 37 D.L.R. (3d) 43, 57-58 (Div. Ct. of Ontario).

116. *Ex parte Napier* (1852) 18 Q.B. 692; *cf. R.* v. *Secretary of State for War* [1891] 2 Q.B. 326

117. *R.* v. *Stafford (Marquis)* (1790) 3 T.R. 646.

118. *R.* v. *Cotham* [1898] 1 Q.B. 802; *R.* v. *Manchester Corporation* [1911] 1 K.B. 560

119. *Cf. R.* v. *Keighley Union Guardians* (1876) 40 J.P. 70.

120. *R.* v. *Barker* (1762) 3 Burr. 1265, 1267.

121. *R.* v. *Archbishop of Canterbury* (1812) 15 East 117, 136.

122. *Ex parte Cornford, re Minister for Education* [1962] S.R. (N.S.W.) 220 (S.C.); *Ex parte Forster, re University of Sydney* (1963) 63 S.R. (N.S.W.) 723 (S.C.).

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modern courts tend to reject an unreservedly conceptual approach and to pose as the crucial question whether, having regard to the need for effective action by administrative organs and functionaries as well as to the basic principle of subordination of administrative action to the rule of law, an adequate nexus between the illegality established and the applicant's interest is demonstrable.

(iii) The transfer of emphasis from "right" to "interest" has been conducive to expansion of the rules governing standing. This development has taken the form either of recognizing a legal right or a sufficient personal interest as alternative requirements of standing,[124] or of accepting a substantial personal interest in performance as a means of establishing a legal right to the discharge of the duty.[125] The former line of reasoning has proved less tortuous in character. Notwithstanding adoption of the comparatively resilient criterion of "interest" the ambit of *locus standi* has been curtailed by qualifying elements adverting to a "real"[126] special"[127] "direct and tangible"[128] an "immediate"[129] or a "specific"[130] interest.

Contrary to the suggestion that any member of the public is entitled to seek the remedy of mandamus, subject to the discretion of the court,[131] these expressions postulate an interest transcending that of the public at large or of a particular class to which the applicant belongs.[132] The mere fact that a person is interested in the performance of a duty as a member of a class of persons, all of whom may be regarded as equally interested, but himself having no particular ground for claiming performance, is insufficient.[133] A proprietary[134] or

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123. *Cf. R.* v. *Stepney Borough Council, ex p. John Walker & Sons Ltd* [1934] A.C. 365.

124. *R.* v. *Commissioners of Customs and Excise, ex p. Cook, supra.*

125. *Ex parte Northern Rivers Rutile Pty. Ltd, re Claye* (1968) 89 W.N. (Pt. 1) (N.S.W.) 13 (S.C.)

126. *R.* v. *Peterborough* (1875) 44 L.J.Q.B. 85, 86.

127. *R.* v. *Manchester Corporation* [1911] 1 K.B. 560, 564.

128. *R.* v. *Barnes Corporation, ex p. Conlan* [1938] 3 All E.R. 226; *cf. R.* v. *Hampstead Borough Council, ex p. Woodward* (1917) 116 L.T. 213.

129. *R.* v. *Frost* (1838) 8 A. & E. 822.

130. *R.* v. *Harlock, ex p. Standford & Atkinson Pty. Ltd* [1974] W.A.R. 101 (S.C. of W.A.)

131. D. C. M. Yardley, "Prohibition and Mandamus and the Problem of *Locus Standi*" [1957] L.Q.R. 534.

132. *Ex parte N.S.W. Rutile Mining Co. Pty Ltd; re Burns* (1967) 1 N.S.W.R. 545, 550-551 (S.C.); *Re Copeland and Adamson* (1972) 28 D.L.R. (3d) 26 (H.C. of Ontario).

133. *Hughes* v. *Henderson and Portage la Prairie* (1964) 46 W.W.R. 202 (Q.B. of Manitoba).

134. *Ex parte N.S.W. Rutile Mining Co. Pty. Ltd; re Burns, supra,* at p. 550 (S.C. of N.S.W.).

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financial[135] interest, provided that it is not of a wholly speculative or contingent character,[136] may enable the applicant to prove a grievance distinguishable from that of the community. It is not an insuperable objection that the pecuniary interest is of an indirect kind – for example, diminution of the commercial value of property because of its proximity to a hazardous structure[137] or the adverse effect of an incorrect registration on the priority of the applicant's interests in property.[138] *A fortiori,* a creditor of an insolvent has sufficient interest to apply for mandamus to compel an official to proceed with a prosecution for fraudulently concealing assets,[139] as does a mortgagee of the rates in circumstances where a municipality neglects to levy a rate for the current year.[140]

An interest superior to that of the whole community or a section of it is generally evident from the applicant's participation in legal proceedings[141] or from his initiative in securing the enactment of the relevant statutory provision.[142] Clearly, a defendant in committal proceedings has *locus standi* to obtain mandamus.[143] Apprehended damage to reputation is probably a permissible basis of standing.[144]

The lack of a special interest demonstrable by any of these means results in denial of standing. An objector to an application to a licensing court for a liquor licence is devoid of *locus standi* if his sole aim is to inform the mind of the court and he is in no sense a party to the proceedings.[145] Where the applicant sought to make absolute a rule nisi for mandamus commanding the clerk of a court to issue a warrant to commit a debtor to prison for non-payment of a fine, the writ was withheld for want of an adequate interest, monetary or otherwise, in the applicant.[146] If the applicant's endeavour is merely to discover or establish a state of things[147] or to protect

135. *Croydon Corporation* v. *Croydon Rural Council* (1908) 2 ch. 321; *The State (Modern Homes Ltd)* v. *Dublin Corporation* [1953] I.R. 202.

136. *Ex parte Northern Rivers Rutile Pty. Ltd, re Claye* (1968) 3 N.S.W.R. 294 (S.C.)

137. *R.* v. *Shire of Coolangatta* (1930) 24 Q.J.P.R. 156 (S.C. of Queensland)

138. *Parker* v. *Brooks* (1897) 16 N.Z.L.R. 276 (C.A.).

139. *R.* v. *Windeyer* (1847) 1 Legge 366.

140. *Re Municipal District of Lambton* (1899) 20 L.R. (N.S.W.) 375 (S.C.).

141. *R.* v. *Cotham* [1898] 1 Q.B. 802.

142. *R.* v. *Manchester Corporation* [1911] 1 K.B. 560.

143. *Ex parte Donald, Re McMurray* (1969) 1 N.S.W.R. 461 (S.C.).

144. *R. ex rel. F. W. Woolworth Co. Ltd and Slabick* v. *Labour Relations Board of Saskatchewan* (1954) 4 D.L.R. 359 (C.A. of Saskatchewan).

145. *R.* v. *Whiteway, ex p. Stephenson* [1961] V.R. 168 (S.C.).

146. *Ex parte Mullen, re Wigley* (1970) 2 N.S.W.R. 297 (S.C.).

147. *R. ex rel. Connelly* v. *Publicover* [1940] 4 D.L.R. 43 (S.C. of Nova Scotia).

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the interests of other persons[148] or, if, in the absence of a cognizable personal interest, the representative quality of the applicant's interest is not apparent,[149] he falls outside the purview of the duty which mandamus purports to enforce.[150]

These limitations on the scope of standing are entirely consistent with the policy objectives of mandamus. However, there are contexts in which each member of a given class of persons may validly assert *locus standi*. A statutory obligation imposed on a minister to conduct a poll may be enforced by any member of the electorate.[151] The basis of actionability is that the minister is accountable not to the Crown but to the individual to whom the legal duty is owed.[152] The adequacy of the applicant's interest is not vitiated by its being shared with a large and indefinite group of persons,[153] and each member of the relevant class is treated as "a person interested".[154]

(iv) A prominent feature of the development of the law is the progressively diminishing importance of classification as a means of associating *locus standi* with particular categories of applicants for relief. Ratepayers, for instance, constituted a class of persons to whom, for historical reasons, the Court of King's Bench afforded liberal access to restrain the *ultra vires* activities of public bodies to whose expenses they contributed.[155] Thus, mandamus is available readily to a ratepayer against a local authority to compile an accurate rating list[156] or to secure compliance with operative standing orders,[157] provided that the ratepayer is acting genuinely as such.[158] Judicial

148. *R.* v. *Liverpool,* Manchester and Newcastle-upon-Tyne Railway (1852) 21 L.J.Q.B. 284.

149. *R.* v. *Witham Savings Bank* (1834) 1 A. & E. 321.

150. *Re Hall and Johnson* (1974) 52 D.L.R. (3d) 237 (A.D. of Nova Scotia).

151. *Re McKay and Minister of Municipal Affairs* (1973) 35 D.L.R. (3d) 627 (S.C. of British Columbia).

152. *Re Central Canada Potash Co. Ltd and Minister of Municipal Resources of Saskatchewan* (1973) 32 D.L.R. (3d) 107, 113, (S.C. of Saskatchewan); *cf. R. ex rel. Lee* v. *Workmen's Compensation Board* [1942] 2 D.L.R. 665, 686 (C.A. of British Columbia).

153. *Att.-Gen. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] Q.B. 629, 649.

154. *R.* v. *Commissioners for Special Purposes of the Income Tax* (1888) 21 Q.B. 313, 317; *cf. R.* v. *Leicestershire Guardians* 1899 2 Q.B. 632.

155. *R.* v. *Greater London Council, ex p. Blackburn* [1976] 1 W.L.R. 550.

156. *R.* v. *Paddington Valuation Officer, ex p. Peachey Property Co. Ltd* [1966] 1 Q.B. 380, where, however, the application was unsuccessful on the merits; *cf. R.* v. *London (City of Union Assessment Committee)* [1907] 2 K. B. 764.

157. *R. (McKee)* v. *Belfast Corporation* [1954] N.I. 122.

158. *R.* v. *Peterborough* (1875) 44 L.J.Q.B. 85.

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solicitude for the community of interest typifying ratepayers has been much in evidence in New Zealand[159] and Ireland.[160] Indeed, applicants have often been accorded *locus standi* in their capacity as ratepayers, although their actual interest, obliquely recognized by the court as worthy of protection, was of a different character.[161] This artificiality of reasoning is repudiated by subsequent decisions which have exposed the anomalies inherent in the privileged status conferred on ratepayers. This trend, which has received an impetus from extension of the local government franchise to persons other than ratepayers, is reflected in a recent comment by the House of Lords. Their Lordships, referring to a decision in which the Court of Appeal impliedly drew a distinction between the mother and the father of a child (the former being a ratepayer, and the latter not), in relation to their interest in preventing the exhibition of pornographic films by a local authority in breach of its statutory duty,[162] assailed the distinction as "carrying technicality to the limits of absurdity".[163] The emerging attitude, characterized by greater resilience, is beneficial from the standpoint of policy.

(v) As a fillip to the movement away from a rigidly conceptual approach, modern courts underline the value of treating standing not in the abstract or as an isolated point but in the legal and factual context disclosed by the evidence.[164] This suggestion, incompatible with the consideration of standing as "a separate, and logically prior, question",[165] enjoins on the court a meticulous examination of the duty devolving on the respondent and the nature of the alleged breach as a preliminary to determination of the question of standing.[166] This approach, endorsed by Canadian courts,[167] has enabled the reception of fuller material facilitating the latter decision.

It is clear from a survey of judicial attitudes during the preceding decades that, although the House of Lords, in a recent pronouncement,

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159. *Fleming* v. *Walker* (1910) 29 N.Z.L.R. 989 (S.C.)

160. *R. (Bridgeman)* v. *Drury* [1894] 2 I.R. 489.

161. See *e.g. R.* v. *Hereford Corporation, ex p. Harrower* [1970] 1 W.L.R. 1424.

162. *R.* v. *Greater London Council, ex p. Blackburn, supra.*

163. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed* [1981] 2 W.L.R. 722, 737, *per* Lord Diplock.

164. *ibid.* at p. 727, *per* Lord Wilberforce.

165. *ibid.* at p. 741, *per* Lord Fraser of Tullybelton.

166. *Cf.* p. 751, *per* Lord Roskill.

167. *Nova Scotia Board of Censors* v. *McNeil* (1975) 55 D.L.R. (3d) 632, 636 (S.C. of Canada); *Re Doctor's Hospital and Minister of Health* (1976) 68 D.L.R. (3d) 220 (H.C. of Ontario).

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has explained the rules relating to standing in applications for mandamus in terms of the correlative ideas of "right"[168] and "duty",[169] these concepts no longer receive the restrictive interpretation which was characteristic of decisions at the turn of the century. The leading case predicating "a legal right to insist upon performance"[170] has incurred the emphatic disapproval of the House of Lords,[171] and the suggestion was made that the older cases would have been decided differently had they come before a divisional court during the last twenty years.[172] The liberal assumptions pervading modern Commonwealth decisions are exemplified by the Canadian approach that "The court does not weigh interest scrupulously"[173] and by the concession of *locus standi* in England to "any one of those offended or injured"[174] or "reasonably asserting a genuine grievance".[175] These developments, founded on a generous interpretation of the criterion of "interest" are salutary in terms of legal principle, in that identification of standing with specific legal right deprives mandamus of its public law complexion and results in a distortion of the law.[176]

The expansion of standing within the framework of mandamus has had the effect of whittling down gradually the dichotomy between the rules which control *locus standi* in respect of *certiorari* and prohibition, on the one hand, and mandamus, on the other. It has been pointed out that, as a matter of policy, the distinction should be preserved in contemporary law, in so far as the interest of a person seeking to compel an authority to fulfil a duty is different from that of a person whose complaint is that a judicial or administrative body has, to his detriment, exceeded its powers.[177] A realistic appraisal of the prevailing law, however, is that empirical judicial treatment of problems of standing – a feature of the modern cases – detracts from theoretical recognition of this dichotomy.

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168. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra,* at p. 742, *per* Lord Fraser of Tullybelton.

169. *ibid.* at p. 728, *per* Lord Wilberforce.

170. *R.* v. *Lewisham Union Guardians* [1897] 1 Q.B. 498.

171. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra,* at p. 748, where Lord Scarman described the *Lewisham* decision as "deplorable"

172. *ibid,* at p. 736, *per* Lord Diplock.

173. *R. ex rel. Connelly* v. *Publicover* [1940] 4 D.L.R. 43, 46 (S.C. of Nova Scotia).

174. *R.* v. *Greater London Council, ex p. Blackburn* [1976] 1 W.L.R. 550, 559, *per* Lord Denning M.R.

175. *Arsenal Football Club Ltd* v. *Ende* [1980] Q.B. 407, 425.

176. *Cf.* H.W.R. Wade, *Administrative Law* (1977), p. 610.

177. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra* at p. 728, *per* Lord Wilberforce.

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Assessed in relation to the central objective of upholding the principle of legality in public administration, it is clear that extension of the standing of individuals supplies a lacuna in the legal machinery for enforcement of duties devolving on public authorities. Legislative action does not necessarily entail an effective safeguard; for, just as administrative expediency and the broader aspects of policy are matters for Parliament, so the lawfulness of administrative action is, properly, the concern of the courts.[178] Nor is there ground for complacency regarding the initiative of the Attorney-General in the light of the established practice which precludes him from seeking a remedy against a minister or a department of the central government.[179] Viewed in the perspective of aternative means of securing legal redress, the availability of access on an extended basis to individuals and to groups of persons significantly augments the effectiveness of the remedy.

The primary stimulus for development arises from the awareness of modern judges that the restrictions embedded in the traditional law inhibit complete exploitation of the potential of the remedy. The courts, accordingly, are inclined to adopt an *ad hoc* approach which relegates precision in order to allow full scope for questions of factual and statutory context. Thus, in a comment which conflicts clearly with the emphasis on a duty owed to the applicant[180] as an element of the foundation of mandamus, an Australian court has been prepared to concede that, in the face of evidence of neglect or refusal by the Commissioners of Police to investigate drug trafficking, a police officer would have the requisite interest to resort to prerogative proceedings directed towards enforcement of a public duty.[181]

Equitable Remedies

(a) *Declaratory proceedings*

It is a fundamental principle of English law that public rights can be asserted only by the Attorney-General as representing the public.[182]

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178. *ibid.* at p. 740, *per* Lord Diplock.

179. H. W. R. Wade, *op. cit.* p. 511.

180. *Ex parte Rice, re Hawkins* (1957) 74 W.N. (N.S.W.) 7 (S.C.).

181. *R.* v. *McAulay, ex p. Fardell* (1979) 28 A.L.R. 22, 26 (S.C. of the Northern Territory).

182. *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435; *cf. London County Council* v. *Att. Gen.* [1902] A.C. 165; *London Passenger Transport Board* v. *Moscrop* [1942] A.C. 332.

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This exclusive right vested in the Attorney-General may be exercised either at the relation of an individual purporting to be aggrieved or *ex mero motu*. It is undesirable that the Attorney-General should seek to enforce purely private rights,[183] but this does not constitute an absolute limitation.[184] At any rate, where injunctive relief is not sought as an alternative or a supplementary remedy,[185] the joinder of the Attorney-General is indispensable if the plaintiff lacks *locus standi* to secure a declaration.[186]

The rule has been acted on by Commonwealth courts that, where the right sought to be declared has been conferred not for the benefit of individuals but in the interest of the community as a whole, the Attorney-General is the appropriate plaintiff.[187] Although the High Court of Australia has declared that "The assertion of public rights and the prevention of public wrongs by means of [declaratory proceedings] is the responsibility of the Attorney-General",[188] the distinction between public and private rights is tenuous in some contexts.[189] Thus, notwithstanding that particular members of the public may be peculiarly injured by an infringement of imperative statutory provisions, it may yet be held that the duties imposed by these provisions are not owed to individual members of the public but are enforceable exclusively by the State.[190]

Within a federal constitutional framework, a declaratory judgment may be sought by the Attorney-General of a State against the Attorney-General or an officer of the federal government,[191] by the Attorney-General of one State against the Attorney-General of another State,[192] by the federal government against a State[193] and by the

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183. *Att.-Gen.* v. *Garner* [1907] 2 K.B. 480.
184. *Wyld* v. *Silver* [1963] 1 Q.B. 169.
185. *N.S.W. Fish Authority* v. *Phillips* (1970) 1 N.S.W.R. 725 (S.C.).
186. *Hampshire County Council* v. *Shonleigh Nominees Pty Ltd.* [1970] 1 W.L.R. 865.
187. *Att.-Gen of the Commonwealth* v. *T. & G. Mutual Life Society Ltd.* (1978) 19 A.L.R. 385 (H.C. of Australia).
188. *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia* [1979] A.L.R. 257 (H.C. of Australia).
189. See, *e.g. Munnich* v. *Godstone R.D.C.* [1966] 1 All E.R. 930.
190. *Webster* v. *Dobson* [1967] V.R. 253, 255 (S.C.).
191. *Att.-Gen. for Victoria* v. *The Commonwealth (Pharmaceutical Benefits Case)* (1945) 71 C.L.R. 237 (H.C. of Australia).
192. *Tasmania* v. *Victoria* (1935) 52 C.L.R. 157 (H.C. of Australia).
193. *N.S.W.* v. *The Commonwealth* (1915) 20 C.L.R. 54 (H.C. of Australia).

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federal Attorney-General against a federal functionary.[194] As the Australian experience indicates, the devolution of powers between the federal and State legislatures, and among the organs of the federal administration, enhances the usefulness of the declaratory judgment in this constitutional setting.

Although the declaratory judgment has supplemented the prerogative remedies valuably, the rules as to *locus standi* in respect of the declaration contain a limiting feature which is inapplicable to *certiorari*, prohibition and mandamus. A declaration, by its very nature, is of no avail to a plaintiff not invested with legal rights which are capable of being declared.[195] This principle would appear to be entrenched in England,[196] but qualified departures from it have been made in Commonwealth jurisdictions, notably Canada.[197] The definition of *locus standi* by reference to "some interest by reason of the plaintiff's legal rights being affected"[198] has resulted in an adjacent landowner not being entitled to assail, in declaratory proceedings, an unauthorized planning permission[199] and in a local authority devoid of proprietary interests in the relevant land not having competence to seek a declaration that the registration of claims to rights of common was *ultra vires* the governing legislation.[200] It would seem, then, that "an immediate personal interest",[201] postulated in the declaratory context, is appreciably more restricted in scope than the criterion of "real merit"[202] or an "objective of sufficient consequence,"[203] as interpreted in the perspective of the prerogative remedies.

The requirement of "special damage"[204] relevant to declaratory proceedings has been construed in Australia as not being confined to actual pecuniary loss,[205] although a mere intellectual or emotional

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194. *Commonwealth* v. *Australian Commonwealth Shipping Board* (1926) 39 C.L.R. 1 (H.C. of Australia).

195. H.W.R. Wade, *Administrative Law* (4th ed., 1977), p. 505.

196. *Gouriet* v. *Union of Post Office Workers, supra.*

197. *Thorson* v. *Att.-Gen. of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1 (S.C. of Canada).

198. J. F. Garner, "*Locus Standi* in Actions for a Declaration" (1968) 31 M.L.R. 512, 519.

199. *Gregory* v. *Camden London Borough Council* [1966] 1 W.L.R. 899.

200. *Thorne Rural District Council* v. *Bunting* [1972] Ch. 470. A proprietary right has been deemed essential: *Cameron* v. *Hogan* (1934) 51 C.L.R. 358 (H.C. of Australia)

201. de Smith, *Judicial Review of Administrative Action* (4th ed., 1980), p. 509.

202. *R.* v. *O'Sullivan, ex p. Clarke* [1967] W.A.R. 168, 173, (S.C. of Western Australia)

203. *Ex parte Delaney, re Hay* [1963] S.R. (N.S.W.) 137. 139 (S.C.).

204. *Hanson* v. *Radcliffe Urban District Council* [1922] 2 Ch. 490.

205. *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia* [1979] A.L.R. 257, 268 (H.C. of Australia).

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concern does not suffice.[206] The test which has been applied generally in respect of declaratory relief is that of "special interest"[207] involving the quality of being "peculiarly affected".[208] The same notion is conveyed by judicial assertions that the plaintiff must be "more particularly affected"[209] than other persons or injured "in a manner different from the public generally".[210] An authoritative Canadian formulation requires the plaintiff to be "specifically affected or exceptionally prejudiced".[211] The mere "satisfaction of righting a wrong, upholding a principle or winning a contest"[212] is inadequate to support *locus standi.* These restrictive trends are reinforced by the sparing[213] and cautious[214] use which the courts have sometimes made of the declaratory judgment, notwithstanding its strikingly resilient scope and comparative freedom from technicality.[215]

A strict approach to standing in declaratory actions has generally been adopted in Australia where a person claiming to be aggrieved by the rejection of his application for renewal of membership of an unincorporated association,[216] a member of the public who had no interest except by virtue of his citizenship in an agreement concluded between the Commonwealth of Australia and a State[217] and a taxpayer alleging that a statutory board had exceeded its functions,[218] have all been denied *locus standi* to obtain a declaration. In New Zealand, similarly, a plaintiff failed to secure relief in respect of unauthorized

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206. *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109; *Thompson* v. *Council of the Municipality of Randwick* (1953) 90 C.L.R. 449 (H.C. of Australia).

207. *Robinson* v. *The Western Australian Museum* (1977) 51 A.L.J.R. 806, 814 (H.C. of Australia)

208. *Stockwell* v. *Southgate Corporation* [1936] 2 All E.R. 1343, 1351.

209. *Anderson* v. *Commonwealth* (1932) 47 C.L.R. 50, 51 (H.C. of Australia).

210. *Ansett Transport* v. *Air Express* (1979) 25 A.L.R. 639, 646 (H.C. of Australia).

211. *Denison Mines Ltd* v. *Att.-Gen. of Canada* (1973) 32 D.L.R. (3d) 419, 431 (H.C. of Ontario); *cf.* the criterion of "real interest" referred to in *Russian Commercial & Industrial Bank* v. *British Bank for Foreign Trade Ltd* [1921] 2 A.C. 438, 448.

212. *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia, supra,* at p. 270 (H.C. of Australia).

213. *Palfreyman* v. *Southern Metropolitan Master Planning Authority* (1968) 15 L.G.R.A. 38, 50.

214. *Dairy Farmers' Co-operative Milk Co. Ltd* v. *The Commonwealth* (1946) 73 C.L.R. 381, 392 (H.C. of Australia).

215. I. Zamir, *The Declaratory Judgment* (1962), pp. 270 *et seq.;* see also I. Zamir, "The Declaratory Judgment v. The Prerogative Orders" [1958] P.L. 341, 357.

216. *Pridmore* v. *Reid* [1965] Tas S.R. 177 (S.C.).

217. *Anderson* v. *Commonwealth of Australia* (1932) 47 C.L.R. 50, 52 (H.C. of Australia).

218. *Logan Downs Pty.* v. *Federal Commissioner of Taxation* (1965) 112 C.L.R. 177, 188 (H.C. of Australia).

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expenditure incurred by a municipal council on the basis that the detriment complained of was sustained by the ratepayers as a body.[219] A comparable current of authority exist in Canada, although its force is diminished by an inconsistent judicial trend which has received wide acceptance at the federal and provincial levels. Representative of the narrow approach in Canada are decisions withholding *locus standi* from such persons as a group of postmasters objecting to the unlawful appointment of a colleague,[220] a company not owning property but formed with the object of preserving the residential character of a housing development seeking the revocation of building permits,[221] a ratepayer attacking the validity of a contract under which a municipal corporation purported to grant an exclusive right to an urban transportation company,[222] the owners of a mine seeking to have the Atomic Energy Control Act[223] declared *ultra vires* the Parliament of Canada,[224] and a member of the public attempting to prevent the operation of a French language radio station.[225] But it is clear, even in keeping with the assumptions on which these decisions are based, that once "an intense and special interest in the proceedings"[226] required by the law is established by the plaintiff, the circumstance that he shares this interest with a numerous and fluctuating group of persons does not deprive the plaintiff of capacity to obtain a declaration.[227]

The basis of the restrictive view of standing in connection with the declaratory judgment is the insistence on breach of a vested personal right as a precondition of *locus standi*. The High Court of Australia has emphasized that a declaration is necessarily granted on the premise that "the applicant has or would, upon the construction of the statute or instrument in question, have at some time and in

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219. *Collins* v. *Lower Hutt City Corporation* [1961] N.Z.L.R. 250, 251 (S.C.).

220. *Blackie* v. *Postmaster-General; Decarie* v. *Postmaster-General* (1975) 61 D.L.R. (3d) 566, 568 (Fed. Ct., Trial Div.).

221. *L'Association des Propriétaires des Jardins Tache Inc.* v. *Les Enterprises Dasken Inc.* (1974) 26 D.L.R. (3d) 79 (S.C. of Canada).

222. *Robertson* v. *City of Montreal* (1915) 26 D.L.R. 228 (S.C. of Canada).

223. R.S.C. 1952, c. 11.

224. *Denison Mines Ltd* v. *Att.-Gen. of Canada* (1973) 32 D.L.R. (3d) 419, 431, (H.C. of Ontario).

225. *Cowan* v. *C.B.C.* [1966] 2 O.R. 319 (C.A. of Ontario).

226. *Re Doctor's Hospital and Minister of Health* (1976) 68 D.L.R. (3d) 220 (H.C. of Ontario).

227. *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410; *Prescott* v. *Birmingham Corporation* [1955] Ch. 210; *Tonkin* v. *Brand* [1962] W.A.R. 1 (S.C. of Western Australia).

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some circumstances a right, though it might not presently be enforceable."[228] The High Court of Australia has expressly repudiated a "discretion to declare the existence or non-existence of a situation which does not give rise to a right in the applicant".[229] This preoccupation with right is characteristic of some New Zealand decisions as well.[230] In Canada, likewise, jeopardy to a right by reason of the wrongful application of the law has been adopted as the crucial factor relevant to *locus standi*.[231]

One of the central themes pervading judgments which embody a cautious approach is eagerness to decline jurisdiction to express definitive opinions "on any point of law puzzling any private citizen on any question".[232] This resolve, which may be identified as the basic element of the rationale underlying the restrictive approach, has been expressed by the House of Lords[233] and by the Supreme Court of Canada.[234]

There is a clear consensus in some Commonwealth jurisdictions that a liberal approach to standing with regard to declarations is warranted in cases involving a challenge by ratepayers to the legality of expenditure by local authorities. This category of case, which appears to have been treated in England[235] and in Canada[236] as an

228. *Gardner* v. *Dairy Industry Authority of N.S.W.* (1977) 18 A.L.R. 55 at 60 (H.C. of Australia)

229. *ibid.*

230. See, *e.g. Wellington Municipal Officers' Association (Incorporated)* v. *Wellington City Corporation* [1951] N.Z.L.R. 786, 788 (S.C.).

231. *Burnham* v. *Att.-Gen. of Canada* (1970) 15 D.L.R. (3d) 6, 12 (S.C. of British Columbia).

232. *Smith* v. *Att.-Gen. of Ontario* [1924] S.C.R. 331 (S.C. of Canada).

233. *Glasgow Navigation Co.* v. *Iron Ore Co.* [1910] A.C. 293, 294.

234. *Coca-Cola Co. of Canada Ltd* v. *Mathews* [1945] 1 D.L.R. 1, 4 (S.C. of Canada).

235. *Prescott* v. *Birmingham Corporation* [1955] Ch. 210. However, the principle has since been reasserted that a ratepayer is not entitled to sue a local authority or its members without the leave of the Attorney-General unless he can show either an interference with some private right or an interference with a public right from which he has suffered damage peculiar to himself: *Barrs* v. *Bethell* [1981] 3 W.L.R. 874. According to the view of the Chancery Division, the imputation of a sufficient interest to an individual to apply for a declaration or an injunction in proceedings for judicial review does not necessarily invest him with a sufficient right to obtain the same relief in an action brought without leave in his own name *(ibid.,* 891). A rationale for this restrictive approach to standing was suggested by Warner J.: "Manifestly local authorities and their members are particularly vulnerable to actions by busybodies and cranks, and I do not think that the law can be criticised for providing, in their case, a filter in the form of a requirement that either the consent of the Attorney-General to a relator action or the leave of the court for an application for judicial review should be obtained" *(ibid.,* 892).

236. *MacIlreith* v. *Hart* (1907) 39 S.C.R. 657 (S.C. of Canada).

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exception to the requirement of personal legal right, is anomalous in principle, in that the reasons which may be urged in support of the exception have validity beyond the narrow circumstances encompassed by the exception. However, there has been resistance in Canada to enlargement of the ambit of the exception by analogy.[237]

Independently of this arbitrary exception, a broader conception of standing in declaratory proceedings lies at the root of a series of important judicial decisions throughout the Commonwealth. A threat of acquisition of private property in the future,[238] uncertainty as to whether the permission of a local authority would be granted in respect of an enterprise which had involved a substantial outlay on the part of the plaintiffs,[239] commercial interest in the use of a parking area controlled by a statutory authority[240] and a legislative measure altering the distribution of seats in the legislature to the disadvantage of incumbent members[241] have been held by Australian courts to confer *locus standi* on persons adversely affected. In the last case, the sitting members were treated as persons aggrieved rather than as "strangers", in the sense relevant to declaratory proceedings challenging the validity of principal[242] or delegated[243] legislation. In Canada, it has been held that, even though a municipality's actions in using certain insecticides cause harm to the community as a whole, an individual has standing to seek a declaration denying the legality of the municipality's actions in circumstances where a mandatory requirement of the empowering legislation has been contravened.[244] The validity of a statute which had been enacted but not proclaimed in force, has been considered of such practical importance to those whose affairs would be especially affected by the proclamation of the provisions as to confer standing on them.[245]

Judicial attitudes conditioning these decisions have contributed to recession of the risk that the utility of the declaratory remedy would be stultified by arid conceptualism. However, the most striking

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237. *Smith* v. *Att.-Gen. of Ontario* [1924] 3 D.L.R. 189, 193-194 (S.C. of Canada).

238. *McColl* v. *Ryan* (1968) 89 W.N. (N.S.W.) (Part 1) 74, 77 (S.C.).

239. *Long* v. *Copmanhurst Shire Council* (1969) 90 W.N. (N.S.W.) (Part 1) 657, 663-664 (S.C.).

240. *N.S.W. Fish Authority* v. *Phillips* (1970) 1 N.S.W.R. 725, 729 (S.C.).

241. *McDonald* v. *Cain* [1953] V.L.R. 411, 420 (S.C.).

242. *The Real Estate Institute of N.S.W.* v. *Blair* (1946) 73 C.L.R. 213, 226 (H.C. of Australia).

243. *Brownsea Haven Properties Ltd* v. *Poole Corporation* [1958] Ch. 574.

244. *Stein* v. *City of Winnipeg* (1974) 48 D.L.R. (3d) 223 (C.A. of Manitoba).

245. *Canadian Indemnity Co.* v. *Att.-Gen. of British Columbia* (1974) 56 D.L.R. (3d) 7, 26 (S.C. of British Columbia).

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developments extending the frontiers of the declaratory judgment as a remedy with far-reaching implications for the control of legislative and administrative action have occurred in Canada.

In a decision which marks a watershed in the development of the law relating to *locus standi,* the Supreme Court of Canada in 1975 arrogated to itself discretion to determine whether a person who sought to challenge the constitutional validity of an Act of the Canadian Parliament had standing as a taxpayer to bring such an action.[246] Among the essential elements involved in the court's decision are the nature of the legislation against which the challenge is directed and the question whether the issue sought to be raised is a justiciable one. The substance of this seminal pronouncement is that where all members of the public alike are affected by the legislation and no person or class of persons has any particular interest in the matter, and where the legislation is not regulatory in nature but declaratory or directory and creates no offences and imposes no penalties, but does involve the expenditure of public funds, the court has discretion to permit an action by a taxpayer to test the validity of the legislation.[247] This Canadian decision offers a refreshing contrast with the comment, by the High Court of Australia, that "A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*".[248] Continued viability of the declaratory judgment in administrative law had been foreshadowed in the suggestion made in a Western Australian case that "The court should not be astute to non-suit a plaintiff who seeks to establish the law if there is any reasonable ground for holding that he has a right to proceed",[249] but the subsequent decision of the High Court of Australia represents, unfortunately, a reversal of this salutary approach.

The major components of the justification for enlargement of the rules regulating *locus standi* in declaratory proceedings, effected in Canada, may be disentangled.

(i) The source of the principle that a person has no standing to maintain an action to restrain an unlawful violation of a public right

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246. *Thorson* v. *Att.-Gen. of Canada* (1975) 43 D.L.R. (3d) 1 (S.C. of Canada).
247. *ibid.*
248. *Australian Conservation Foundation Incorporated* v. *Commonwealth of Australia* [1979] A.L.R. 257, 270 (H.C. of Australia).
249. *Tonkin* v. *Brand* [1962] W.A.R. 1, 21 (S.C. of Western Australia).

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unless he is exceptionally prejudiced by the wrongful act is to be found in the law relating to public nuisances,[250] the policy foundations of which offer no parallel with the declaratory judgment invoked to control the unauthorized exercise of legislative or administrative power. The distinct historical background of these branches of law renders reasoning by analogy unsuitable and heightens the need for selective treatment and adaptation of legal principles which have been evolved in a different environment.

(ii) The overriding consideration, perhaps, is that, in situations where no one is accorded standing to sue in relation to a justiciable matter which strikes at the root of constitutional or legal authority, a grave deficiency is revealed in the structure of the remedial law. In the absence of any other effective process,[251] the governing provision of law would be nugatory if it were not fortified inferentially by a correlative right in a member of the public, in proper circumstances, to invoke the jurisdiction of the courts.[252] Contrary to the suggestion that it is for Parliament, rather than for the courts, to take the initiative in filling this gap in the law,[253] it would be a matter for regret if the creative judicial role in moulding the declaration as a flexible remedy in administrative law were to exclude this vital aspect of declaratory proceedings.

(iii) Since the prerogative remedies of *certiorari* and prohibition have been made available, even in non-constitutional contexts, to persons lacking specific legal right to impugn jurisdictional excesses, the Supreme Court of Canada concluded, on a parity of reasoning, that a similar extension was opportune in declaratory proceedings. This assimilation, it is submitted, is invulnerable, in that, notwithstanding the distinct historical antecedents of the prerogative writs and of the declaration in private law, there is no reason in principle why the rules as to standing in respect of use of the declaratory judgment in public law should differ materially from those applicable to *locus standi* in relation to prerogative remedies.

(iv) A factor inhibiting rationalization of the law is the reluctance of the courts to eschew aberrations and constraints which are part of the heritage of the common law. This hesitation is due, in part, to the uncertainty of judges as to the extent of their commitment

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250. *Cowan* v. *C.B.C.* [1966] 2 O.R. 309, 311 (C.A. of Ontario).

251. *Re McNeil* v. *Nova Scotia Board of Censors* (1973) 46 D.L.R. (3d) 259 (S.C. of Nova Scotia).

252. *Stein* v. *City of Winnipeg* (1974) 48 D.L.R. (3d) 223, 236 (C.A. of Manitoba).

253. *Mercer* v. *Att.-Gen. of Canada* (1972) 24 D.L.R. (3d) 758, 760 (A.D. of Alberta).

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in whittling down existing barriers.[254] However, current entrenchment of judicial discretion as the operative criterion furnishes an adequate safeguard against unreflecting extension of the applicable law.

(v) Where unauthorized legislation results in a probable increase in the fiscal burden on the citizenry, the conferment of *locus standi* on a member of the public to question the validity of legislation may be seen in a federal context as a logical, and desirable, extension of the principle underlying the established competence of ratepayers to restrain unwarranted expenditure by a municipality.[255]

(vi) Apart from the fiscal consideration, there is positive value in direct judicial recognition of the right of citizens, subject to the overall discretion of the courts, to control the exercise of legislative and administrative power by organs of the State.[256]

(vii) It is more in accordance with equitable notions that the merit of the plaintiff's intervention should be assessed in relation to substantive aspects of the illegality alleged, so as to enable judicial discretion to be exercised on the basis of a complete appraisal of relevant legal and circumstantial factors, than that standing should be disposed of as a threshold issue.[257] This reflection has influenced recent judicial attitudes in England.[258]

The result of contemporary developments is that the declaratory judgment possesses a greater potential in the field of public law in some Commonwealth jurisdictions than it does in England where the purview of the remedy has been consciously contained.[259] This is a significant departure from judicial activism in England in the early years of the last decade when the Court of Appeal elevated to a "matter of high constitutional principle"[260] the competence of an injured member of the public to prevent a government department or a public authority from contravening the law in circumstances where the Attorney-General, representing the Crown as *parens patriae*,

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254. *Thorson* v. *Att.-Gen. of Canada, supra,* 18 (S.C. of Canada.)

255. *Cf. Re Brodie and City of Halifax* (1974) 46 D.L.R. (3d) 528, 546 (S.C. of Nova Scotia).

256. For an assessment of the enhanced judicial role in this context, see J. M. Johnson, "*Locus Standi* in constitutional Cases after *Thorson*" [1975] P.L. 137 at pp. 159-160.

257. *Cf.* P. Robertshaw, "Persons Aggrieved and the *Locus Standi* Problem: A Territorial Approach" [1971] P.L. 169, 188.

258. *Pyx Granite Co. Ltd* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 571; contrast *Clark* v. *Epsom Rural District Council* [1929] 1 Ch. 287.

259. *Gouriet* v. *Union of Post Office Workers, supra.*

260. *Att.-Gen. ex rel. McWhirter* v. *Independent Broadcasting Authority* [1973] Q.B. 629.

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declined to institute proceedings. The subsequent assertion by the House of Lords that the enforcement of public rights is the exclusive right of the Attorney-General,[261] coupled with the principle of non-justiciability of the Attorney-General's discretion as to the suitability of relator proceedings,[262] has curbed drastically the role of public-spirited citizens and of voluntary organizations in ensuring the compliance of administrative authorities with the law. A more robust judicial attitude, it is heartening to note, survives in Scotland where judges have acknowledged no reason in principle why an individual should not sue in order to prevent a breach by a public body of a duty owed by that body to the public.[263]

The avenues of development of Australian law bear comparison with dominant trends in the English case law. The stringency of the Australian approach to *locus standi* in declaratory proceedings, however, has been mitigated by use of the declaratory judgment to adjudicate on an internal dispute between members of an administrative tribunal, as opposed to a *lis* between the tribunal and a member of the public.[264] A noteworthy aspect of prevailing Canadian law is the expansion of *locus standi* in the declaratory context beyond the limits attendant on the prerogative remedies; for the element that the plaintiff's rights should be adversely affected "in some way differently from the way in which the rights of the general community are affected"[265] is no longer an essential prerequisite of a declaratory judgment in Canada.

(b) *Injunctions*

There is some indication that the standing of an individual to claim injunctive relief in the area of public law is more restricted than that relevant to declaratory actions.[266] The governing principle is that an individual is competent to sue without joining the Attorney-General in two cases only: first, where the interference with a public right is such that some private right of the plaintiff is transgressed; and,

261. *Gouriet* v. *Union of Post Office Workers, supra.*

262. *London County Council* v. *Att.-Gen.* [1902] A.C. 165, 169.

263. *Wilson* v. *I.B.A.*, 1979 S.L.T. 279.

264. *Bennetts* v. *Board of Fire Commissioners of N.S.W.* (1967) 87 W.N. (N.S.W.) (Pt.1) 307 (S.C.).

265. D.E. Paterson, *An Introduction to Administrative Law in New Zealand* (1967) p. 204.

266. I. Zamir, *The Declaratory Judgment* (1962), pp. 270 *et seq.*

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secondly, where, although no private right is violated, the plaintiff sustains special damage peculiar to himself from contravention of a public right.[267]

The complexity of the law is attributable largely to the absence of a uniform criterion which determines standing. According to a series of English decisions, the essential requirement is an actionable wrong or special damage peculiar to the plaintiff,[268] but a rival strand of opinion postulates an actionable wrong as well as particular damage.[269]

It is clear that an injunction is not available to enforce every statutory duty.[270] In assessing the nature and purpose of the duty, and the effect of its breach,[271] the court considers, in particular, whether damages constitute an adequate remedy. If damage is irreparable in the sense that pecuniary compensation is insufficient protection, an injunction would be granted in the absence of countervailing circumstances.[272] This special character of injunctive relief[273] has induced a narrow approach to standing.

A pervasive element in the development of the law is the emphasis on protection of property rights as the foundation of an injunction.[274] An interest "analogous to a right of property"[275] has been envisaged as a requirement of standing. But this strained reasoning has been jettisoned in subsequent decisions which embrace within the scope of an injunction benefits having no resemblance to proprietary rights.[276] Thus, a member of a municipal council resisting wrongful exclusion from the council,[277] a member of the Legislative Council seeking to restrain the presentation of a Bill for the Governor's assent,[278] a

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267. *Boyce* v. *Paddington Borough Council* [1903] 1 Ch. 109, 114.

268. de Smith, *op. cit.* p. 408.

269. *Stockport District Waterworks Co.* v. *Manchester Corporation* (1867) 7 L.T. (N.S.) 545; *Pudsey Coal Gas Co.* v. *Bradford Corporation* (1873) L.R. 15 Eq. 167.

270. *Att.-Gen.* v. *Mercantile Investments Ltd* (1920) 21 S.R. (N.S.W.) 183 (S.C.).

271. *Ramsay* v. *Aberfoyle Manufacturing Co. (Australia) Pty. Ltd.* (1935) 54 C.L.R. 230, 249 (H.C. of Australia).

272. *R.* v. *McFarlane, ex p. O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518, 550 (H.C. of Australia).

273. *Stollmeyer* v. *Trinidad Lake Petroleum Co.* [1918] A.C. 458, 499.

274. *Amalgamated Society of Engineers* v. *Smith* (1913) 16 C.L.R. 537, 553 (H.C. of Australia).

275. *Att.-Gen. ex rel. Lumley)* v. *T. S. Gill & Son Pty. Ltd* [1927] V.L.R. 22 (S.C.).

276. *Cooney* v. *Ku-ring-gai Municipal Council* (1963) 37 A.L.J.R. 212, 220 (H.C. of Australia).

277. *Ariansen* v. *Bromfield* (1957) 57 S.R. (N.S.W.) 24 (S.C.).

278. *Trethowan* v. *Peden* (1930) 31 S.R. (N.S.W.) 183 (S.C.).

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voter objecting to the revision of the electoral roll[279] and a conservation organization seeking to prevent the demolition of an historic building[280] have all been accorded *locus standi* to be granted an injunction. The developments represented by these decisions are crystallized in the pronouncement by an Australian court that injunctive relief "is not limited by reference to principles of proprietary right or analogy to proprietary right".[281]

Pecuniary detriment, although not a conclusive factor,[282] generally supports *locus standi* to seek an injunction. An owner's objection to the resumption of his land[283] and the withholding of his salary from a shire clerk[284] have been held to confer standing. An owner of property has been held entitled to an injunction in respect of an invalid demolition order.[285] The courts of New Zealand have restrained by injunction the enforcement of rates at the suit of a single ratepayer who had sustained loss.[286]

Judicial diffidence in permitting the injunction to be used by individuals as an instrument for preventing illegal action by administrative tribunals is reflected in the observation, by an Australian court, that "The duty to comply with the provisions of an interim development order is a duty towards the public at large and not towards the individual, so that the correlative right is vested in the public and not in private persons, even though they may suffer special damage".[287] Similarly, the view has been expressed in England[288] and in New Zealand[289] that the object of town and country planning legislation, generally, is to restrict development for the benefit of the public and not to confer new rights on individuals even if they live close to the proposed development. The test applied has been

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279. *McDonald* v. *Cain* [1953] V.L.R. 411, 438 (S.C.).

280. *National Trust of Australia (Victoria)* v. *Australian Temperance and General Mutual Life Assurance Society Ltd* (1976) 37 L.G.R.A. 172.

281. *Att.- Gen.* v. *British Petroleum (Australia) Ltd* (1964) 83 W.N. (N.S.W.) (Pt. 1) 80 (S.C.).

282. *California Theatres Pty. Ltd* v. *Hoyts Country Theatres Ltd* [1959] S.R. (N.S.W.) 188 (S.C.).

283. *Blanch* v. *Council of the Shire of Stroud* (1948) 48 S.R. (N.S.W.) 37, 45 (S.C.).

284. *Howes* v. *Gosford Shire Council* (1962) 78 W.N. (N.S.W.) 981 (S.C.).

285. *Broadbent* v. *Rotherham Corporation* [1917] 2 Ch. 31.

286. *Palmerston North Borough* v. *Palmerston North-Kairanga River Board* [1916] N.Z.L.R. 919, 925 (S.C.).

287. *Grand Central Car Park Pty Ltd* v. *Tivoli Freeholders* [1969] V.R. 62 (S.C.).

288. *Buxton* v. *Minister of Housing and Local Government* [1961] Q.B. 278, 283.

289. *Att.-Gen.* v. *Birkenhead Borough* [1968] N.Z.L.R. 383, 389 (S.C.).

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whether the statutory duty was owed to the party aggrieved as well as to the State, or whether it was a public duty exclusively.[290]

The strict dichotomy between private and public rights, which is the essential basis of this approach, is difficult to maintain in peripheral factual contexts. Thus, although the acquisition of an unwarranted benefit by a trade rival is insufficient to support *locus standi*,[291] it has been recognized in Australia that an application for an injunction, sought by a competitor to vindicate a private commercial interest, may secure simultaneously the public interest of consumer protection.[292] In circumstances of this nature, the question suggested by an English court, in identifying a dominant personal interest, whether an individual could reasonably be required to bear the cost of the suit,[293] has pragmatic value.

It is a welcome development that the subjection of administrative authority to the rule of law has been tacitly accorded priority by the shaping of satisfactory principles as to the standing of individuals. It has been declared in England that, notwithstanding the imposition of a penalty attendant on the breach of a statutory duty, the duty could still be owed to individuals who, accordingly, could claim *locus standi*.[294] The courts of Canada[295] and Australia[296] have been prepared to issue injunctions to prevent *ultra vires* action by public authorities in the absence of a contrary intention expressed or implied in the governing statute.[297] Non-pecuniary interests, such as the interest of a conservation society in ecology and the environment, may suffice for purposes of standing, subject to judicial discretion.[298] A liberal conception of standing has been found appropriate in cases where unfair trade practices have a clearly injurious effect on a large section of the community.[299]

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290. *Phillips* v. *Britannia Hygienic Laundry* [1923] 2 K.B. 832, 841.

291. *Dover Picture Palace Ltd* v. *Dover Corporation* (1913) 11 L.G.R. 971.

292. *World Series Cricket Pty. Ltd* v. *Parish* (1977) 16 A.L.R. 181, 186-187 (H.C. of Australia).

293. *Att.-Gen.* v. *P.Y.A. Quarries* [1957] 2 Q.B. 169.

294. *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402; *Britannic Merthyr Coal Co.* v. *David* [1910] A.C. 74.

295. *Village de la Malbaie* v. *Boulianne* [1932] S.C.R. 374 (S.C. of Canada).

296. *Municipal Council of Sydney* v. *Campbell* [1925] A.C. 338.

297. *Orpen* v. *Roberts* [1925] 1 D.L.R. 1101 (S.C. of Canada).

298. *National Trust of Australia (Victoria)* v. *Australian Temperance & General Mutual Life Assurance Society Ltd* (1976) 37 L.G.R.A. 172.

299. *Cf. R.* v. *Judges of the Federal Court of Australia, ex p. Pilkington Aci*

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In keeping with contemporary needs and priorities, the scope of the applicable test has been expanded significantly. "Threatened and repeated unlawful and forcible interference with the exercise of rights"[300] has been deemed sufficient. Damage to personal health and comfort has been accepted as a legitimate basis of standing,[301] irrespective of contravention of proprietary rights. The mere possibility of a violation of the law, with accompanying detriment to the applicant, has been considered adequate for injunctive relief.[302] The subsistence of a contractual nexus between the parties has not precluded the grant of an injunction.[303] "Special damage" may consist of inconvenience and delay, provided that it is substantial, direct rather than consequential, and appreciably greater in degree than that suffered by the general public.[304] The insistence on personal legal right as a prerequisite of an injnunction[305] has ceased to import a limitation of practical consequence, in view of decisions granting an injunction to the governor of a school,[306] to parents[307] and to ratepayers[308] to restrain action by a local authority which was *ultra vires* the enabling legislation. In these decisions, "right" has been interpreted in a sense scarcely distinguishable from "interest". Contrary to a Canadian observation that departures from the requirement of legal right are explicable on the basis of analogy with cases envisaging the control of municipal expenditures,[309] the generality of the development emerges explicitly from Australian[310] and New Zealand[311] decisions which uphold the jurisdiction of the courts, in proper cases, to enforce by injunction statutory provisions which regulate the functions and powers of administrative authorities.

(Operations) Pty. Ltd (1979) 23 A.L.R. 69 (H.C.A.).

300. *Lynch* v. *Brisbane City Council* (1961) 104 C.L.R. 353, 360 (H.C. of Australia).

301. *Att.-Gen.* v. *Mercantile Investments Ltd* (1920) 21 S.R. (N.S.W.) 393 (S.C.).

302. *McLean* v. *Rowe* (1925) 25 S.R. (N.S.W.) 330 (S.C.).

303. *Gratton* v. *Council of the City of Greater Cessnock* (1964) 81 W.N. (N.S.W.) (Part 1) 346 (S.C.).

304. *Walsh* v. *Ervin* [1952] V.L.R. 361, 371 (S.C.)

305. *Thorne* v. *British Broadcasting Corporation* [1967] 1 W.L.R. 1104.

306. *Lee* v. *Enfield London Borough Council* [1967] L.G.R. 195.

307. *Legg* v. *Inner London Education Authority* (1972) 1 W.L.R. 1245.

308. *Bradbury* v. *Enfield London Borough Council* [1967] 1 W.L.R. 1311.

309. *Rosenberg* v. *Grand River Conservation Authority* (1975) 61 D.L.R. (3d) 643, 649 (H.C. of Ontario).

310. *Dajon Investments Pty. Ltd* v. *Talbot* [1969] V.R. 603 (S.C.); *cf. Ku-ring-gai Municipal Council* v. *Edwards* (1957) 57 S.R. (N.S.W.) 379, 383 (S.C.).

311. *Kiwitea Highway Board* v. *Wanganui Harbour Board* (1885) N.Z.L.R. 4 S.C. 257 (S.C.).

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As part of the process of broadening the *locus standi* of individuals to obtain an injunction, two particular developments call for comment.

(i) The residual value of injunctive proceedings in supplying procedural deficiencies in the existing law has been recognized by the Court of Appeal of England: "Whenever Parliament has enacted a law and given a particular remedy for the breach of it, such remedy being in an inferior court, nevertheless the High Court always has reserve power to enforce the law so enacted by way of an injunction or declaration or other suitable remedy."[312] An aggrieved individual or body, to whom no other sufficient remedy is available, may seek the Attorney-General's intervention on his or its behalf in relator proceedings,[313] which are in substance proceedings maintained by the aggrieved party, the role of the Attorney-General being confined to initiating the suit. This dimension of the injunction is part of modern administrative law, but sparing use of the remedy for this purpose is enjoined by English judicial authority[314] for reasons of policy, such as discouragement of application of the criminal law by courts of civil jurisdiction.

(ii) The Supreme Court of New Zealand has suggested, *obiter*, that in circumstances where the Attorney-General declines to institute proceedings on the relation of a private person, the latter may overcome the impediment by having the Attorney-General added as a defendant.[315] This suggestion, in so far as it entails a virtual abrogation of the rules as to *locus standi*, goes too far. The relaxation attempted by the English courts hardly represents a parallel development; for the view of the Court of Appeal of England was that, in exceptional circumstances, the court had inherent jurisdiction to override the Attorney-General's discretion.[316] This falls short of recognition of an unqualified right in the litigant to confer standing on himself by joinder of the Attorney-General without the interposition of judicial discretion. Even the limited movement begun in England has since been reversed,[317] and it is apparent that the innovation recommended by the courts of New Zealand, basides lacking a cogent rationale, derives no support from the mainstream of judicial decisions in any other part of the Commonwealth.

312. *Att.-Gen.* v. *Chaudry* [1971] 1 W.L.R. 1614.
313. *Att.-Gen.* v. *Smith* [1958] 2 Q.B. 173.
314. *Gouriet* v. *Union of Post Office Workers, supra.*
315. *Stowell* v. *Geraldine County Council* (1890) 8 N.Z.L.R. 720 (S.C.); *Palmerston North Borough* v. *Palmerston North-Kairanga River Board* [1916] N.Z.L.R. 919 (S.C.).
316. *Att.-Gen. ex rel. McWhirter* v. *Independent Broadcasting Authority, supra.*
317. *Gouriet* v. *Union of Post Office Workers, supra.*

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Statutory and Other Innovations

A conspicuous blemish in the system of administrative law developed by the courts of England and the Commonwealth during the last century is the unduly technical and cumbersome character of the principles governing *locus standi*. The piecemeal evolution of the law has brought about the stratification of principles and approaches in distinct compartments, with inadequate provision for a uniform structural framework. Procedural refinements which give the law the appearance of a mosaic have prompted the despairing remark that "An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies".[318] Academic criticism has been directed, for the most part, at the casuistry of the rules as to standing, bereft of a deeper rationale, and highlights the "hodgepodge of special instances"[319] contained in "scattered and contradictory judicial utterances"[320] as the chief obstacle to consolidation of the law.

The basic reason for the complexity of the law is the variety of remedies, differently conceived, and subject to particular rules which determine their respective scope. The fundamental contrast is that between the prerogative remedies which have their application exclusively in public law and the remedies furnished by a declaration or an injunction which, despite their genesis in private law, are among the foremost devices used today for the control of public authorities. While there are marginal differences of emphasis among the remedies within each category, the central dichotomy, clearly, is between the two main groups of remedies, the unification of which to any considerable extent has never been achieved by the common law.

In view of the history and origin of the prerogative writs-the contemporary application of which is based on the use of remedies, nominally available to the Crown, for the purpose of protecting the citizen from abuse of administrative power-it is entirely fitting that elasticity of the requirements as to standing should typify these remedies of public law. The shaping of the writs of *certiorari* and prohibition and, in a more limited degree, of mandamus by the courts has been, on the whole, a sustained record of "progressive

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318. K.C. Davis, *Administrative Law Treatise* (1958) Vol. 3, pp. 388-389.

319. L. L. Jaffe, "Standing to Secure Judicial Review: Private Actions" (1961) 75 Harv. L.R. 255, 258.

320. A. Rubinstein, *Jurisdiction and Illegality* (1965), p.95.

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discarding of technical limitations upon *locus standi*".[321] Throughout the development of the law pertaining to the writs, the underlying antithesis was between the invasion of a legal right vested in the applicant and a prejudicial impact on the applicant's interests, not necessarily involving the breach of a legal right as the criterion on which *locus standi* was predicated. Notwithstanding occasional setbacks, some of which arrested beneficial adaptations of the law in crucial respects, the general course of development signifies a movement towards acceptance of the latter criterion as the foundation of standing.

It is, therefore, an accurate assessment of current judicial attitudes to the use of prerogative orders that "The courts have allowed (individuals) liberal access under a generous conception of *locus standi*".[322] However, despite the gradual relaxation of restraints as to standing in this area-a trend which has taken the form partly of treating anomalous restrictions as obsolete and partly of interpreting the surviving limitations with considerable latitude-there are intrinsic abridgements of relief under the prerogative writs which have remained untouched by judicial creativity. Indeed, some limiting elements have been accentuated by unsatisfactory judicial reasoning. The curtailment of *certiorari* to the province of quasi-judicial powers at one stage of the development of the writ, the distinction between investigative and adjudicatory functions of subordinate tribunals in the context of the requirement that the decision of the tribunal should have an impact on existing rights *proprio vigore* and the growing concept of the unreviewable policy decision are examples of such aberrations. These constraints, combined with impediments of a practical nature regarding interrogatories and general aspects of inspection and discovery of documents, are indicative of entrenched limits to the potential of prerogative writs or orders as instruments for the judicial control of administrative action.

These considerations have revealed "a very real need for a simple, all-embracing method of redress unencumbered by restrictions".[323] Equitable remedies like the declaration and the injunction have, in some measure, fulfilled this need. But, unfortunately, these remedies themselves are hedged in by restrictions as to *locus standi* which continue to leave gaps in the law. The salient qualifying features of

321. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed* [1981] 2 W.L.R. 722, 736 (H.L.) *per* Lord Diplock.

322. *ibid. at p. 748, per* Lord Scarman.

323. G. J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law" (1955) 18 M.L.R. 138.

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the declaratory judgment are strict insistence in some Commonwealth jurisdictions that the assertion of public rights is the sole responsibility of the Attorney-General, and the exacting interpretation of "injurious affection" of commercial and possessory (as distinguished from proprietary) interests in such a manner as to confer standing. The amplitude of the Attorney-General's discretion with regard to the availability of relator proceedings has unacceptably curbed the purview of both declaratory and injunctive relief, although judicial initiative has enabled corrective action, to some extent, to be taken. This has taken the form in Canada of dispensing with the Attorney-General's participation in limited contexts and in New Zealand of evolving a device to secure his joinder compulsorily.

Each remedy, then, complements the others, and no single remedy is self-sufficient or exhaustive. The co-existence of distinct, but interlocking, remedies has been the source of sterile procedural controversy, especially since the partial overlap of remedies has given rise to debate whether the applicability of one remedy precludes the use of another.[324] The operation of different rules as to *locus standi* for each individual remedy has been justly denounced as "absurd".[325] The fundamental objection to the structure of the law moulded by the courts revolves around the likelihood that the choice of a remedy, which is ultimately held to be unsuitable, would result in the failure of an application possessing evident merit. Excrescences relating to the identity and scope of alternative remedies have thus presaged the denial of substantive justice.

The advantage of principles as to *locus standi* forged on the anvil of expediency is their adaptability and resilience. The predominance of questions of context and balance is the product of use of the case law technique in shaping the major contours of the law. The House of Lords, in a recent survey of the rules as to standing, made the comment: "They were made by judges; by judges they can be changed."[326] In constructing and revamping these rules, the courts of England and the Commonwealth have shown sensitivity to changes in political and social institutions and in prevailing values. However, the gradual accretion of principle established by judicial precedent has sometimes reached an impasse which has called for comprehensive

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324. *Jeanneret* v. *Hixson* (1890) 11 L.R. (N.S.W.) Eq. 1, 8 (S.C.); *Francis* v. *Yiewsley and West Drayton Urban District Council* [1957] 2 Q.B. 136.

325. H. W. R. Wade (1976) L.Q.R. 337.

326. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra,* at p. 736, *per* Lord Diplock.

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reformulation of the applicable law by a method transcending the limited scope of isolated judicial decisions. Thus, the expectation of Lord Denning that "We have in England an *actio popularis* by which an ordinary citizen can enforce the law for the benefit of all, as against public authorities in respect of their statutory duties"[327] has been made impossible of fulfilment by contrary developments at the highest level of judicial authority.

Against this background, which highlights the limits on the capacity of the common law for self-criticism and amelioration, there has emerged a consistent trend in England and the Commonwealth towards restructuring aspects of the law of *locus standi* by extra-judicial means. As early as 1966, the Supreme Court (Prerogative Writs) Rules of Victoria[328] provided, in effect, that a person who had *locus standi* to seek a particular remedy may be granted any of the other remedies (including a declaratory judgment and an injunction) specified in the rules. The succeeding decade has been a period of legislative activism in Commonwealth jurisdictions. In 1971, as a sequel to the reports of the McRuer Commission, the Judicial Review Procedure Act was passed in Ontario. This lead was followed in New Zealand where the Judicature Amendment Act was enacted in 1972. The object of both these statutes, *inter alia,* was to provide for an application for review coextensive with the elements of relief in any one or more of the prerogative and equitable remedies, while retaining the pre-existing remedies in juxtaposition with the application for review. The Federal Court Act 1971 of Canada and the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth of Australia incorporate a criterion of standing applicable to remedies of administrative law. The *Report on Remedies in Administrative Law* prepared by the English Law Commission[329] in 1976 paved the way to the promulgation, in the following year, of the Rules of the Supreme Court.[330] These had the effect that, on an application for judicial review, the court, where it would previously have had jurisdiction to grant the applicant any of the prerogative orders, may now grant him a declaration or an injunction as a supplementary or an alternative remedy, notwithstanding that the applicant would have no *locus standi* to claim the declaration or injunction in a civil action against the respondent public authority, for lack of proof of

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327. Lord Denning, *The Discipline of Law* (1979), p.133.
328. Order LIII, 1966.
329. Cmnd. 6407 (1976).
330. R.S.C., Ord. 53, r. 3.

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infringement of a legal right.[331] This provision, now incorporated in section 31 of the Supreme Court Act 1981, removed a fetter on the use of the declaration and the injunction as remedies in the sphere of public law, which had been imposed by the House of Lords and which could not have been circumvented by judicial decision. The Rules of the Supreme Court confirmed by recent legislation, also purported to unify and to crystallize the principles as to *locus standi* in a succinct form.

The common aim of these innovations is to abrogate the subtle procedural differences among the remedies, including distinctions having a bearing on standing, and to substitute for them a uniform and simplified procedure. It is important, however, to appreciate the limited perspective of the innovations. The House of Lords has emphasized that, however great its importance, the reform is of an exclusively procedural character: "It does not – indeed, cannot – either extend or diminish the substantive law. Its fuction is limited to ensuring '*ubi jus, ibi remedium*' ".[332] Since the grant of judicial review under the present law is not in "the uncontrolled discretion of the court",[333] the sufficiency of the applicant's interest continues to be determined by norms deriving from the pre-existing law. For example, in the application of the principle that declaratory and injunctive relief may today be granted legitimately in circumstances encompassed by the prerogative orders, demarcation of the limits of *locus standi* required by the latter remedies is a necessary basis of the decision whether a declaration or an injunction may be claimed by the applicant in terms of the contemporary law. The point which warrants emphasis is that the danger of rejection *in limine* of a claim worthy of support because of the narrowness of the test employed to assess the adequacy of standing, is not necessarily forestalled by the recent changes in England and the Commonwealth, but remains a daunting possibility.

Apart from this risk, against which vigorous and perceptive judicial attitudes furnish the sole safeguard, the choice of phraseology in the supervening legislation or other instrument may itself pose fresh problems while contributing to the solution of difficulties caused by previous patterns of development of the law. The selection of the phrase "sufficient interest" by the Rules Committee of the Supreme

331. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra,* at p. 735, *per* Lord Diplock.

332. *ibid.* at p. 743, *per* Lord Fraser of Tullybelton.

333. *ibid.* at p. 741, *per* Lord Fraser of Tullybelton.

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Court of England in 1977 and the retention of this phrase in section 31(3) of the Supreme Court act, 1981, of England and Wales were probably motivated by the resolve to use an expression substantially unencumbered by judicial precedent. The 11th report of the Public and Administrative Law Reform Committee of New Zealand published in 1978 endorses the view that the phrase "sufficient interest" embodies a formula which allows scope for further development of the requirement of standing by the courts, having regard to the relief claimed.

The corresponding formulation adopted in Canadian and Australian legislation has inhibited, in some respects, the extension of *locus standi*. The Canadian statute accords standing to "any party directly affected."[334] This phrase, according to a plausible interpretation, is of more limited scope than the principle of the common law. Much of the ambiguity characterizing the case law on the topic of the prerogative remedies derives from use of the word "stranger" in two distinct senses to describe, respectively, a person who was not a party to the impugned proceedings and one who, besides not being a party, was not affected prejudicially by the proceedings.[335] The case law is often marred by the assumption that a person who did not participate in the proceedings either as plaintiff or as defendant, is incapable of demonstrating an adequate interest in the subject matter of the suit. This construction, which defeats the object of the law, could well be revived by the Canadian formulation. The Law Reform Commission of Canada has recommended, for good reason, that the legislative formula should be broadened so as to embrace, at least, the criterion of standing spelt out by the common law.[336]

The Australian legislation providing for judicial review makes reference to "a person aggrieved by a decision to which the Act applies".[337] This phrase is defined as including any person whose interests are adversely affected by the decision, failure to decide or action in question.[338] The statutory definition is appreciably narrower than that suggested for Australian law by the Kerr Committee in whose opinion a person would be "aggrieved" or "adversely affected" by a decision if it affected his rights, property, privileges or liabilities or denied him some right, property, privilege or liberty which he

334. Federal Court Act 1971 (Canada), s. 28.

335. *Cf.* L.L. Jaffe, "Standing to Secure Judicial Review: Public Actions" (1961) 74 Harv. L.R. 1265 at p. 1274.

336. Working Paper 18 of 1977, Chap. 6 p. 39.

337. Administrative Decisions (Judicial Review) Act 1977 (Commonwealth), s. 5 (1).

338. S. 3 (4).

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was claiming.[339] In contrast with this comprehensive formulation, the statutory definition lends itself readily to the construction that the infraction of a legal right, rather than the exposure of an interest to jeopardy, supplies the essential requirement of standing.[340] This view is strengthened by the choice of wider expressions, such as "interests that are affected"[341] and a "person interested in a decision,"[342] in analogous statutory contexts in Australia.

In a comparative evaluation of the modern law, it is apparent that the form of words used in England is preferable to that adopted in Australia and in Canada. However, apart from verbal differences among the formulae acted upon in Commonwealth jurisdictions, a general comment may be made on the scope of contemporary reform of the law. The pith and substance of the current reformulation is the removal of differential barriers to access to the courts, varying according to the identity of the remedy sought and the nature of the relief anticipated. From the standpoint of policy, there is no sound reason for the retention of divergent rules, and the exposition of a homogeneous concept of standing is desirable. But, as the House of Lords has recently pointed out, the reference to "sufficient interest" or to an analogous concept involves "plain words of limitation."[343] Moreover, judicial discretion constitutes the core of this qualifying expression. Indeed, the English Law Commission expressly recommended that applicants for judicial review should have "such interest as the court considers sufficient".[344] The character and immediacy of the requisite interest will agitate the minds of judges of the future, just as these questions have vexed their predecessors. All that the recent changes purport to achieve is the relegation of negative aspects of the judicial heritage by providing an uncomplicated structural framework within which the development of the law can be carried on without procedural hindrance. The effectiveness of judges in accomplishing this task depends on their perception and courage, and on their vision of an administrative system which amply fulfils modern social needs. Timidity and vacillation, largely the product of frailty of judicial convictions, have in the past prompted

339. Parliamentary Paper No. 144 of 1971, para. 306.

340. *Cf.* J. Griffiths, "Legislative Reform of Judicial Review of Commonwealth Administrative Action" [1978] Fed. L.R. 47-49.

341. Administrative Appeals Tribunal Act 1975 (Cw.), s. 27 (2).

342. Administrative Decisions (Judicial Review) Act 1977 (Cw.), s. 12.

343. *R.* v. *Inland Revenue Commissioners, ex p. Federation of Self-Employed, supra,* at p. 753, *per* Lord Roskill.

344. Cmnd. 6407 (1976), para. 48.

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temporary withdrawal and abdication of responsibility. The central question, then, is not one of dexterity or adroitness in applying the remedies of the common law but of depth of judicial commitment to the values underlying these remedies.

Conclusion

Access to the courts is the touchstone of the whole system of administrative law. The spectacular developments during the last decade in such areas as natural justice, the residuary conception of procedural fairness, the control of administrative discretion, promissory estoppel and the construction of preclusive provisions can all be set at nought by an unduly restrictive doctrine of *locus standi* which erodes capacity to invoke the supervisory jurisdiction of the courts.

While the standard of sufficiency has been applied with comparative flexibility in recent years, the requirement of interest is irretrievably entrenched in modern administrative law. It is submitted that a candid reappraisal of the policy foundations of the law is necessary to prevent idiosyncratic development of the rules as to standing in the future.

The desire to increase the utility of imaginative changes in the substantive law by revamping the procedural machinery has inspired a liberal approach to *locus standi*. On the other hand, a powerful restraining influence has been exerted by the robust antagonism of the common law to "a mere busybody who was interfering in things which did not concern him".[345] The cogency of this premise, in comparison with countervailing factors, calls for evaluation in the light of social policy today.

There is lack of balance, it is submitted, in a judicial approach which is prepared to acquiesce in unlawful action by government departments and by public authorities for the reason that the illegality is brought to the court's notice by a person who is considered to have an insufficient stake in the subject matter. In an age of particular vulnerability of the citizen in consequence of the rapidly expanding frontiers of government, the priorities inherent in this approach are palpably unsound. It is a compelling argument that there ought to be recognition of a paramount social interest in ensuring that the complex of powers devolving by legislation on institutions of central and local government and on a variety of statutory boards is exercised in conformity with the rule of law. This objective, by virtue of its

345. *R.* v. *Paddington Valuation Officer, ex p. Peachey* [1966] 1 Q.B. 380, 401.

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link with the substance of freedom, is entitled to precedence over the quality and degree of the personal interest of the individual who resorts to the courts in order to prevent unlawful action by the executive. The realistic means of accommodating this reformulation of priorities in the content of the common law is not to jettison the requirement of standing (some residue of which is subsumed in judicial discretion) but to limit with consistent rigour the notion of a "busybody" or a "stranger" for purposes of the law relating to *locus standi*. Such a transformation of outlook, in response to phenomenal changes in the scope and ramifications of government in our time, is surely a tribute to the sagacity and resilience of the common law.

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

OK contains a series of articles which discuss and evaluate
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as been transformed by dramatic legislative changes as well as by
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rk have had their origin in English law, but the avenues of
ment have not been uniform in different Commonwealth jurisdictions.
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and voidability of administrative action, the values sustaining
y jurisdiction, the concept of error of law as a potential substitute
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