

“THE ROLE OF EVIDENCE IN PUBLIC LAW”

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PART I

Evidencing The Reasons For Decisions In Public Law.

Introduction.

The object of this paper is to examine the role played by evidence in the decision making process of administrative bodies. The normal approach to analysing administrative decision making is to pigeon hole the various methods of challenging an administrative decision and to discuss each separately. Whilst this approach is useful in that it makes the subject manageable it tends to treat each area independently and does not provide an overview of the subject as a whole. This work will seek to show that the use of evidence is central to any decision making process, and that a conscious effort to develop a principled approach to the treatment of the use of evidence in administrative decision making would therefore provide the basis for the further development of a comprehensive system of administrative law.

The impetus for this work came from a study of the infamous decision reached in **Boyle v Wilson**.¹ The facts were quite simple. Mrs Boyle kept a public house, which had been so licensed for over fifty years. In 1904 she applied for a renewal of the licence. At the licensing court an inspector of police objected to the renewal on the ground that the premises were in-sanitary and the district was congested. He was not put on oath and no evidence was provided to substantiate his allegations. There had been no objections to renewal of the licence in the past and no complaints had ever been made to Mrs Boyle. She offered to carry out any recommendations in regard to the sanitary arrangements of the premises but the court refused to make any and simply refused the licence. She claimed that the court had set a policy to refuse the renewal of licences in her district and was not therefore making a decision on her application as such as they were so bound to do. It was held by the House of Lords that provided the court acted within its authority it could reach any decision it saw fit.² There was no question of ignorance, prejudice or bias.³ There had been a hearing as prescribed under the relevant licensing act.⁴ The court could reach its decision without the appearance of any objector or evidence.⁵

The approach to administrative decision making has altered considerably since this time. It will be demonstrated that it would be unlikely that, such a decision would be reached by a modern court. The most striking injustice seems to have been the total disregard for evidence by the court. The role played by evidence in the decision making process would appear, at least at first sight to be vital. Before any decision-maker can make a decision he obviously needs to have a framework to work within, which tells him what kinds of decisions he is to make and the subject matter which he is to deal with, setting out his aims and establishing criteria by which he will make those decisions. The trigger to decision making may then be an application from an individual outside the administrative department concerned, for example, an application for planning permission, or equally may be self generated by that administrative department itself to carry out department policies, e.g. should a planning department establish a new office. Evidence then supplies the factual situation around which the decision is made. The quality and reliability and the substance of the evidence will shape the actual decision. From the point of view of a person whose interests are affected by the decision, the content of that evidence is therefore of great importance. However the ability to control the quality and reliability of evidence admissible to the decision-maker depends, inter alia, on who makes the decision,⁶ where they make the decision⁷ and how the decision itself is made and by what authority it is made.⁸ There is no single absolute

¹ **Boyle v Wilson**. [1907] A.C. 45.

² This reflected the view of limited review. See **Brittain v Kinnaird** Part 2 below.

³ The question of decision making without evidence is discussed latter, see fn 28 and Part 2 where bias and fetter are discussed in detail.

⁴ If a policy is used as an over riding reason for not granting an application the decision may be struck down for a failure to make a decision at all. Policy may be used as a reason for deciding in a particular way if in the light of all the circumstances it appears correct to support the policy, but the decision maker should not refuse to consider the matter at all simply because a question of policy is involved. See Part 3 below.

⁵ See Part 2 generally and reference to the **Nat Bell Case**.

⁶ There are a variety of persons involved in decision making, e.g. a Judge, chairman e.g. of a tribunal, Government minister, or a humble administrative officer.

⁷ Decisions may be made by a judge in a court or at a public inquiry by a Chairman of a tribunal at a tribunal or in a variety of venues by for example, the Arbitration Conciliation Advisory Service, (A.C.A.S). as arbiter or conciliator ; a minister acting as an appeal agency or as a chairman of an inquiry, or even as the initial decision maker.

⁸ The decision may be classified as judicial, quasi judicial or purely administrative and the authority to make that decision may

standard for the quality of evidence required which is applicable universally in all decision-making situations, before a decision can be made. Each decision making setting must be examined separately.

Within the court system evidence is controlled in several ways. Under the rules as to admissibility of evidence, evidence is categorised into admissible evidence and inadmissible hearsay evidence. The veracity of oral evidence to the court is encouraged by the swearing of oaths, and the consequent threat of prosecution for perjury. Fact is clearly distinguished from belief, impression and other subjective opinions. Oral evidence not given on oath is less authoritative. The court process affords the opportunity to interested parties to have the evidence cross-examined. Finally a judge or jury will make a decision on the facts, the latter with the help of the judge to clarify and outline the issues at stake. Appeal exists in the majority of cases to higher courts within the hierarchy of the Supreme Court structure on questions of fact and of law.⁹ Even failing this, since the proceedings of the court are recorded in detail and the evidence filed, if at some future date new evidence of a substantial nature is produced which affects the finding of the court a retrial can be ordered.

The safe guards relating to evidence in the court system do not apply to all decision-making fora. The court process is tripartite, with two adversaries facing each other, and a judge in between who supervises and referees the confrontation. Evidence is the central platform around which the process functions with each side producing evidence to support their view of the facts, and cross-questioning the evidence of the other. A judge decides on the questions of law appertaining to the issue and a jury (or a judge in civil matters) decides the facts. Questions of policy do not (at least theoretically) affect the outcome of the trial.¹⁰ Courts are not usually specialised decision-makers.¹¹ The range of decisions courts make are wide ranging and depend on the issues brought before them.

By contrast, within the administrative field the administrator deals specifically with one type of problem. He usually has a departmental policy to carry out, single handed in a non- adversarial situation where he receives and evaluates all the evidence himself and makes the decision. Sometimes some method of appeal is provided for, perhaps to a tribunal.¹² At other times an ouster clause may be inserted which attempts to establish him as the final decision maker, stating that judicial review is not available and that there is no appeal, or that an appeal to a specific body is the only method of questioning the decision.¹³ Sometimes no apparatus is provided for at all to question the decision, on the basis that it is an internal matter for the department alone to decide upon. In questioning such decisions it is therefore not always possible to raise the issue of evidence directly, since the only method of challenging the decision is by judicial review and not by appeal, where the central issue will often be the question of evidence itself. Evidence, instead of being the central feature of an appeal becomes an ingredient of the grounds for judicial review, e.g. ultra vires may be the ground for review. The reason that a decision was ultra vires may in turn be due to faulty procedure, unreasonableness, illegality etc. This is not to say that the evidence issue is any the less important, since at the end of the day it may well be that it is the abuse of evidence that has caused the faulty procedure, made the decision unreasonable, or given rise to an illegality. It simply means that it is not so easy to evince a set of clearly defined rules allowing the interested party to question the use or non use of evidence in that

be granted by act of parliament who may declare the decision to be final or subject to appeal. An ouster clause may seek to restrict judicial review. See p6 below.

⁹ Within the court hierarchy appeal lies from the magistrates court to the Crown court for criminal cases, or to the Q.B.D. on questions of law, and to the County Court for civil cases. This system of appeal continues up to the House of Lords as the final court of appeal. Even in the absence of a right of appeal the high court exercises a supervisory role over inferior courts and applications can be made for judicial review of decisions by inferior courts, though this is rare, since the rules of evidence effectively ensure that there is little need for review.

¹⁰ The word policy can be used in two ways. A court unlike an administrative body is not established to carry out specific functions, e.g. The Ministry of Agriculture - which might have a policy aim to keep the price of agricultural produce at a certain level - and might only grant assistance to farmers who could achieve the necessary economies demanded by the policy. Judges do however make so called public policy decisions e.g. G.C.H.Q. case regarding National Security. The policy is not Government policy and is less specific.

¹¹ The role of a court is obviously to make decisions, but it does not specialize in decisions in a specialist field, e.g. a rent tribunal or a rating officer only make decisions on rent or rates evaluations.

¹² The statute giving the authority to make decisions will specify if and how a decision will be challenged. There is no universally applicable process and each statute will have its own preferred process. A wide variety of methods of challenge exist under the various statutes.

¹³ The declaration is final regarding appeal, but the courts have been reluctant to concede their authority to ouster clauses. See Part 4 below.

decision making process.

Historical Review of The Development of Judicial Review

In previous centuries the role played by the administration in Britain had been quite limited. The build up of the administrative machinery in Britain started off relatively slowly. The magistrates office was probably the first attempt at the centralisation of administrative power in the 11th century, aimed at the collecting of taxes. Gradually a number of offices were set up to deal with land drainage between the 14th to 17th century. During the 18th century the interests in public health and hygiene led to the establishment of major sewage schemes, factory supervision etc. The industrial revolution and the growth of mass transport systems forced the central government to provide nation wide regulatory agencies. The late 18th and the 19th century saw an unprecedented growth in local and central government agencies concerned with the regulation of public utilities¹⁴

The early attempts at controlling administration centered on the use of the Royal Prerogative and the authority of the common law and Parliament. From as early as the 13th century the courts used the prerogative writs of certiorari, mandamus and prohibition to control the exercise of power by the Justices of the Peace who represented the earliest form of administrative organ in England. Initially, the Courts of Star Chamber were used to regulate the affairs of the early forms of administrative body on behalf of the king. Conflict between the crown and Parliament led to the Court of Star Chamber being used as a prop to regal power. When Parliament wrested power from the Crown the Court of Star Chamber was abolished. The courts alone were left to supervise inferior courts and the decision making process. Parliament kept its own administration under control through Parliamentary devices. Parliament can regulate the government departments through the device of Ministerial responsibility and question time. It is questionable how efficient this in fact is as a check on the administration. The time available is limited and the secretariat are skilled at giving just enough information to satisfy the question maker without embarrassing the minister concerned. Frequently the object of a question is to score political points rather than to scrutinise detail or to provide any real control¹⁵

As a result a potential conflict arose between the court's role as supervisor of administrative decision making and Parliament's control over the administration. During the 19th century the courts started to limit the extent to which they would supervise the administrative decision making process. Unless the decision-maker was an inferior court, or acted outside his power the courts became reluctant to interfere since the control of political agencies became the business of Parliament. This was possibly not too serious a problem for the individual. Despite the unprecedented expansion in the area of central government control of the administration of Britain in the 19th century, the primary concern of government was to improve the health of the nation, which it did through a variety of Public Health agencies which co-ordinated the actions of the local authorities. The actual scope of government departments was limited however by a policy of laissez faire, in that it was believed that free market forces were the most appropriate method of regulating the economy. As a result the individual would not have been so radically affected by government action as in the present era. Whilst the judiciary have for some not inconsiderable period of time possessed the machinery to challenge the decision making process within administrative government it has tended to use that machinery sparingly. This is probably due to the influence of the 19th century constitutional lawyers such as Dicey who denied that there was an administrative government agency which might exercise arbitrary power in Britain, and which needed an administrative law system to deal with it, This concept was given a further impetus by the Donoughmore Committee Report in 1932 which by classifying decision making into judicial, quasi judicial and administrative resulted in the latter category being considered to be outside the scope of judicial review.

In recent times the administration has penetrated all aspects of British life, in a manner which far exceeds the 19th century development of the public health authority.¹⁶ It is no longer possible to accept the 19th century view that there is no such thing as administrative law and the courts have been forced to face up to the reality of the situation and to develop a system of administrative law. Many government departments have been established to perform specific functions for the well being of the populace as a whole. The department, to function well needs clear policy objectives. Any control exercised over a department's activities by the courts is likely to reduce the speed and efficiency with which that department functions. By contrast an interested party affected by decisions of the department will demand the right to challenge and perhaps seek to criticise departmental decisions and policy that he

¹⁴ See Jaffe & Henderson. 1956. 72 L.Q.R. 345 - 365.

¹⁵ Phil Norton. Dissent in the House of Commons. 1974 - 1979. Oxford Union Press. 1980; O'Hood Phillips. Constitutional and Administrative Law. 6th ed. pp203 - 205.

¹⁶ See Patrick McAuslan. "Administrative Law, Collective Consumption and Judicial Policy." 46. M.L.R. 1983. ppl - 4

or she is dissatisfied with. Parliament in giving decision-making power to the administration has to strike a balance between the rights of the individual and the need to give the department the ability to function efficiently.

How much thought Parliament actually gives to this problem when creating such power is often questionable and perhaps the reason why this discussion is necessary at all. Parliament is obviously more concerned with the implementation of policy. Parliament sees a task which it wishes to be performed and is interested to facilitate the carrying out of that task. An appeals system is likely to delay and limit the effectiveness of what Parliament sees as an essential task which needs to be carried out with all haste. Parliament appears to presume that the courts can deal with any injustice that might arise but ignores the invidious position that the courts might be placed in attempting to deal with such situations. Further the inherent conservatism of the courts is not taken into account. The dilemma that the courts find themselves in attempting to deal with judicial review on the grounds of reasonableness is demonstrated by the cases of **Puhlhofer v London Borough of Hillingdon** and **R v Secretary of State, ex parte Butt & Swati**.¹⁷ An administrative body may be charged with a duty e.g. in this instance to house the homeless. The administrator may have limited resources. There are statutory minimum standards for the quality and standard of housing that the administrator can supply. Therefore the number of properties that he has available to house people is limited. What category of persons should he regard as homeless? A generous interpretation of homelessness result in a surplus of applicants to his resources. What is a reasonable definition of the term? If the courts redefine the term generously they place a duty to re-house on the administrator which he cannot fulfil and for which Parliament is unwilling to provide the resources. This is a problem, which only Parliament can resolve. Where Parliament affords no control the underlying philosophy is obviously to give the decision-maker a free hand. Anyone seeking to impose controls runs the risk of questioning the supremacy of Parliament.

Evidence And Reasons For Decisions.

It is not necessarily Parliament's fault that it does not deal effectively with the issues at stake. For more than a century now the prevailing attitude amongst the judiciary has reflected the views of Dicey who proclaimed that Britain did not have an administrative law process. Dicey believed that since there was no exercise of arbitrary power in Britain there was no need to develop a system of administrative law to deal with that non-existent arbitrary exercise of power. It is only in recent years that these myths have been laid to rest. The courts have woken up to the need to establish a compact court system for dealing with questions of administration, and with establishing a unique process for dealing with such issues.¹⁸ It is perhaps too much to hope for that Parliament will now also respond to the demands for clear guidance on how to deal fairly with review of administrative decisions. In the meantime all one can do is to analyse the methods currently in use in the courts and to see what role evidence plays in their deliberations. The most significant contribution that Parliament could possibly make towards clarifying the role played by evidence in administrative decision making would be to lay down rules for the giving of reasons for decisions.

The remedies in Public Law have evolved through procedural devices for seeking redress to administrative injustice. The substance of such claims has become submerged in the rhetoric of the procedural devices, so that the evidential basis of the claim is not easily challengeable. If an administrative decision-maker has to give a full account of the reason how and why he reached a particular decision then the evidential basis for his decision would be more clearly disclosed.

A duty to give reasons alone would be insufficient without a sanction for a failure to provide such reasons. Parliament could either order that such a decision should be remitted to the decision maker with an instruction that he provide full reasons for the decision, or the decision could be rendered void by judicial review. The need for such sanctions can be demonstrated by the conflict which has appeared in the irreconcilable decisions that have recently been reached by courts on this issue regarding various duties placed upon tribunals under a variety of Acts of

¹⁷ **Puhlhofer v London Borough of Hillingdon** [1986] 1 All E.R. 467 and **R v Secretary of State, ex parte Butt & Swati** [1986] 1 All E.R. 717; See also the commentary on these cases by Sunkin, "Judicial Review after Puhlhofer & Swati Is the Administration still Challengeable?" N.L.J. 1986.304 - 306.

¹⁸ See the development of the Q.B.D. of the High Court as the main court for dealing with judicial review; the modernised Order 53 and **O'Reilly v Mackman** [1983] 2 A.C. 237 which have simplified the rules relating to standing, and set up a simplified procedure which does not depend on applying for a specific ground for review or a specific remedy. Also since the early beginnings dating from **R v Northumberland Tribunal ex parte Shaw** [1952] 1 K.B. 338, and especially **Ridge v Baldwin** [1964] A.C. 40 the courts have shown that they are more willing to widen the scope of judicial review and have refused to be limited by the Donoughmore Committee classification of decision making. See also Part 4 below.

Parliament.¹⁹ Sometimes the failure has resulted in the case being sent back to the tribunal with an instruction to provide reasons.²⁰

Sometimes the failure has resulted in the decision being rendered a nullity.²¹ In yet other circumstances the failure has been frowned upon but nothing more has come of it.²² If the decision is reached, on a false evaluation of the evidence, on false evidence, or on a complete lack of evidence the applicant would be have grounds for an application for judicial review. The traditional response to such a proposition, (evidenced not least by a current reluctance to give full reasons on the part of many administrators, resulting in the large number of applications for judicial review in recent years, and especially by the numbers of complaints received by the ombudsman) by the administrators in general is that giving reasons is time consuming and expensive. The obvious reply to this might be that by being obliged to give a full account of the reasoning involved in a decision the decision maker is forced to make a thorough going and properly evaluated decision which he can justify. The result would be fewer dissatisfied applicants, and a reduction in the number of viable complaints to Ombudsmen and applications for judicial review. Further it would advise all future applicants of what is expected of them so that they might fulfil the conditions needed to make a successful application.²³

There are other possible methods of minimising expense. Obviously it would be impractical for every administrator to provide full reasons for every single decision that he might make in the course of his duties. The administrative burden might be immense. The majority of decisions do not cause any dissatisfaction whatsoever in any case. Thus if the right to request reasons were to be given to those who find they are dissatisfied with a decision then a great deal of unnecessary expense could be avoided. A system of post application for reasons is preferable to a prior request system, as currently in operation under the tribunal system since otherwise an applicant who had omitted to make such a request would discover that his rights had already been lost to him even before he was aware that he might need them. Complaints about a failure to provide reasons could first be submitted to an ombudsman who could decide if there had been such a failure and order that such reasons be provided if the complaint was well founded. This could avoid the high expense involved in court proceedings and the allegation²⁴ that the provision of reasons simply encourages litigation.

The problems that are caused by a failure to provide reasons have been recognised for a long time now. Indeed as long ago as 1957 the Frank's Committee Report led to the Tribunals and Inquiries Act 1958 and ultimately to s12. Tribunals and Inquiries Act 1971 laid down a procedure for reason giving by tribunals provided the applicant requested the reason for the decision before the hearing. Since then, some Acts of Parliament have also placed a duty on persons given power under the act to make decisions to furnish reasons for their decisions. The reason becomes fact recorded on the face or the record and is available for an appeal or judicial review of the decision in the future. Unfortunately this procedure does not apply to the administrative decision making process outside the protected area of the Tribunal. Without this protection a decision can in effect be made on the basis of no evidence whatsoever, and

¹⁹ Genevra Richardson Article, *The Duty To Give Reasons: Potential and Practice*. p448 Public Law 1986. If the failure reveals an independent error of law then the failure can be challenged on that basis alone, e.g. the decision may be invalid as a failure to take account of relevant considerations.

²⁰ **Mountview Court Properties Ltd v Devlin** (1970) 21 P & CR. The decision was remitted to the original tribunal for them to provide reasons for their decision. A failure to comply with s12 Inquiries & Tribunals Act does not provide grounds for an appeal on a point of law.

²¹ Megaw J held in **Re Poyser and Mills' Arbitration** [1964] 2 Q.B. 467 that a failure to provide adequate reasons itself amounts to an error of law, regarding s12 Tribunals and Inquiries Act. His reasoning was followed in **Givaudan v M.H.L.G.** [1967] 1 W.L.R. 250. and again in **Alexander Machinery (Dudley) Ltd v Crabtree** [1974] I.C.R. 120.

²² **Crake v Supplementary Benefits Commission** [1982] 1 All E.R. 498. Wolf J. held that a mere failure to comply with section 12 did not of itself provide grounds for appeal on a point of law and so unequivocally followed the decision in *Mountview*, fn 21 supra.

²³ Genevra Richardson p440 relates the three conceptual basis for the argument that openness in government and in decision making legitimates the process, viz. the economies that result, the dignitary theory, and the rationality theory. She contrasts the benefits with the criticisms of more legitimisation theory and concludes that in the end it amounts to a crude restatement of the familiar argument that fair procedures result in better decisions.

²⁴ Genevra Richardson. p461. Relates the restrictive interpretation given to reason giving in some quarters to minimise the number of appeals that might otherwise be facilitated by such reason giving. The corollary of this might be that the need to give reasons would improve the decision making process and result in a higher degree of consistency which would in fact result in less dissatisfaction and thus fewer appeals

unless the administrator concerned makes a mistake and reveals that fact he can often resist any form of review of his decision. This was demonstrated, by the Court of Appeal's decision in **R v Lancashire County Council, ex parte Ruddleston**.²⁵ Despite many good intentions shown by Sir John Donaldson M.R., his judgement showed that he was unwilling or unable to broaden the scope of judicial review to include a power vested in the court whereby it could impose a duty on the council to provide the court with a full account of the decision making process. If the courts are unable to take in the concept of reason giving by administrative decision-makers then it is essential that Parliament takes a lead and establishes a duty to give reasons.

A major problem that has surfaced under current Acts of Parliament which impose a duty to give reasons is that the decision maker might provide reasons for his decisions but that those reasons might be inadequate and in fact, explain little or nothing to the applicant as to how or why the decision was made. It has been emphasised at all times in this article that there should be a duty to supply full reasons, and not simply reasons for the decision.²⁶ Whilst the courts have been willing to recognise the need for adequate reasons they have not always been able to establish clear criteria as to what is or is not adequate. It would be useful if Parliament could spell out guidelines as to adequacy.

Conclusions And Recommendations.

There are occasions when the provision of reasons alone will still prove to be insufficient to provide the complainant with a remedy. The case of *Boyle v Wilson* demonstrates the problem. Mrs Boyle was told the reason why her application for a renewal of her licence was refused. The reason, namely that her premises were in-sanitary was justified by a bald allegation by an official unsupported by any evidence whatsoever. There is a need to establish that the reason is validated by evidence, which shows the reason to be substantiated. Therefore along with the reason there should be provided the substantive basis for the decision.²⁷ Administrative departments should be obliged to publish guidelines to potential applicants for decisions by those departments. The guidelines should advise the applicant of what is expected of the applicant in order for him to make a successful application. Compliance with such standards would then establish a legitimate expectation by the applicant, which if not achieved would of itself furnish grounds for judicial review and relief.²⁸ Such guidelines would have benefited Mrs Boyle in that she would have known that the state of the drains on her premises were vital to the decision. She could have had them independently inspected and had any necessary remedial work done prior to the application and supported her application with hard evidence in the form of a surveyor's report. Such evidence once submitted to the court would become part of the evidence on the face of the record and could not then be ignored by the court. Whether or not that evidence is in fact vital to the decision (that is to say is jurisdictional or not) is yet another matter, and it is this very question which will be discussed in Part 2 below. It would however force the court to admit that its decision was based on a policy of slum clearance and not on the sewage issue and so clarify what issues were really at stake, which in turn would facilitate a future application for judicial review.²⁹

²⁵ **R v Lancashire County Council, ex parte Huddleston** [1986] 2 All E.R. 941 A.W.Bradley. Openness, Discretion and Judicial Review. p508 Public Law 1986. Miss H was refused a discretionary grant for an award to study for a degree at university. Since she had not been resident within the authority's boundaries for three years prior to the application because her father had been working in Hong Kong she was not eligible for a mandatory award but the council could make a discretionary award. It seems that since the council would only be reimbursed with 10% of the expenditure there were no special circumstances which might justify them granting the award. The council would not disclose under just what special circumstances they might make such an award. From that statement it could be concluded that the council might a) never make a discretionary award ; b) was concerned only with financial considerations ; c) was taking irrelevant considerations into account. Equally it is possible that they had taking all factors into account and the decision was impeccable. On a scarcity of information it is impossible to tell.

²⁶ **Re Poyser and Mill's Arbitration**, fn 23 supra, " proper, adequate reasons must be given .. which not only will be intelligible, but also can reasonably be said to deal with the substantial points that have been raised". see Genevra Richardson, p457. The adequacy of the reasoning.

²⁷ Genevra Richardson argues that facts and expertise are part and parcel of full reasons. pp458 - 468.

²⁸ See Part 4 on legitimate expectation, and **Ex parte Khan**, regarding the effect of a Home Office circular on advice as to what criteria had to be fulfilled before a successful application for an entry permit for an adopted child might be made.

²⁹ The effect of policy on the exercise of discretion is discussed further in Part 3 below..

PART II

Internal And External Jurisdiction.

Threshold Jurisdiction Of Decision Maker And Scope of Power.

All decision making within the administrative process is subject to the limitations placed on it by the body which gives the decision maker authority to make the decision. The limitation is represented by the Doctrine of Ultra Vires. A decision-maker can only do those things which he is authorised to do. What the decision-maker is authorised to do is a question of law. He cannot do those things that he is expressly forbidden from doing. If there is a precondition to doing something then he may only do it if those conditions actually exist. The existence of the precondition is a question of fact. These propositions have been expressed in the form of mathematical formulae by Craig,³⁰ and by Hartley and Griffiths.³¹ Thus

- “1). Authority to do X. (Law)
- 2). Authority to do X, but expressly forbidden from doing Y. (Law)
- 3), If X exists (Fact) , authority to do Y or must do Y (Law).”

In propositions (1) and (2), if Y is carried out the body in question has acted beyond its authority. Proposition (2) is simply a more precise version of proposition (1). The aim is to delineate the extent of the power granted by a statute, to an administrative body. Thus if a body is established to decide what is and what is not a fair rent for rented property all it can do is to decide how much rent a tenant must pay. It cannot instruct the landlord to make structural repairs to the premises. If it were to do so the instruction would be ultra vires and could be struck down. An example of simple ultra vires is **R v G.L.C. ex parte Bromley L.B.G.**³² where a local authority gave a grant to an association which was not entitled to a grant under the enabling statute. The courts do not interpret the extent of the authority so narrowly that only those things expressly mentioned are covered. The courts will permit acts reasonably incidental to those expressly stated³³. s11 Local Government Act 1972 states that a local authority:-

“shall have the power to do any thing which is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions”

In proposition (3) if X does not exist but nonetheless Y is carried out, then again it is ultra vires, for jurisdictional error. It is a question of law as to what is the factual situation that must exist before the authority may be exercised, but a question of fact as to whether the situation actually exists. Thus in **Re Ripon (Highfield) Housing Confirmation Order 1938**³⁴ a power in relation to land was exercisable only if the land concerned was not parkland. Since the land in question was parkland, the Confirmation Order was ultra vires. Similarly in **R v Fullham, H & K Rent Tribunal ex p Zerek**.³⁵ The tribunal had the power to set fair rents for private rented accommodation. The tribunal had the right to consider any application set before it. Lord Goddard stated that *“If a certain state of facts has to exist before an inferior tribunal has jurisdiction, it can inquire into the facts in order to decide whether or not it has jurisdiction, but it cannot give itself jurisdiction by a wrong decision on them.”* In effect, the tribunal can consider an issue to see whether the necessary precondition exists to enable it to exercise its authority. If the precondition exists the tribunal can act, but if it does not it cannot.

³⁰ See P.P.Craig. Text Book. Administrative Law. p23.

³¹ T.C.Hartley & J.A.G.Griffiths. Government and Law, p347. Law in Context Series 2nd ed.

³² **R v G.L.C. ex parte Bromley L.B.C. 1984.** Times. 27th March. Under s143 Local Government Act 1972 the local authority was empowered to pay reasonable subscriptions to local authority associations formed for the purpose of consultation on the common interests of the local authorities of London and for the discussion of Local Government affairs. The existing association was the London Boroughs Association, which resolved to support central government policy to abolish the G.L.C. The L.B.A. had a conservative majority. An alternative association was established called the London Authorities Association. Its constitution declared that its objectives were to fight for local accountability of the Metropolitan Police to establish London as a nuclear free zone, and to oppose abolition of the G.L.C. In November 1982 the G.L.C. paid a subscription to L.A.A and claimed to do so under the provisions of s143. Bromley challenged the grant and sought a declaration that the payment was illegal and ultra vires. It was held that under the Act an association, to qualify for a grant, had to represent all the London boroughs on a non party political basis. The L.A.A. was a party political association and thus not eligible under s143.

³³ P.P.Craig. Administrative Law. p109 ; **A.G. v Great Eastern Railway Co.** 1880.5 App. Cas. 473. H.L. per Lord Selbourne.

³⁴ **Re Ripon (Highfield) Housing Order, 1938, White & Collins v Minister of Health.** [1939] 2 KB 838.

³⁵ **R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek** (1951) 2 KB 1.

In **Re Butler, Camberwell Clearance Order 1939**³⁶ the Housing Act 1936 permitted Clearance Orders to be made regarding certain types of houses which were old and in a poor state of repair. Lord Greene M.R. pointed out that in deciding what kind of property triggers off the enabling power of the Act is a question of law, but that it is a question of fact as to whether the property in question satisfied that description. In **Relton & Sons v Whitstable U.D.C. 1967**³⁷ a Local Authority had the power to make a New Street Order but not to make an order for existing streets. The reviewing court was therefore concerned with whether or not it was already an existing street. Similarly in **R v A.L.T.V.N.A. ex parte Davies. 1953**³⁸ the minister of Agriculture and Fisheries had power to consent to a notice to quit an agricultural holding if certain conditions existed.

Certiorari issues to quash on the grounds of ultra vires for lack of jurisdiction if it is found on the facts that the conditions do not exist. All these cases show that the issue of evidence can therefore be broached in these situations to challenge the decision-making power of an administrative body. A jurisdictional error of fact may be challenged collaterally in ordinary court proceedings when the court will then be called upon to decide upon the issue before continuing to consider the rest of the case.

In **Zerek** a landlord agreed to let unfurnished premises to Zerek. When Zerek arrived to take occupation of the premises, with his furniture, the landlord refused to let him enter unless Zerek first leased his furniture to the landlord. The landlord then released the furniture to Zerek, in an attempt to make the premises furnished. Zerek nonetheless applied to the Rent Tribunal for the setting of a fair rent. The Tribunal decided that the premises were unfurnished and went on to set a fair rent. The landlord challenged the decision of the tribunal on the basis that the premises were furnished and there was a jurisdictional error of fact. Devlin L.J. in the High Court agreed that in reality the premises were unfurnished and refused to quash the decision. The tribunal was correct to investigate the matter as to whether or not the premises were or were not furnished so as to decide whether or not the case itself was within its jurisdiction. However, if they had wrongly decided that issue, the correct place to challenge it was collaterally in an action for higher rents in the county court. Judicial review is not designed to determine de novo issues of fact. However, Order 53 Civil Procedure Rules and **O'Reilly v Mackman**³⁹ have since changed the perception of just what is and is not suitable for judicial review, as will be demonstrated latter in this chapter.

The Jurisdiction Of The Reviewing Body.

Since **Anisminic Ltd v Foreign Compensation Commission**⁴⁰ it has become clear that a statutory ouster provision

³⁶ **Re Butler, Camberwell (Wingfield Mews) No 2 Clearance Order, 1936** [1939] 1 KB 570.

³⁷ **Relton & Sons (Contracts) Ltd v Whitstable U.D.C.** (1967) 210 Estates Gazette 955, D.C.

³⁸ **R v Agricultural Land Tribunal for Wales & Monmouth Area, ex p Davies** [1953] 1 All E.R. 1182.

³⁹ **O'Reilly v Mackman** [1983] 2 AC 237. Following a Report of the Law Commission in 1978, a revised Rule of the Supreme Court introduced a new 'Order 53' procedure for applicants of judicial review by the High Court. The new procedure affects the remedies of certiorari, prohibition and mandamus, originally known as the prerogative writs, and the private law remedies of injunction and declaration. Prior to the introduction of the new Order 53 each remedy had its own separate procedure. The Order avowedly introduced a uniform procedure for all applicants. The applicant applies for judicial review stating the reasons for the application, but without having to specify exactly what remedy is required. The court will decide whether or not there is a valid question to be answered, without actually deciding the application, and whether or not the applicant has a sufficient interest - represented by locus standii or standing under the old rules - and either reject the application or approve the next stage of the application which is the actual review. The court acts as a filter weeding out vexatious applications where there is no real chance of success and attempts to abuse the system by attempting to secure an appeal against a decision where there is either no appeal or a more appropriate body. The court will not allow an application if there is a more appropriate body to apply to or where the issue can be dealt with collaterally in another court as pointed out by Diplock in **Zerek**, fn 6 above. **O'Reilly v Mackman** and subsequent cases have shown that the procedure is not entirely uniform and that the standing requirements still vary with the type of remedy sought, and especially that the standing for mandamus, injunction and declaration are higher than for certiorari and prohibition. see Chapter 8. Garner's Administrative Law. 6th edition.

⁴⁰ **Anisminic Ltd v Foreign Compensation Commission** (1969) 2 AC. 147. The Egyptian Government confiscated all foreign owned property around the Suez Canal and sold it to Egyptian companies. Anisminic had mining interests confiscated. The Egyptian government sold the interests to T.A.D.O. Anisminic then advised their former customers to boycott any minerals produced by T.A.D.O. which they did. T.A.D.O. then approached Anisminic and offered to buy out Anisminic's remaining nominal interest in the business. A token sum of half a million pounds was agreed which enabled Anisminic to recoup a small proportion of its losses. The Egyptian Government eventually gave the British Government £27m as compensation for loss suffered by British firms who had had their assets confiscated. The task of distributing the money was given to the F.C.C. The sum was not sufficient to fully reimburse all the firms involved. The F.C.C. took pains to

will be ineffective to prevent judicial review of threshold jurisdictional matters. The decision is rationalised on the basis that whilst Parliament had clearly evinced the view that any decision by the F.C.C. would be final, only legal decisions could be so treated. Since the body concerned had no authority to make the decision because it was outside its jurisdiction, the court was not in fact reviewing the decision at all, but merely declaring the acts of the body in making that decision illegal.

Parliament may give the administrative body jurisdiction to conclusively determine the existence of some or all of the jurisdictional facts. Thus in **Dowty Bolton Paul Ltd v Wolverhampton Corp No2**⁴¹ the local authority had to decide whether land was still required for the purpose for which it was first acquired. Such a decision is not challengeable for jurisdictional error. The purpose of judicial review is not to provide an appeal. If this is required then Parliament will have prescribed an appropriate appeal body. The merits of the case are not the concern of judicial review. For this reason non-jurisdictional errors of law or fact are not subject to judicial review. They are issues upon which the decision maker is entitled to go wrong. It was held in **R v Nat Bell Liquors** that under the no evidence rule a decision maker can even make a non jurisdictional error of fact even if he has heard no evidence upon which to base his finding.⁴²

Craig however feels that **Nat Bell** should be viewed in the context of the theory of limited review that was current at the time that the case was heard and that it is merely an extension of and a natural outcome of that theory. A court decides if a question of fact is jurisdictional. Then if that question involves a question of fact the court will receive affidavit evidence relating to that fact. **Nat Bell** was consistent with the decisions in **Bolton**, **Brittain** and **Mahoney**⁴³ in that a limited review theory was applied to the question of jurisdiction. Since the court found that the issue was not jurisdictional in any case, the facts were also non-jurisdictional and so the court was prepared to accept the decision without evidence. Since the watershed case of **R v Northumberland Compensation Appeal Tribunal ex parte Shaw**⁴⁴ it has become clear that if a non-jurisdictional error of law appears on the face of the record then review is possible.

As stated, Simple Ultra Vires and Jurisdictional Error appear quite straightforward to apply. The formulae can however be complicated by the introduction of subjective conditions. Thus if the decision maker is satisfied that X exists he may do Y. In such a situation unless it can be shown that he was not in fact satisfied that X existed the decision may not be questioned except on the ground of reasonableness, for abuse of discretion and breach of natural

minimise the claims to ensure the money went round. Under the enabling statute a firm would be eligible for compensation if it was a British firm before the incident occurred in October 1956 and if it or its successor in title was British after August 1958.

The question that arose to be decided was whether Anisminic was entitled to compensation since it had sold out to T.A.D.O. It turned on the interpretation of the regulation requiring the company or its successor in title to be British in August 1958. The provision could mean that providing the person who had suffered loss was British in 1956 then they were entitled to compensation unless they had been taken over by a foreign company. Alternatively it could mean that the assets had to be held by a British firm as successor in title. If this was so since T.A.D.O. now held the assets and T.A.D.O. was Egyptian then T.A.D.O. not unnaturally was not entitled to compensation. The House of Lords held that the condition that the company was British in 1956 was a condition precedent and that providing the company that sustained the loss continued to be British it was entitled to compensation.

⁴¹ **Dowty Boulton Paul Ltd v Wolverhampton Corpn (no 2)** (1976) Ch 13. The court regarded the question whether or not the land was still required by the council for a particular purpose as one of degree which the council was entitled to interpret itself. Review in such a situation would amount to an appeal and a fresh decision on the merits of the case, replacing the council's opinion with that of the court.

⁴² See **Nat Bell Liquors Ltd** (1922) AC. 128.

⁴³ **Brittain v Kinnaird** (1819) 1 B & B 432 ; **R v Bolton** (1841) 1 Q.B. 66 **R v Mahoney** (1910) 2 I.R. 695. Lord Sumner in **Nat Bell** (1922] 2 A.C. 128 at 152 - 154. "Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts are to be collected. Thus, in the well-known case of **Brittain v Kinnaird**, the plaintiff had been convicted under the Bumboat Act, and the conviction stated his offence in terms of the Act simply, 'for that he had unlawfully in his possession in a certain boat certain stores', very much as the conviction runs in this case. He said that his vessel was of 13 tons burthen and was not a boat, and sued the justice but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate."

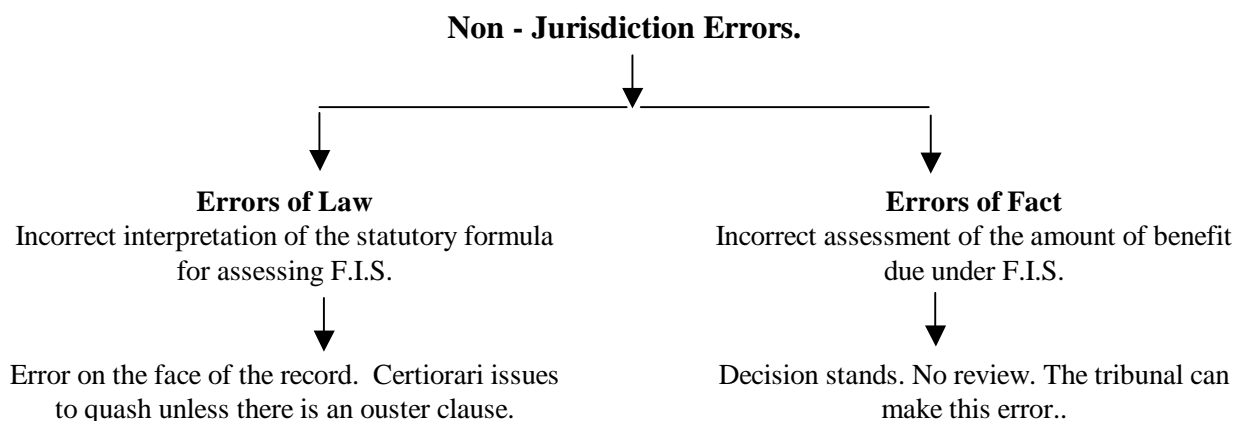
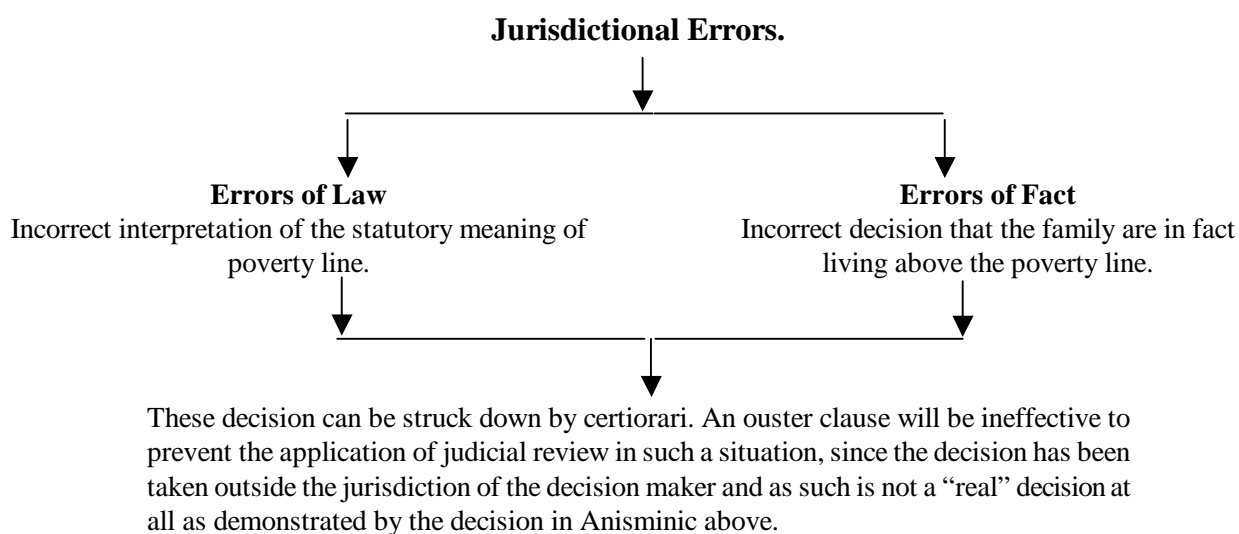
And see Below p28 for further discussion on limited review.

⁴⁴ **R v Northumberland Compensation Appeal Tribunal ex parte Shaw** [1952] 1 KB 338.

justice, in that on the known facts no reasonable decision maker could have made such a decision. See the criteria of Lord Greene in **Associated Provincial Picture Houses v Wednesbury Corporation**.⁴⁵ His decision making power may be reinforced by a formula declaring that he is the sole person who can decide if X exists and that that decision is final.

The jurisdiction of an inferior court or tribunal may equally depend on a preliminary question of law or fact, or of mixed law and fact.⁴⁶ Thus a distinction must be drawn between those errors which are jurisdictional and those which are non-jurisdictional. The treatment of errors of law and errors of fact also differ so they must also be distinguished. The problem is that none of these distinctions is necessarily easy to draw. This is illustrated below using a theoretical model, which demonstrates schematically the various consequences of jurisdiction and non-jurisdictional errors.

For the purposes of the model, let it be assumed that a tribunal is set up to decide disputes between the Department of Health and Social Security and applicants regarding the payment of Family Income Supplementary Benefit (FIS) to persons below the poverty line, by the D.H.S.S. to applicants. Jurisdiction exists if a family is below the poverty line.⁴⁷



In recent times the question has been posed as to whether or not the distinction between jurisdictional and non-jurisdictional errors of law has ceased to exist. The debate started with the House of Lords' decision in **Anisminic v F.C.C.**⁴⁸ As much as anything the court was seeking to find a way around an ouster clause, without at the same time

⁴⁵ *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB. 233. ; See also Part 3 on the issue of reasonableness,

⁴⁶ See *Emery & Smythe* 1984. L.Q.R. 612 at 616, 629 and 630 and *Tsakiroglou v Noble Thorl* [1962] A.C.93. as to the categorisation of questions of mixed fact and law as questions of degree.

⁴⁷ It should be noted that the notion of a "poverty line" is not intended to represent any presently clearly defined legal term of art, though the scheme presented presumes that such a notion does in actual fact exist, if only for the purposes of this example. The scheme should permit the reader to more readily place the succeeding commentary into perspective.

⁴⁸ **Anisminic**. See fn 11 supra.

appearing to openly question the supremacy of Parliament as the supreme law making body in the U.K. The F.C.C. was to be the final arbiter of claims for compensation by firms claiming loss of businesses as a result of the Egyptian Government's nationalisation of the Suez Canal. The F.C.C. incorrectly limited the number of applicants by misconstruing its guidelines contained in an Order of Council, so that only firms, which were taken over by other British firms could claim. Effectively, no one at all would be able to make a successful claim since all the successors in title to the businesses were Egyptian, though a British firm with an Egyptian subsidiary might have been eligible. Plainly a great injustice was being perpetrated by the F.C.C. and so the courts were eager to find a way to interfere with the finding. It did so on the basis that the F.C.C. could only make final decisions as long as it remained within its jurisdiction. Any decision made whilst outside its jurisdiction is no actual, "real" decision at all. Unfortunately their lordships were divided as to whether or not the decision was in fact jurisdictional or non-jurisdictional. Lord Morris thought the error was non-jurisdictional and Lord Pearson found that there was no error at all.

The House of Lords in **Anisminic v F.C.C.** operated on the assumption that there was a distinction between jurisdictional and non-jurisdictional errors of law. Since it fudged the issue of how to distinguish between the two, commentators⁴⁹ soon started to express the opinion that the distinction was impossible to draw and for all practical purposes of no significance. Since a loss of the distinction would destroy the only basis on which the judges in **Anisminic** could legitimately have set the finding of the F.C.C. aside without impinging on the supremacy of parliamentary law making such a proposition was not wise, even if it seemed to be based on common sense, namely that Parliament must logically have intended for the F.C.C. to distribute the money, and the construction placed on the enabling legislation by the F.C.C. would have prevented them from doing so. If the F.C.C. had consistently used the same interpretation each time it considered an application then no doubt Parliament would have been forced to amend the enabling legislation so that the money could be distributed. However, if that construction was only applied to some applications as a method of reducing the number of claims on the fund then without the decision reached by the House of Lords there would have been no way of challenging the obvious injustice to those applicants who had otherwise legitimate claims eliminated by such a decision.

However, if there is no distinction between jurisdictional and non-jurisdictional errors of law then the ouster clause is effective and **Anisminic** is wrongly decided. Nonetheless, Lord Denning attempted the impossible in **Pearlman v Keepers of Harrow School** 1979.⁵⁰ Denning took his lead from the views expressed by Lord Diplock in his extra judicial address to Cambridge University. 1974.⁵¹

"The F.C.C. had made a mistake as to the law applicable to a particular claim before it. In asking itself the wrong question in the case before it, as every tribunal must inevitably do if it makes any mistake as to the law applicable to the facts, the F.C.C. acted outside its jurisdiction. The decision renders obsolete the technical distinction between errors of law which go to jurisdiction and errors of law which do not."

Denning held in **Pearlman** that the distinction no longer existed. Lane L.J., dissenting, held that the error in question in that case was non-jurisdictional. Eveleigh L.J. thought that it was jurisdictional. Finally in **Re Racal Communications Ltd** [1981]⁵² the House of Lords held that **Pearlman** was wrongly decided. The error was non-jurisdictional and there was a distinction between the two forms of error. Following Lane's dissenting judgement the distinction is between an error of law on which jurisdiction depends and an error of law as to the merits of the case, which is what the court is there to decide in the first place. Unfortunately this is not the end of the matter. In **Pearlman** the court had attempted to review a case which had progressed from the County Court to the High Court and from which no appeal provision existed to the Appeal Court. It was within the sole jurisdiction of the High Court. Diplock drew a distinction between administrative tribunals and authorities and inferior courts. All errors of

⁴⁹ eg. see Craig, Administrative law pp336 - 338.

⁵⁰ **Pearlman v Keepers and Governors of Harrow School** (1979) QB 56. H.W.R. Wade. *Anisminic Ad Infinitum*. 1979. L.Q.R. 163. ; Jurisdictional review for jurisdictional error. J.Griffiths. 1979 C.L.J. 11.

⁵¹ Stanley De Smith Memorial Lecture. Reported at 1974 (33) C.L.J. p233, at p243.

⁵² **Re Racal Communications Ltd** [1981] A.C. 374 on appeal from **Re A Company** [1980] Ch.138. This involved an application for judicial review from a High Court case. It was hardly surprising that the House of Lords found that the High Court judge's rulings were not subject to judicial review on a question of non-jurisdictional error. Either there would be an appeal from the decision or there would not. ; Jurisdictional Review of Errors of Law. John Griffiths. Vol 39. 1980. C.L.J. 232. It took 27 pages of a House of Lords judgement to establish that a local valuation court was in fact an inferior court. H.W.R. Wade. New twists in the *Anisminic* Skein. 1980. 96. L.Q.R. 429. ; J.Griffiths. Jurisdictional Review of errors of law. 1980 C.L.J. 232.

law made by tribunals and other administrative authorities are jurisdictional. As far as courts are concerned only jurisdictional error is reviewable.

In the light of the decision in **Re Racal** a decision made by a court of law could place a complainant at a disadvantage as far as judicial review is concerned. This resulted in a number of cases where the classification of certain decision-making fora as courts was challenged.⁵³ In **R v G.M. Coroner's Court ex p Tal**⁵⁴ it was declared that the Coroners Courts are not courts for this purpose.

Regarding judicial review of decisions reached by courts it is still necessary to draw a distinction between jurisdictional and non-jurisdictional errors of law. The judges do not find this an easy task, and clearly applicable criteria are lacking for drawing the distinction. This may well be because as several commentators⁵⁵ have pointed out, the answer all depends on the way one places the question as to whether it is jurisdictional or not and even as to whether it is fact or law. Professor de Smith⁵⁶ has suggested an alternative jurisdictional test :-

“It would seem a reasonable working hypothesis to assume that when a court has jurisdiction to review the decisions of an administrative tribunal on questions of law, its intervention should extend to those matters upon which its decisions are likely to be better than those of the tribunal under review.”

He does not say how an application of this would solve the sticky problem of ouster clauses, though perhaps he envisages Parliament solving this problem at the same time that it sets new criteria for judicial review.

As noted by various commentators, e.g. Professor Wade⁵⁷, the law / fact distinction is also difficult to draw. Earlier it was pointed out that under the no evidence rule in **Nat Bell Liquors**,⁵⁸ a decision could be reached, on the basis of no factual evidence. Modern cases, by regarding it as a matter of law rather than fact, have been able to find jurisdiction in later cases. In **Global Plant Ltd v Secretary of State for Health & Social Services**⁵⁹ it was held that if a Minister makes a finding without evidence, it is an error of law. The Minister had decided that two drivers were employees and so the company had to pay a National Insurance Contribution on their behalf, which would not have been due if they were independent contractors. The minister had evidence before him on which to base the decision. It was not the court's task to decide the case on its merits. The court could find that the decision was one which, no reasonable decision-maker could have reached (the hypothetical doppelganger test) in the light of all the facts. However providing the decision was one which could have been reached by the decision maker, as it was in this case then the court would not interfere, (It was within the band of reasonableness surrounding a decision on the given facts.) Garner⁶⁰ notes that only Jurisdictional errors of fact can be converted into Jurisdictional errors of law by a lack of evidence, hence the distinction between **Nat Bell** and **Global Plant**. Does this mean that in the light of **Re Racal** there is no distinction between Jurisdictional and non-Jurisdictional errors of fact for tribunals but there is for courts of law, and if so what was the distinction between the missing evidence in **Nat Bell** and the sort of evidence which if lacking would have led Lord Widgery to strike down the minister's decision in **Global Plant** ? Garner does not

⁵³ eg. **A.G. v B.B.C.** [1981] 1 A.C. 303.

⁵⁴ **R v Greater Manchester Coroner's Court ex parte Tal** [1984] 3 All E.R. 240.

⁵⁵ Wade 1979. L.Q.R. p163 at 166. fn 20 above ; Emery & Smythe. Error of Law in Administrative Law. 1984 L.Q.R. 612. at p617 notes the warning of Professor Wade, Administrative Law 5th ed p817 that "there can hardly be a subject on which the courts act with such total lack of consistency as the difference between fact and Law". The categorisation may depend on policy. The court decides if it wishes to intervene as a matter of policy and then classifies the question as one of fact or one of law by asking the appropriate question which results in an affirmative answer one way or the other. This is especially so if the question is one of mixed fact and law where, it is difficult to establish criteria for the classification. Emery & Smythe argue that the courts are becoming more consistent and set out what they believe to be effective criteria for determining the question.

⁵⁶ De Smith : Judicial Review of Administrative Action. 4th ed. 1980. pp127-128.

⁵⁷ Wade. 1979, L.Q.R. p166. and see fn 20 supra. Emery & Smythe, p614 describe the division and categorisation of questions of mixed question of fact and law into separate questions of fact and law involved in the decision making process as a three stage process whereby the court engages in (i) fact finding, (ii) rule stating and (iii) rule application. The three stages may not occur consecutively or even separately, but they are implicit in deciding an issue. The three stages provide an analytical framework within which to identify and characterise the types of error which may occur. Even if one accepts their scheme as a viable method of categorisation even they accept, that the issue has been inconsistently dealt with by the judiciary.

⁵⁸ **R v Nat Bell Liquors** [1922) AC. 128. see above p20.

⁵⁹ **Global Plant Ltd v Secretary of State for Health and Social Services** 1972 1 Q.B. 127.

⁶⁰ Garner's Administrative Law. 6th ed. p102. foot note 19.

elaborate.⁶¹

In **Ashbridge Investments Ltd v Minister of Housing and Local Government**⁶² Lord Denning M.R. stated that the scope for review in statutory application cases may be wider than in inherent review cases and so covered any error of law, with the result that no evidence became an error of law. This is exhibited by **Colleen Properties Ltd v Minister of Housing and Local Government**⁶³. A local authority declared two rows of houses to be within a clearance area under the Housing Act 1957. The authority could compulsorily purchase 'any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area'. The local authority sought to acquire property adjacent to the two rows. The owner objected and a public inquiry was held. The authority submitted no evidence to support their claim that the property was needed to develop the area and the inspector submitted a report stating that the acquisition of the property was not necessary. The Minister of Housing rejected the report and confirmed the compulsory purchase order. The Housing Act 1957 provided for a 'statutory application to quash' procedure for judicial review, and the applicant used this procedure to challenge the Minister's decision. The Court of Appeal quashed the Minister's decision because there was no evidence on which he could reject the inspector's findings. The case could have been decided on the basis of jurisdictional error of fact, so on the facts of the case Denning's findings were obiter.

Garner feels that the distinction between statutory and inherent applications for judicial review is vital.⁶⁴ Outside the area of statutory applications to quash, 'no evidence' is not in itself a ground for challenge.

It has already been remarked that the courts have viewed the role of review from a variety of perspectives ranging from that of limited review in the early 18th century, through to that of extensive review culminating in the recent redrafting of Order 53 and cases such as **O'Reilly v Mackman**. Part of the problem in reviewing the case law on jurisdictional errors and non-jurisdictional errors is that the judges do not use consistent terminology but rather reflect the language of the perspective that they are operating under at any particular time. An understanding of the various perspectives is essential to understanding the conflicting categorisations given by judges to questions as being ones of law or fact and as jurisdictional or non-jurisdictional. Craig⁶⁵ discusses this issue at considerable length.

Under the theory of limited review if the subject matter lies within the tribunal's jurisdiction then any conditions qualifying the X factor in the equation "if X {qualified by a, b and c} then do Y", that is to say a, b or c, will not be reassessed by the court.⁶⁶ In **Brittain v Kinnaird** the magistrate had criminal jurisdiction where certain goods were carried in a boat. The defendant was convicted of carrying such goods in a vessel which the defendant claimed was not a boat. The classification of the vessel as a boat was held not to be jurisdictional. The jurisdictional matter was whether or not he was carrying the goods covered by the Act. Since he was the magistrate was not outside his jurisdiction.

Similarly in **R v Bolton**⁶⁷ the applicant was evicted from his property. Under the relevant statute a pauper could be evicted from property. The charge was properly laid under the statute. The court held that the magistrate was entitled to classify the applicant as a pauper despite the fact that he had paid his rates and maintained the property. The theory of limited review has received considerable support by Gordon who has written extensively in the law journals on the subject.⁶⁸ Gordon criticises the collateral fact doctrine. All powers and duties exercised by virtue of any Act of Parliament are subject to a condition that a certain state of affairs must exist first, but it is for the body entrusted with the power to determine whether or not that state of affairs exists. The collateral factors conditioning the existence of the X factor cannot be subdivided into preliminary and essential factors, since the conditioning factors are represented by the sum of those conditions. There is no workable test to distinguish between jurisdictional and non-jurisdictional conditioning factors. The cases on the subject cannot be reconciled. Gordon's test is too rigid. It

⁶¹ See also, below at p31. for Craig's explanation.

⁶² **Ashbridge Investments Ltd v Minister of Housing and Local Government** [1965] 3 All E.R. 371. ; Garner p102.

⁶³ **Colleen Properties Ltd v Minister of Housing and Local Government** [1971] 1 All E.R. 1049.

⁶⁴ See p30 below for Craig's viewpoint. ; Garner's Administrative Law. 6th ed. p164 ; Re Racal supra foot note 23 ; **South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union** [1981] AC 363.

⁶⁵ Craig, Administrative Law. p316 - 149.

⁶⁶ Craig. p304 – 305.

⁶⁷ **Brittain v Kinnaird** ; **R v Bolton**. See fn 14 supra.

⁶⁸ Gordon. The Relation of facts to Jurisdiction. 1929. 45 L.Q.R, 458. fn 6 supra; Craig p304.

affords too much power to the decision-maker. The argument is circular. The issue is within the jurisdiction of the decision-maker, provided the subject matter is properly placed before that body. Since the qualifying factors within the bracket cannot be looked at this will nearly always be so, so there is no method of challenging a body which assumes jurisdiction beyond that intended by Parliament.

Under the collateral or jurisdictional fact theory the court seeks to distinguish between parts of the X factor, so that some parts of it are jurisdictional and other parts are not. Whilst the theory attempts to seek out a middle line it provides little in the way of predictive guidelines to the way any new situation which has no direct indistinguishable precedent might be decided. The court has to separate those factors, which go to the merits of the case from those which merely qualify the X factor. These can be further subdivided into those which go to the jurisdiction of the case, and those which do not. The courts that have used the doctrine assume that there are non-jurisdictional elements that qualify the X factor. The problem is to devise a workable test to distinguish them from the jurisdictional elements.

A theory of "extensive review" has been advocated by Gould.⁶⁹ He would separate those factors going to the merits of the case from those that merely qualify the X factor. Since the X factor goes to the jurisdiction of the case he would not attempt to separate any of the elements qualifying the X factor at all. Gould's theory would force the courts to interfere whenever any factor qualifying the X factor was missing and would leave the courts with no room to manoeuvre. The present activist stance taken by the courts⁷⁰ may appear to resemble the result advocated by Gould, but it is one achieved by a generous interpretation by the courts of what is at present considered to be jurisdictional rather than by a blanket acceptance that all elements qualifying the X factor are jurisdictional. The theory of extensive review is based on three premises. Questions of law have only one answer which must be provided by the courts. This is the only way control can be maintained over bodies outside of the superior courts. Any clause, which indicates a contrary intention to these premises, will be interpreted almost out of existence.⁷¹ However the simple fact that a case is disputed demonstrates that questions of law can and do have more than one answer. Which answer is preferred is a subjective choice. There are no objective criteria for making the choice. In many cases Parliament will have chosen a body specialising in the subject matter at hand to make the choice. There is no good reason for concluding that a court could or should be better equipped to make the choice. The courts are not the only institution that can control the administrative process. Parliament, through question time, subcommittees, boards of inquiry and the Ombudsman can provide a measure of control.

It is clear that the courts have moved a long way from the concept of limited review formulated in **R v Bolton**, **Brittain v Kinnaird**, and **R v Mahoney**⁷² once more. The collateral fact doctrine has been in existence for a long time and has operated side by side with the limited review doctrine. It was used as early as 1632 in **Nichols v Walker**⁷³ to decide which of two boroughs had the right to levy poor law rates from a house-holder. Similarly in **Bunbury v Fuller**⁷⁴ it was held that in the circumstances a court could not find in an action for debt for non-payment of tithes. An assistant tithe commissioner had incorrectly ruled that the land was subject to tithes. Since his finding was incorrect the court had no jurisdiction over the matter. The assistant tithe commissioner was in effect attempting to give the court jurisdiction in a situation where it had none. With the exception of the statutory application cases⁷⁵ attempts to distinguish between limited review and collateral fact cases on the basis of different wording in the

⁶⁹ Gould, "Anisimic and Jurisdictional Review" [1970]P .L. 358. ; Craig. p307 fn12.

⁷⁰ With the decisions in **Pulhofer v Hillingdon L.B.C.** [1986] 1 All ER. 467 HL and **Ex parte Swati** [1986] 1 All E.R. 717, CA it has been suggested by Sunkin in 1986 N.L.J. 304 that the courts may be signalling a retreat from the activist, interventionist stance. ; G.L.Peiris in "Jurisdictional Review and Judicial Policy, The Evolving Mosaic " vol 103 L.Q.R. 1987, p66 at 105 concludes that whilst jurisdictional concepts have been widened the courts have been forced to find other methods of limiting review so that the end result is that little change has in fact been achieved. However, concrete gains have been made by the courts in their treatment of evidence within the decision making process which are unlikely to be negated completely. It is obvious that a limit must be placed on the courts so that judicial review does not disintegrate into appeal. (See chapter 5 below) The arbitrary distinctions applied to jurisdictional error was not the ideal method by which to limit review. In the light of modern judicial thinking the theory of limited review is unlikely to return.

⁷¹ Craig. p25.

⁷² See fn 14 supra re **Brittain v Kinnaird, R v Bolton & R v Mahoney**.

⁷³ **Nichols v Walker** 1632 - 1633 Cro.Car.394. Since two competing boroughs wished to levy a rate from the household the court had to make an interventionist decision to decide which could legitimately make the levy. The obvious method of reaching a decision was to find that only one of them could be acting within the jurisdiction afforded by the relevant statute.

⁷⁴ **Bunbury v Fuller**. (1853) 9 Ex.111 per Coleridge J at p140. ; see Craig p318.

⁷⁵ Presuming that the distinction between statutory applications is as vital as Garner believes. See fn 34 supra.

enabling statutes are not realistic. For this reason Craig⁷⁶ sees the difference between **Nat Bell** and the modern cases simply as the result of moving away from the theory of limited review.

How much evidence is needed before a decision becomes valid? This is a difficult question to answer especially where, as in **Ashbridge** and **Secretary of State for Education v Tameside M.B.C.**⁷⁷ the power is expressed as being operable where the decision-maker is "of the opinion that" certain conditions exist, or is "satisfied that" someone has acted in a particular manner. The courts have recently been prepared in such situations to find that a minimum content of evidence is necessary for the decision-maker to form an opinion.

In **Ashbridge** Lord Denning M.R. found that the court could intervene if the Minister concerned acted on no evidence, or reached a decision to which on the evidence he could not reasonably have come. In **Tameside** it was held that where a Minister had to decide on the reasonableness of the acts of a local education authority the court had to inquire into the existence of facts relied on by the minister, to ensure that the minister "*took those facts into consideration; made a proper self direction as to those facts did not consider other irrelevant facts in his decision, but that the evaluation of those facts is for the minister alone.*"⁷⁸

The court when it interferes does so on the basis that the tribunal concerned has erred in law. Craig feels the status of these cases is unsure in that they were concerned with a statutory form of control and not the common law and that House of Lord's cases to the contrary were not mentioned.⁷⁹

In the majority of cases it is not possible to challenge the opinion of the decision maker on the basis of jurisdiction at all since the existence of the elements qualifying the X factor becomes the subjective opinion of the decision maker and ceases to be a question of fact or law, jurisdictional or otherwise. The only way the decision can be challenged is on the basis that no reasonable decision maker could have arrived at that decision in the circumstances.

The grounds for judicial review for unreasonableness will be considered in Chapter 3 below. However, a number of cases have established that where the liberty of the applicant is involved there must be a minimum content of fact available to the decision maker before he can reach an opinion on the existence of a state of affairs which goes to the jurisdiction of the case. In **R v Secretary of State for the Home Department ex p Khawaja**⁸⁰ it was held that, when the liberty of a subject is at stake, sufficient evidence which merely gives rise to a belief that a certain state of affairs exists, is not enough. The relevant facts must be actually proved and a mistaken belief is reviewable. The rules established in **Khawaja** may not lay down general criteria for the exercise of opinion by a decision maker and may only apply where the liberty of a subject is at stake. The court justified its ruling that the decision had to be based on evidence on the need to protect the freedom of the individual. Future courts may extend the rule to include other and wider categories of subject matter of interest that also need protection. Eventually it could evolve into a general rule applying to all rights. Equally the courts may restrict the rule strictly to cases where liberty of the individual is involved.

In **Zamir**⁸¹ the court was concerned with the question whether an immigrant's entry certificate had been obtained by fraud. The House of Lords, Lord Wilberforce in particular, held that under s26(1)(c) of the Immigration Act 1971 an illegal entrant included not only the clandestine entrant into the U.K. but also someone who entered by

⁷⁶ Craig p318.

⁷⁷ **Ashbridge Investments Ltd v Minister of Housing and Local Government** (1965) 1 W.L.R. 1320. ; **Secretary of State for Education and Science v Tameside M.B.C.** (1977) A.C. 1014.

⁷⁸ Per Lord Wilberforce in **Tameside**, [1977] A.C. 1014 at 1047. "If a judgement requires, before it can be made, the existence of some facts then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgement has been made upon a proper self direction as to those facts, whether the judgement has not been made upon other facts which ought not to have been taken into account. If those requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge."

⁷⁹ Craig. p332.

⁸⁰ **R v Secretary of State for the Home Department, ex parte Khawaja** [1983] 1 All E.R. 765; and **ex parte Khera**. Both cases were heard at the same time. A series of cases which preceded these two had considerably restricted the rights to judicial review of immigrants against decisions reached by the immigration officials concerning the classification of such immigrants as illegal entrants see **R v Secretary of State for the Home department, ex parte Hussain** (1978) 1 W.L.R. 700 ; **R v Secretary of State for the Home Department, ex parte Choudhary** [1978] 1 W.L.R, 1177; **R v Secretary of State for the Home Department ex parte Jayakody** (1982) 1 W.L.R. 405.

⁸¹ **R v Secretary of State for the Home Department, ex parte Zamir** [1980] Q.B. 378; A.C. 930 ;

deception. It represented a breach of s26(1)(c) of the Act, and s33 defines illegal entrant to include a person who had entered in breach of the immigration laws. Wilberforce stated that an immigrant is under a positive duty of candour and a failure to disclose all material facts amounts to deception. The scope of review for such a decision was limited to the Wednesbury band of reasonableness principle. Zamir's application for habeas corpus was rejected.

In **ex p. Khera** an 18 year old Indian citizen applied for and was granted an entry certificate in 1974. His father had settled in the U.K. in 1972. Under the regulations as a dependant son under the age of 21 he was granted indefinite leave to enter in 1975. Unknown to the immigration officer Khera had married in 1975 and so was no longer dependant on his father. Khera had not been questioned on the matter. There was no evidence that he had deliberately or knowingly concealed the information. Khera was made subject to an order detaining him pending summary removal since there were reasonable grounds to conclude (under the Zamir formula) that he was an illegal immigrant.

In **ex p. Khawaja** a similar order had been made. Khawaja a Pakistani national had gone through a Muslim marriage ceremony to Mrs Butt in Belgium. They flew into Manchester airport and presented themselves to different immigration officers. He indicated an intention to stay for a week and received a visitor's entry permit for a month. The couple later married in England. Khawaja had deliberately concealed his intention to settle in England. The House of Lords reconsidered the meaning of illegal entrant. Under s33(1) Immigration Act 1971 an illegal entrant is defined as a person unlawfully entering or seeking to enter the U.K. in breach of the immigration laws and includes a person who has so entered. The H of L held that a person perpetrating a fraud is covered by the act. Fraud and deception include a deliberate failure to disclose material facts, where the applicant realises that such facts are material.

The scope of the courts powers to review the legality of an order to detain and remove an alleged illegal entrant. Under s4 and schedule 2 of the act the immigration authorities can remove and detain pending removal 'illegal entrants'. Zamir had held that the officer concerned could exercise these powers if he had reasonable grounds to believe the person was an illegal entrant. The applicant would have to show both that he was not an illegal entrant and that the officer concerned had no reasonable grounds to believe that he was one. This view was rejected in Khera and Khawaja. The officer had to prove the fact that the leave to enter was obtained by fraud. If the entrant was not in fact an illegal entrant the court could review the decision. A reasonable ground for belief alone on the part of the officer is insufficient. It was decided that Khera's detention was illegal, but that since Khawaja had been deliberately deceitful his detention order would not be disturbed. Nigel P Gravells,⁸² doubts that the rulings in Khera in actual fact made any difference since the Home Office could still go through deportation procedures. However as pointed out by Andrew Grubb,⁸³ the important issue of habeas corpus is involved. The applicant retains his freedom pending deportation proceedings and has important appeal rights appended to those proceedings. Peter Cane⁸⁴ concludes that **Khawaja** indicates that the courts may be moving towards a substantial evidence rule which might replace the theory of jurisdictional fact, but which would operate on a sliding scale depending on the importance of the issues at stake.

Conclusion

Where the existence of elements qualifying the X factor are the subject of the decision maker's opinion it has been demonstrated that there are problems in examining the quality of evidence needed before a decision maker can reach a decision. If a principled approach to the use of evidence were to be developed then consideration would have to be given to extending the rules as applied to **Khawaja** to cover a wider range of subject matter. In the meantime, where the opinion of the decision maker on such matters arises then the next form of review to be examined, namely reasonableness appears to be the most likely way that the opinion and the quality of evidence on which it has been based can be challenged.

⁸² "Removal of Illegal Entrants The Scope of Judicial Review" 99 L.Q.R. 1983 p363 at 371

⁸³ "Illegal Immigrants – 'Nothing to declare' - the House of Lords Rethinks" C.L.J. 1983. p184 - 187,

⁸⁴ ."An introduction to Administrative Law. Clarendon Law Series. Ch 3. Questions of Law and Questions of Fact at p62

PART III

Evidence And The Exercise Of Administrative Discretion.

Policies Governing The Exercise of Discretion

A decision-maker is presented with an issue that he has to settle. Logically, before he can proceed towards making that decision he must assemble all the facts relevant to the issue. He will then apply whatever criteria he has been supplied with, by the statute authorising him to make the decision, to the facts as known to him and make his decision. Viewed from this perspective the decision making process is a mechanistic one based on issues of fact and the application of legal principles, and as such is one which is infallible and cannot go wrong. Such a perspective however ignores the human element in decision making. In Part 2 above it was demonstrated that a subjective element may be introduced into the discovery of jurisdictional facts by making the existence of the fact subject to the opinion of the decision maker. Equally the appropriate course of conduct to be pursued by the decision maker can become a matter of subjective opinion by the introduction of a formula stating that the decision maker should do whatever he feels is most appropriate in the circumstances. The decision-maker is given a discretion as to what, if anything at all, he should do in the circumstances. In many instances the influence which facts and therefore evidence actually have on the decision can be severely restricted by the application of a subjectively worded formula. The discretion replaces the duty. A duty is a rule, which can be more easily enforced since there is only one course of action that the decision-maker is allowed to pursue.⁸⁵

The decision-maker may be given the discretion for a number of reasons. He is often considered to be an expert in the field in question and therefore the most appropriate person to make the decision. He is given the discretion to allow for more flexible decision making and to give him room to manoeuvre. Often he will have to balance the interests of persons affected by the outcome of the decision with the interests of the administrative department that he is acting for. The decision-maker may be guided by a self generated, or department generated policy. A policy may be challenged by way of judicial review in two ways. Firstly, the policy may act as a fetter on the exercise of a discretion within the decision making process. If the policy acts as a fetter the result is that the decision-maker may not be carrying out his statutory duty at all and so the policy may be struck down. Secondly, the policy adopted by the decision-maker may not reflect the criteria under the enabling legislation. Applying the policy may result in an attempt to achieve improper purposes, which would accordingly be ultra vires.

Policy in this context can belie the meaning given to it in ordinary parlance. D.J.Galligan provides a useful discourse on the use of policy in administrative decision making.⁸⁶ A discretionary power is considered, by many theorists and judges as something which requires each decision to be made according to the circumstances of the particular situation, free from the constraints of preconceived policies as to the ends and goals to be achieved by such power. He suggests that an alternative and better view is that :-

“discretion entails a power in the decision maker to make policy choices, not just to deal with the individual case, but to develop a coherent and consistent set of guidelines which seek to achieve ends and goals within the scope of powers and which determine particular decisions policy represents a choice by a decision maker, acting within the scope of his discretionary powers, to adopt or pursue a course of action where such course of action embodies or contributes towards achieving a goal or end which the decision maker considers desirable, advantageous or expedient.”⁸⁷

Any decision maker entrusted with wide discretionary power will be obliged to develop some guidelines to aid decision making on routine matters. L.L.Fuller observed that “in actual systems for controlling and directing human conduct, a total failure to achieve anything like a general rule is rare.”⁸⁸

⁸⁵ It was demonstrated in Part 2 above that the existence of a duty provides no guarantee that that duty can easily be enforced. In many situations the existence of circumstances which invoke the carrying out of the duty will form the central issue. Where the existence of such circumstances is a matter of opinion for the decision maker then unless the decision maker's opinion is one which no reasonable decision maker could have held, there will be no way to challenge the decision and thus enforce the duty.

⁸⁶ D.J.Galligan. "The Nature and Function of Policies within Discretionary Power." 1976 Public Law, 332 - 357.

⁸⁷ Galligan. p332.

⁸⁸ L.L.Fuller. "The morality of law." 1969. p48. See also Loughlin . Procedural Fairness A study of the crisis in Administrative Law. p237.

It is perhaps as well to distinguish at this stage between broad issues of policy, which will be discussed later in relation to reasonableness, and to the finer stages of policy which are akin to guidelines for more specific areas of decision making. Galligan adopts the word "individuation" to describe the process of adopting or developing guidelines by generalising policies to give content to discretionary power, which is constant from one decision to another, and nominates the guides that result as principles of individuation." Principles of individuation guide and condition the choice of the decision-maker in a particular case. They may be broad, flexible guides allowing the decision-maker a considerable degree of discretion, or, at the other extreme, norms whose specific terms are clear and specific, and which determine the decision in particular cases. The central issue in the legal control of policies is now clear according to Galligan

*"It is the resolution of the apparent conflict between the interest of the decision-maker in developing policies which determine particular decisions and the interest of the individual in obtaining discretionary decisions which take proper account of the special features of his claim."*⁸⁹

Galligan considers that individuation is natural, inevitable and highly desirable. By adopting and making known principles of individuation an authority satisfies demands of fairness by decisions which are consistent and reasonably predictable. If a decision-maker has criteria to follow he will have to develop a more reflective attitude towards decision making to ensure the criteria are fulfilled each time he makes a decision. Some questions are inherently unsuited to determination by generalised criteria. They are unique and non-recurring and incapable of classification. Galligan exemplifies such cases as those involving social security claims.⁹⁰ Skilled decision-makers are required to identify such areas of decision making. Apart from these areas individuation is to be desired. Any disadvantages to the individual are offset by the advantages of fairness and certainty.

If a policy acts as a fetter on the exercise of discretion the integrity of the policy may be subrogated to the interests of the individual. The origin of the policy may be generated by the decision-maker himself, or come from another department's guidelines or recommendations that he agrees to follow, from contracts that limit the scope of his future actions or from assurances given to others which form an estoppel restricting his future choices. It is not intended to analyse the different forms of fetter here, but simply to discuss the effect of a fetter on the exercise of discretion. The evidence which underpins the interests of the individual may be overlooked in the interests of the policy, or simply because the policy provides a rule guided method of decision making which saves the decision maker the trouble of thinking and applying the facts to the decision making process unless they fit exactly the criteria of the rules he is following.

How far should a decision-maker be allowed to follow principles of individuation, and at what stage should a line be drawn between the interests of the individual and those of the integrity of the policy ? This issue has received considerable academic attention in recent years from amongst others Davis, Blom-Cooper, McAuslan, Loughlin, Peter Cane and Jeffrey Jowell.⁹¹ and is related to the facilitative green light theory on administrative decision making and its corollary the individualist red light theory.⁹² There is little evidence of agreement on this question. The basis of judicial intervention however is clear. The discretion is given to the decision-maker and it is intended that he should make the decision. The purpose of judicial review is to ensure that from the Diceyan point of view the rule of law is observed and the decision-maker remains within the scope of his authority and follows any rules of law which

⁸⁹ Galligan. 1976, Public Law. p335.

⁹⁰ Contrast Cane, Chapter 4, Administrative Law. Clarendon Law Series. p67-68 where Professor Donnison's views on the need to individuate the guidelines for Social Security are laid out. Donnison was a Chairman of the Social Security Commission. See also McKenna, "The Legalisation of Supplementary Benefits." [1985] Public Law.

⁹¹ Davis. Discretionary Justice A preliminary Inquiry. Urbana, 1977, Louis Blom-Cooper. "Lawyers and Public Administrators Separate and Unequal. Public Law. pp215 - 235 Patrick McAuslan. Administrative Law, Consumption and Judicial Policy. 46 M.L.R. 1983. 1 - 20 : Martin Loughlin. Procedural Fairness A study of the crisis in Administrative Law Theory. 1978 28 University of Toronto L.J. 215 - 241 Peter Cane. Administrative Law. Clarendon Law Series. Chapter 4. Control of the Exercise of Discretionary Powers. Jeffrey Jowell. The Legal Control of Administrative Discretion. 1973. Public Law. 178 - 220. G.D.S.Taylor. Judicial review of improper purposes and irrelevant considerations. 35. C.L.J. 1976. pp272 - 291.

⁹² Traffic light analogy. The Red Light theory was so named by Carol Harlow & Richard Rawlings in Law and Administration. Law in Context Series. It indicates judicial decisions which operate as a red light to administrative action. The green light theory facilitates administrative action. Recently writers such as Martin Partington have become known as amber theorists in that they recognise that some administrative decisions show the red light and other a green light and so there is no consistent theory applicable to decisions in judicial review which act for or against the administration.

govern the exercise of his discretion. Judicial review is not an appeal on the merits of the case. Whether or not this is the ideal way to approach the matter is another question altogether.

The judicial attitude to the scope of individuation has varied from a wide general acceptance of the needs of rule guided decision making to the protection of the interests of the individual. The basic approach is that the rules should not fetter the exercise of discretion. **R v Port of London, ex parte Kynoch**.⁹³ General policy is permitted but the policy must not prevent the considering of merits in each situation. The authority had a discretionary power to grant licences for wharfage. The council had a policy not to grant licences for facilities which would be in direct competition with their own activities. Kynoch applied to construct a private wharf that would compete with them. They heard his application and considered whether there were any special circumstances, which justified a licence despite their general policy. They concluded there were none. The court held that the discretion had been exercised and there was no fetter on its exercise. If the policy acts as a rule that the authority will not hear any application of a particular character, by whomsoever made, the merits are disregarded. Thus in **R v Walsall J.J.**⁹⁴ the Liquor Licensing Magistrates passed a resolution not to hear applications for new licences and refused to hear the applicant or to consider his case. Mandamus would issue to direct the magistrates to hear and determine the application. Per Lord Campbell "*They cannot exercise the discretion reposed in them unless they hear the facts and arguments which the applicant is prepared to adduce.*"⁹⁵

A policy may be adopted but must not evolve into a rule, which prevents the exercise of discretion. Galligan categorises this as a restrictive approach to individuation. An alternative but equally restrictive approach is to allow a policy provided it is simply one of the factors taken into account in reaching a decision and that all other relevant factors are also taken into account. This approach was adopted in **Stringer v Minister of Housing and Local Government**.⁹⁶ If the decision-maker delegates his discretion, as in **Lavender v MR. & L.G.**,⁹⁷ the result is that he is prevented from giving proper consideration to other matters that might be relevant. Galligan commends an unrestrictive approach where the discretion is individuated to such an extent that the only question in the particular case is whether '*this policy should be applied to this situation ?*' Does this exclude consideration of the merits of a case ? Policy represents a decision in advance, as to the weight of certain factors which will be common to each exercise of discretion. This is part of the decision-maker's job. The only restriction on this is that an interested party should be told what the policy is and given an opportunity to argue for an exception to it in his case.⁹⁸ This in turn will ensure

⁹³ **R v Port of London ex parte Kynoch**. [1919]. 1 K.B. 176. Per Banks L.J. "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case ... If the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

⁹⁴ **R v Walsall J.J.**, (1859). 18. J.P. 757.

⁹⁵ Galligan. Public Law. 1976. p347.

⁹⁶ **Stringer v Minister of Housing and Local Government**. [1970] 1 W.L.R. 1281. A policy was adopted not to grant building permits within a certain area of the Jodrell Bank telescope to avoid undue interference to the telescope. An application was heard but dismissed in favour of the policy. Per Cooke J. on an application for judicial review. '*It is not however as it seems to me, a policy which is intended to be pursued to the disregard of other relevant consideration.*' See Galligan. p348.

⁹⁷ **Lavender and Son Ltd V Minister of Housing and Local Government**. [1970] 1 W.L.R. 1231, A fetter (in this case by delegation of the decision making process to the policy of another body) equals a failure to give proper consideration. Contrast **R v Rotherham. Licensing Justices. ex parte Chapman**. There was a general policy to grant no more than two occasional liquor licences at a time, though all applications were heard and from time to time an exception to the policy would be made. The C.A. declared this was an invalid fetter. It would appear that the C.A. went rather too far in this case. See p349. Galligan.

⁹⁸ **British Oxygen v Board of Trade**. [1971] AC. 610. The Board of Trade had a discretion to give grants to firms making capital investments. They established a policy that the minimum expenditure on any item of capital had to be £25. B.O.C. spent over £4m on new gas bottles. However each bottle cost less than £20. The Board of Trade refused a grant. Application for review on the grounds that the policy fettered the discretion. Per Bankes L.J. "*The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears' to an application. There is no great difference between a policy and a rule. There may be cases where the Board should listen to argument against a policy. What it must do is to refuse to listen at all .. a large authority may have had to deal already with many similar applications and then it*

that the merits of each application are heard and considered. Amazingly, Galligan uses **Boyle v Wilson** as a commendable example of this in action. It is true that it is an example of the judges allowing individuation.⁹⁹ There was however no obligation on the justices to hear evidence at all and no opportunity was afforded to her to argue effectively for the renewal of her licence, contrary to Galligan's claim. Galligan claims that this approach is attractive because it avoids the conceptual difficulties of allowing policies but then stipulating that they must be just one factor to consider in each case. He believes that only an exceptionally cynical person might think that a duty to hear an applicant's representations might deteriorate into a window dressing exercise which guarantees little in the way of sympathy to the individual case. Procedural safeguards may mean nothing if there is lack of substance, despite Galligan's opinion that the courts should not dabble with 'substantive policy.' These are two quite separate notions, which it is submitted Galligan has at this stage confused with each other.¹⁰⁰

The Use Of Policy to Achieve Improper Purposes.

The policy adopted, in the broader sense of the word than that used by Galligan to signify individuation, may be one, which seeks to achieve an improper purpose. There is little scope for discussing the role of evidence within the field of improper purposes, but the topic is laid out here as an essential prerequisite to understanding the related issues of reasonableness and relevant and irrelevant considerations since, in many of the cases, it is not possible to separate the reasoning adopted from the issue of improper purposes. It is common in administrative law for a decision of a reviewing court to be based on several issues, often with none of them being satisfactorily dealt with, in such a way that one is left with an impression that the conclusion reached is undeniably justified, but with a general picture of overall justice being constructed on the basis of a plethora of thin justifications cast over a wide area of seemingly relevant issues. This approach is evident in **Roberts v Hopwood**¹⁰¹ the decision being based on three separate grounds.

This tendency towards obfuscation makes it extremely difficult for the interested party to find anything tangible in the decision to which he can apply concrete evidence in order to prove the underlying premise incorrect. In fact, in attacking the underlying policy behind a decision-maker's exercise of power, the judiciary itself may be seen to be merely substituting its own policy for that of the decision maker. The courts might refute this allegation by pointing out that they are not there to substitute their own decisions for those of the initial decision-maker, and that the review court is not an appellate body. In such a situation evidence has a minimal role to play if any at all, since the court decides the issue on multifarious grounds. If one aspect of the decision is not supported by adequate evidence or justification then the court still has the other reasons for the decision to rely on, so a challenge is impracticable unless one can show all three premises to be incorrect.

Improper purposes are clearly evident regarding the exercise of powers under the Craig formula 'If X exists the authority may do Y'.¹⁰² This is not a licence to do Z. If the authority does Z it is ultra vires and void. Thus in **Municipal Council of Sydney v Campbell**,¹⁰³ the council purchased land near the city centre which was due to rise in value due to city centre improvements made by the Council. The council indulged in property speculation, with the aim of making a profit. The council was not empowered to do this. The council was limited under the legislation to purchases of land, which would improve the city centre.¹⁰⁴ Thus the council attempted to achieve an improper purpose. If the council had brought evidence to show that they had at first intended to use the property for city centre developments, but had later changed its mind then it would have been free to sell the property at a later date. Again since the council would be the sole possessor of evidence towards such a contention, once made it would be extremely difficult to disprove. The intrusion of law into such areas may in fact, therefore, not be of any long-term benefit in situations where the decision-maker acquires a higher level of legally orientated skill. The law will only catch out the careless administrator.

will almost certainly have evolved a policy so precise that it could be called a rule. There is no objection to that provided it is always ready to listen to a new argument." See Galligan p351.

⁹⁹ Galligan. p350

¹⁰⁰ Evidence to support substantive policy is referred to at pp51 - 52 below.

¹⁰¹ **Roberts v Hopwood**. [1925] AC. 578.

¹⁰² See Part 1 where the formula is introduced, and Part 2 where the question of collateral fact relating to the X factor is discussed.

¹⁰³ **Municipal Council of Sydney v Campbell** [1925] A.C. 339. P.C.

¹⁰⁴ The council's claim that the profit could then be ploughed back into city-centre improvements was not accepted by the court, despite the fact that council enterprises are often seen as legitimate methods of financing the council's statutory purposes.

However, the issues at stake are not always so obvious. The decision-maker may be guided by two separate considerations, one within the criteria of the enabling legislation and one outside it. Thus in **Westminster Corporation v London & S.W.Railway Co**¹⁰⁵ the council constructed a subway incorporating a public convenience. The council had the power to provide public conveniences but not to build the subway in its own right. It was held that the overriding intention of the council was to provide the public conveniences and not a subway so it was *intra vires*. Thus an *intra vires* purpose can be used to achieve *ultra vires* ends. The problem for the interested party, in such a situation, is to adduce evidence to show which of the purposes was regarded by the authority as the overriding purpose. Since the authority is usually exclusively in charge of the evidence this may be more easily said than done. This problem will be alluded to again later in discussions on procedural propriety and also in relation to evidence visible on the face of the record.¹⁰⁶

Sometimes the use of the power will clearly demonstrate that the purpose was not that intended by the legislature. Thus in **Congreve v Home Office**¹⁰⁷ the Court of Appeal held that a minister could not use his powers to revoke T.V. licences where the licence was abused, as a method of raising taxes. The legislation may not always spell out the purpose but the courts are often prepared to imply such a main purpose. This is especially true of planning law, where the courts will construe the legislation in such a way that any exercise of the power must reasonably relate to the use of the land. In **Mixnams Properties Ltd v Chertsey U.D.C.**¹⁰⁸ the authority used its licensing powers over caravan sites to secure security of tenure for the caravan dwellers, whereas the legislation was only intended according to the court to deal with sanitary matters.

Not all enabling legislation sets clear parameters for the exercise of power. It may in fact appear to leave the exercise entirely in the hands of the administrator, so that any decision he might reach might at first sight appear to be within his power. This is especially true of powers to do as the authority thinks fit and proper in the circumstances, or pay consideration to such matters as they feel are relevant. Even so the power can be used to achieve improper purposes. Thus in **Wheeler v Leicester City Council**¹⁰⁹ the council used a discretionary power to grant licences for the use of recreational grounds as a method of punishing a Rugby Football Club, for allowing three of its players to play rugby in South Africa, contrary to an anti apartheid policy adopted by the council. In exercising the power the council was entitled to have regard to any policy which would promote good race relations in the city. The policy pursued was such a policy, but was overridden by the fact that the central feature of the decision was to punish the R.F.C. Similarly in **Roberts v Hopwood**¹¹⁰ a council could pay whatever wage rates it saw fit. Nonetheless an attempt to create equality between male and female employees was an improper purpose, motivated by misguided philanthropy¹¹¹ according to the House of Lords. Perhaps the most striking example of the judiciary finding improper purposes is the "Fares Fair" decision in **Bromley London Borough Council v Greater London Council**¹¹² (The Fares Fare Case) where, the House of Lords followed an extremely tortuous route to discover that the underlying purpose behind the London Transport Act 1969 was the provision of economically viable transport, thus making subsidised transport *ultra vires* as misguided altruism. The court would not accept the admission of evidence towards the planner's belief that a short term loss would in fact turn into profit in the long run through increased use of the transport system and a benefit from the optimum use of the transport system and economies of scale. Such a gamble could be made by a profit orientated-private company, but not by the council.

Where a statute states that certain considerations must be taken into account, any failure to take such considerations into account will render the decision void and *ultra vires*. The resultant formula, "If X, then having assessed the implications of L & M you may do Y or Z etc." is analogous to the Craig formula "If X exists you can do Y."

If L and M are not taken into consideration an essential stage in the decision making process is lacking and the decision maker cannot proceed to the final stage and decide to do Y or Z. In **Richmond On Thames L.B.C. v**

¹⁰⁵ **Westminster Corporation v L.N.W.R.** [1905] A.C. 426 H of L.

¹⁰⁶ See Part 1 on evidence on the face of the record & Part 4 below on procedural propriety.

¹⁰⁷ **Congreve v Home Office** [1976] Q.B. 629. C.A.

¹⁰⁸ **Mixnams Properties Ltd v Chertsey U.D.C.** [1965] A.C. 735. H of L.

¹⁰⁹ **Wheeler v Leicester City Council** [1985] 2 All E.R. 1106.

¹¹⁰ See fn 17 supra.

¹¹¹ **Roberts v Hopwood.** House of Lords, Per Lord Atkinson. 'considerations of Socialist philanthropy and feminist ambition.'

¹¹² **Bromley L.B.C. v G.L.C.** [1982] 2 W.L.R. 726.

Secretary of State¹¹³ the Town & Country Planning Act stated that the council had to take the Outline Development Plan into consideration in decisions on planning permission and so a decision which failed to do so was ultra vires. Even if the statute does not state what considerations have to be taken into account the court may imply relevant considerations, which have to be taken into account. Lord Diplock explains in *Administrative Law Judicial Review* Reviewed.¹¹⁴

"that there has been a growing tendency to give Acts of Parliament a purposive construction .. and that from this it is but a short step to the presumption that parliament intended the discretion to be exercised rationally and responsibly; and rationality and responsibility involve that due consideration should have been given to all matters relevant to the achievement of the intended purpose and that matters irrelevant to that purpose should not have influenced the decision."

In the "**Fares Fair**" case the House of Lords held that the G.L.C. had failed to take into account the fiduciary duty owed to the rate payers. Similarly in **Roberts v Hopwood** the fiduciary duty to the rate payers was not taken into consideration. Even more difficult to categorise is the converse, taking into consideration irrelevant matters. It is rare to find a statute that states criteria that must not be taken into account, though they do exist, e.g. s13 T.U.L.R.A. 1974 states that certain acts done in furtherance of a trade dispute will not be actionable for the reason only that they have caused a breach of contract.

Irrelevance is more usually implied, by the courts. Probably the most famous example is that adopted by Lord Greene in **Associated Picture Houses Ltd v Wednesbury Corporation**¹¹⁵ of taking into consideration the colour of a teacher's hair. Whilst it appears to be blatantly obvious that it would be unreasonable to take into account the fact that a prospective teacher has red hair in considering her job application, it might not be so obvious if that person was dressed as a punk with bright green, yellow and blue hair. Nor is it so obvious to us today to understand the relevance and reasoning, namely, the protection of youngster's morality from the depredations of film viewing on the Sabbath, applied by the magistrates and upheld by Lord Greene in rejecting the cinema's application for a licence to show films to young persons under 15 years of age on a Sunday night. Evidence adduced to show that the local community had a need for the entertainment for the whole family was of no avail, and irrelevant. Evidence can seldom be of any avail when confronted with "justifiable policy".¹¹⁶ **Roberts v Hopwood** can be viewed from this perspective as the taking into consideration of irrelevant considerations, namely misguided philanthropy. Possibly a perfect example of applying relevance or irrelevancy in whichever manner you chose to justify one's conclusions is provided by contrasting the relevance to the decision making process in the **Secretary of State for Education & Science v Tameside**¹¹⁷ where the House of Lords held that it was relevant to the decision that the local electorate had delivered a mandate for the retention of Grammar School education, whereas a mandate for the G.L.C.'s policies on transport was not relevant to the Fares Fare decision.

McAuslan offers an explanation as to the differing results in the **Tameside** and the **G.L.C.** cases.¹¹⁸ (34). The judiciary traditionally represent the interests of the individual, to which they can best relate. They do not readily accept the concept of collective services provided by the state to cater for the needs of the individual. His individual interests should be encouraged as also should his independent spirit to stand up and provide for himself. This Victorian attitude has since 1980, with the encouragement of the present government been reasserted by the judiciary after an atypical period during which they were more willing to facilitate collective consumption policies of central government. **Tameside** represented a choice between types of educational policy but did not represent an increase in collective provisions by the state. The **G.L.C.** case represented an increase in collective consumption by subsidising transport. Thus in **Tameside** the reasonableness of taking account of the views of the electorate was not

¹¹³ **Richmond on Thames London Borough Council v Secretary of State for the Environment**. [1984] Times. 16th May 1983.

¹¹⁴ Diplock. see fn 22. and C.L.J. 1974 at p243.

¹¹⁵ **Associated Picture Houses v Wednesbury Corp**. [1948] 1 K.B. 223. Lord Greene adopted the example of a red haired teacher from the judgement of Warrington L.J. in **Short v Poole Corporation** [1926] Ch.66.

¹¹⁶ Compare policy as a fetter, where there is a failure to hear the application and to consider the evidence or to exercise a discretion at all with the operation of a justifiable policy which can prevail over evidence. But note the argument for challenging policy on the ground that the policy is not supported by evidence. See below p52, re Galligan and the **Sagnata case**.

¹¹⁷ **Secretary of State for Education and Science v Tameside M.B.C.** (1977) A.C. 1014.

¹¹⁸ McAuslan. "Administrative Law, Collective Consumption and Judicial Policy." 46. M.L.R. 1983. pp12 - 19.

questioned and fiduciary duties were not discussed, whereas in the **G.L.C** case the wishes of the electorate were not to be reasonably taken into account, and the fiduciary duty became a central issue. It could however be pointed out that the view reflected in the **G.L.G.** case was presaged in the **Prescott** case.¹¹⁹ Equally it could be said that the judiciary are more ideologically disposed towards Grammar School education.

Loughlin discusses the idea of structure concerning the aims and goals implicit in an enabling statute, as espoused by Davis and Lon Fuller.¹²⁰ Each statute has a structural integrity which can be divined by the judiciary. If the decision maker does not follow the aims and goals revealed explicitly or implicitly by the statute his decisions will be struck down. The difference between **Tameside** and the **G.L.C.** cases would therefore be that in **Tameside** the authority had correctly followed the structural integrity of the act in question whereas the **G.L.C.** had not. He admits that his work is essentially critical¹²¹ and whilst he outlines the theoretical basis of the structure argument he does not appear to be convinced that it is in fact a sound theory. At the end of the day all he seems to be saying is that the judiciary should not lose sight of the fact that their jurisdiction in judicial review is based on the rule of law in their attempts to apply notions of fairness to the exercise of administrative discretion.

Galligan discusses the evidential basis that is needed to support a policy. Whilst **Sagnata**¹²² was decided ultimately on the basis that the decision makers had fettered their discretion and had not in fact exercised their discretion at all the evidential basis of policy was discussed in considerable detail. If the reasons for adopting a policy and the reasons for exercising a discretion in a particular way are the same, and there is insufficient evidence to support the decision, does this mean that the policy is unreasonable? The problem is that two quite separate notions are under consideration, which share a common feature. It is inevitable that in deciding whether or not there is sufficient evidence to support a decision the judiciary will appear to endorse or criticise a matter which is essentially political. Galligan correctly points out that it is often impossible to produce hard evidence that a political policy will work. That does not prevent people from supporting the opposing views of different political parties, and the expectation is that under a democratic system the party that commands a majority will receive a mandate to carry out its policies. The problem arises where there is a disparity between the policies which have received legal authority

¹¹⁹ **Prescott v Birmingham Corporation**. [1955] Ch. 210.

¹²⁰ Loughlin. 28. University of Toronto L.J. 1978. at p237.

¹²¹ Loughlin. see foot note 6 above. 28. U.T.L.J. 1978 at p215. ; Loughlin attempts to reconcile the **Tameside** and **G.L.C.** cases' varying treatments of the electoral issue in "Local Government, The Law and the Constitution. [1983] Local Government and Society. pp100 - 106. Lord Wilberforce delivered judgements in both cases. He stated in **Tameside**, [1976] 3 W.L.R. 641 at 668 that "*Some selection procedure was inherent in what the electorate had voted for ... It would seem likely that in voting for this change in May 1976 the electors must have accepted, if not favoured, some degree of improvisation ... he (the Secretary of State) failed to take into account that it was entitled - indeed in a sense bound - to carry out the policy on which it was elected.*"

Lord Denning M.R. in the **G.L.C.** case however made it clear that an item on the manifesto of a political party is not binding. Every issue even though on the manifesto must be fully considered afresh when the time arises, and do what is fair and practicable in the circumstances. In the **G.L.C.** Case Lord Wilberforce said that "*The courts will give full recognition to the wide discretion conferred on the Council by Parliament and will not lightly interfere with its exercise. But its actions, unlike those of Parliament, are examinable by the courts, whether on the grounds of vires or on the principles of administrative law. It makes no difference to the question of legality (as opposed to reasonableness see Tameside) whether the impugned action was or was not submitted to or approved by the relevant electorate.*"

In effect an electoral mandate can make a decision reasonable and if that is the only ground it is challenged on then the challenge can be defeated. However if the issue is legality the mandate cannot make what would otherwise be illegal and outside the vires of the authority legal. Diplock also raised the issue of the mandate acting as a fetter on the exercise of discretion. This strand of argument is unwise since it involves the judiciary too closely in political issues and should not in Loughlin's view be followed in future. Loughlin admits that the various reasons used by the judges may in fact be no more than methods of justifying decisions made on the basis of their own ideological leanings. Whilst he rationalises the differences between the two cases the reader is left with the conclusion that even Loughlin himself is not convinced by his own argument.

¹²² **Sagnata Investments Ltd v Norwich Corporation** [1971] 2 Q.B. 614. Sagnata applied for planning permission to open a coin operated amusement hall in the centre of Norwich. The council had decided that such machines are a bad influence on youngsters since it encourages them to become addicted to gambling. The addiction leads to a need for money which leads them into criminal activities and bad company. In order to protect them from themselves they decided not to allow any such centres in their town. Sagnata applied for judicial review in that the policy was unreasonable, acted as a fetter on the discretion and that it was not supported by evidence. See Galligan. p352.

from Parliament and those of a local authority.¹²³ Irrespective of the rights and wrongs of the policy the judiciary should give precedence to the policy which has legal backing. If a change in policy is desired then it is for political forces to seek authority from Parliament for the change.

The final conclusions drawn by Lord Greene in the *Wednesbury* 1948¹²⁴ probably place judicial review of administrative decision making on the grounds of reasonableness into a better perspective than anyone else possibly could.

“The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the authority, but as a judicial authority which is concerned only to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in them.”

Lord Greene explains¹²⁵ that grounds for such a finding would have to be overwhelming and spells out that the mere fact that the review court thinks the decision was unreasonable is insufficient. It must be so unreasonable that no reasonable body could have come to it. Such a finding would be rare. However as with many newly developed criteria which are seen as being potentially applicable in the rarest of situations their use often proves to be of a more frequent application than had been anticipated.

The danger of establishing such criteria regarding the exercise of administrative decision making powers is that the administration may be forced either into excessive caution and thus fail to do its job properly or conversely to hedge its decisions with statements which claim that all the relevant circumstances have been taken into account but that at the end of the day such and such a decision has been reached. The decision maker may, in this way, be able to obstruct any later attempts at judicial review. However even this may be to no avail. Lord Denning proclaimed¹²⁶ that it is always possible to attack a policy decision on the grounds of reasonableness. The implications of this for any decision maker is that he can never be certain that his policy will be approved whatever he does. There are also inherent dangers for the judiciary. There is an extremely thin line between a decision which no reasonable decision maker could have reached in the circumstances, and a decision which the reviewing judge feels could not reasonably have been reached, in the circumstances as seen through the subjective eyes of the judge. Theoretically this should present no problems. The circumstances are viewed objectively from the standpoint of a hypothetical doppelganger, e.g. a reasonable G.L.C. or a reasonable Minister of Education. The problem is that there is only one G.L.C. There are no other G.L.C.s that can be studied to gain an understanding of what the average, reasonable G.L.C. might have done in similar circumstances.

The major problem with reasonableness as a ground for judicial review is that the issues in question are rarely

¹²³ Disparity between the policies of local and central government are not unusual. Frequently opposing political parties control central and local government. Even where the parties and their general policy are the same local needs and central government needs can differ. It is even possible for the central government to approve of the acts of local government and yet to officially oppose them in that the government in power has not got around to repealing legislation disallowing such conduct, or equally authorising it. The acts of the local authority may be contrary to legislation, or unauthorised because it is not *intra vires* the powers so far granted to that authority. The central government and the local government both receive their status on the basis of a mandate. The only practical method of settling a disparity between such bodies is to recognise that Parliament is the supreme body, and that despite local representation, all that the local representative can be empowered to do by virtue of the local mandate is to carry out those acts for which it has received authority to act by Parliament. Regarding evidence to support political notions see Galligan, p342.. Per Phillimore L.J. in *Sagnata* at p639. *“Nobody came forward to say that this sort of arcade had resulted in disastrous damage to the morality of the young in Great Yarmouth or any seaside place or was likely to prove particularly harmful to the young people of Norwich.”*

¹²⁴ *Wednesbury*.at p233 : See foot note 30 above.

¹²⁵ *Infra* p230

¹²⁶ Source. Denning's Book

tangible. The issues dealt with are frequently more a question of policy than of hard fact. Whether or not the judiciary should be permitted to use the reasonableness test or not it is clear that it is not a reliable method of ensuring that a decision-maker's decisions are supported by sound evidence. If the reasonableness test is applied to the **Boyle v Wilson** situation how effective would it be at providing Mrs Boyle with a remedy? The reason for denying her a renewal of her licence was that the authority had settled on a policy of slum clearance. They had decided to clear the area of congested old property. There were, to their mind too many public houses in the area. The sanitary conditions in the area fell below what they saw to be a desirable level. This state of affairs could be verified and shown to be based on sound evidence. Perhaps the justices deciding the application had personal knowledge of the area. On this basis the policy could not be attacked as being unreasonable. Even if the situation was not as cut and dried as surmised what amounts to a slum would be a matter of opinion. Any challenge on this basis would depend on whether the judge reviewing the opinion agreed with it. This in fact probably accounts for the actual decision, in that the judges concerned sympathised with the objectives of the justices in facilitating the rehabilitation of the area, and so shared their opinion.

There was a desire to limit the number of public houses in the area. The policy does not explain why Mrs Boyle's pub should be one of those that had to go rather than any of the other pubs that may have been in the same condition as hers. The rules applied to her application were not the normal criteria of individuation regarding licensing applications. They were a new set of rules, to deal with a new situation. Even if Mrs Boyle had been given an opportunity to present a case for making an exception in her case the strength of the policy in operation might have been so strong that she could not have prevailed in any case. Whilst it does not advance the present discussion on the relevance of evidence directly, perhaps Mrs Boyle's preferred course of action would have been to argue that the discretion was being used to achieve an improper purpose, namely to facilitate slum clearance, and so was an improper exercise of the discretion.

Galligan¹²⁷ concludes that the merits of each case should ensure a minimum level of participation to interested parties where policy considerations are applied to the exercise of administrative discretion. This in turn implies that :-

- A) the policies and their principles of individuation upon which authorities act should be publicised.
- B) individuation is a good thing in relation to discretionary decision making.
- C) where possible formalised and public channels should be used to formulate the principles of individuation
- D) an individual should have the opportunity to show that he should be made an exception to the general policy.
- E) reasons should be given to show how an individual's case has been related to the policy.

A) is certainly a useful suggestion which would provide a degree of certainty and prediction. In the final chapter this will also be linked to the concept of legitimate expectation. Individuation is no doubt a very necessary process but one cannot wholeheartedly embrace the process unless the necessary checks and balances of A), D) and E) are present, the latter being sound proposals. Whilst agreeing with these conclusions the present writer feels that in places Galligan himself has been prepared to presume that they have been applied when in fact they have not.

An alternative method of challenging the administrative decision making process is to ask whether justice has been achieved, and whether the proper procedures have been followed. It is this topic which will be examined in the next chapter. Since Mrs Boyle received a very rough form of justice there is some hope that this may provide a remedy for a person in her position today.

PART IV

¹²⁷ Galligan. p356 - 357,

Natural Justice and Procedural Impropriety.

Introduction

The rules of Natural Justice represent an area of Public Law that relates directly to the role played by evidence in the decision making process. In any given situation where the rules of Natural Justice apply the first rule is that the decision maker must be seen to be free from bias (*nemo iudex in causa sua*) and secondly the individual who is affected by the decision must be given the opportunity to be heard (*audi alteram partem*). The implication is that the parties to any issue will be given a fair hearing with all the necessary opportunities to present their case. Adequate notice must be given of the date of the hearing. The party must be supplied with sufficient information of the other party's contentions so that they can prepare a defence and at the hearing they must be given the opportunity to challenge and rebut evidence proffered against them. The decision must be reached by persons who are totally impartial and who have no interest in the outcome of the hearing. This last rule is so strict that they must not only have no interest in the outcome but they must be seen to have no interest. Thus in **Dimes v Grand Junction Canal Proprietors**¹²⁸ the mere fact that the Lord Chancellor involved in a decision had an indirect interest via the shareholding of his wife in the company concerned was sufficient to invalidate the proceedings, even though he was unaware at the time of the contents of his wife's portfolio and was in reality beyond suspicion.

In such a situation it would appear that the decision in **Boyle v Wilson** could not be repeated today. Mrs Boyle would have every opportunity to cross question the policeman who stated that, in his opinion, her public house was insanitary and to adduce conclusive evidence, if any to the contrary. The outcome of the issue would then be more likely to depend fairly on the facts of the case and not on the mere un-sworn and unverified opinions of an official.¹²⁹

There would appear to be little more to be said about this issue if the above scenario is taken at face value. Indeed the rules of natural justice are often presented in such an un-complicated manner. Thus Lord Denning in his book "The Discipline of Law"¹³⁰ discusses natural justice in the following terms

"I have spent ... very little time on want of natural justice, or bias and the like. The reason is because these have given rise to no controversy. It is beyond doubt that, if a tribunal fails to observe the rules of natural justice, or is biased - its decision is a nullity and void; and it can be quashed on certiorari; or declared void by a declaration to that effect...."

Not every writer sees the issue as being so straight forward. D.C.Yardley states that :-

*"There is no area of administrative law which is so replete with recent case law as that concerned with the rules of natural justice,.... It is because of the complexity of modern life .. that the meaning and status of these rules is so important, and that their practical application to particular circumstances so often becomes the subject of litigation".*¹³¹

The apparent divergence of opinion between these two writers can be reconciled. Lord Denning limited his discussion of the rules of natural justice to the sphere of administrative tribunals, making decisions affecting the legal rights of the parties involved, where it is clearly recognised that the rules apply with all their force and vigour. On the other hand Yardley relates the application of natural justice to the whole gamut of administrative decision making and points to the difficulties that arise in determining whether or not the rules apply, and if not what if anything replaces them, in many situations which are not as favourably protected as the tribunal setting.

Neither writer would minimise the importance of the two rules of natural justice since when they apply their effect is devastating on any decision reached in breach of them. Each rule is separate and complete in itself. A breach of either is sufficient to invalidate a decision. There is no need to show a breach of both rules.

¹²⁸ **Dimes v The Proprietors of the Grand Junction Canal.** (1852) 3 H.L.C. 759, House of Lords. per Parke.B.

¹²⁹ Craig p313 - 315 draws the distinction between limited review and the collateral fact doctrine and questions whether the courts are capable of or even intend to discover the facts of any given situation rather than to set guidelines as to the type of issue which is admissible in an adversarial trial. A court does not necessarily discover the facts. It establishes as a matter of law its view of the facts and makes a determination based on its discovery. This is an essentially pragmatic approach, which is justified since in many situations there is no single undeniable truth, since truth and fact often depend on the standpoint of the observer.

¹³⁰ The Discipline of Law Butterworth. 1979. p84.

¹³¹ DC.M.Yardley. Chapter 4 .Principles of Administrative Law. 1981. 5th ed, p92.

If these rules were to be applied to all forms of administrative decision making however, the administration itself would very quickly come to a halt under the burden of complying with their conditions. Every person affected by a decision of the administration in any manner whatsoever, might have to be notified of the agency's designs and given an opportunity to oppose the proposals. A great deal of time would be needed to hear the resulting disputes and would involve a massive expansion in the resources allocated to tribunals plus an increase in departmental personnel to advocate on behalf of the administrative department concerned. A decision maker would have to be totally free from any interest - personal or policy wise - in any decision in which he was involved. This being so it is obvious that the rules of natural justice have to be limited in their application if the administration is to perform its function. This limiting of the scope of natural justice is not necessarily unfair since many of the decisions taken by administrators do not affect anyone else but the administrative department involved. Thus a restructuring of the internal organization of an administrative department affects only the personnel of that department and not the legal rights and interests of outsiders. It has already been noted¹³² that the scope of judicial review is limited by the rules on standing. Many persons might be interested in what the department is doing, but it is not practicable to allow any and every person with an interest in the affairs of the department to interfere in administrative business unless they have some special form of interest in the department's activities. In this chapter we are concerned with the different standards of natural justice that apply to different degrees of interest that have successfully passed the test for standing. The problem is how to draw up a dividing line above which the rules of natural justice (or some lower standard of procedural fairness) apply and below which they do not. This has been achieved at various times by a variety of devices with differing degrees of success.

In their early applications there seem to have been few restrictions placed on the use of the rules. The single criterion appears to have been whether or not the applicant had a legal right or interest at stake. Thus in **Cooper v Wandsworth Board of Works**¹³³ the applicant had started to build a house. Under an early form of planning control, legislation had decreed that before a house could be built the plans had to be submitted to a board of works. Cooper had failed to do this and the Board therefore ordered that his house be pulled down and proceeded to have it demolished. Cooper sued for damages. He successfully contended that he should have been given an opportunity to explain why he had not tendered the requisite notice. The problem with this form of selection is that there are many situations where an applicant may have something at stake but it is not a legal right. Thus an applicant for a licence has a mere hope of being granted the licence. If a person wishes to renew a licence he only has a privilege. The early view was that the rules of natural justice were complete in scope and in content. Either they applied in full or not at all. Mrs Boyle would have lost her case if she had applied for natural justice if this were the only criterion applicable, because she did not have a legal right, merely a privilege. There was no lesser degree of natural justice to apply to situations, which fell lower down the scale of justice.

In the early twentieth century a new criterion was adopted. Instead of classifying the interest of the applicant the courts classified the type of decision. The rules of natural justice applied only to judicial and quasi-judicial decision making. Purely administrative decisions were not subject to the rules of natural justice, or for that matter, to most of the controls available through the courts for judicial review by means of certiorari or mandamus. This situation remained until 1958 and the case of **Pyx Granite**¹³⁴ when a declaration was allowed against an administrative decision. From that time onwards events moved quite quickly until the administrative / judicial distinction was discredited. However whilst in force its effect was to severely limit the scope and application of natural justice. Part of its rationale still lives on today so it is worth reviewing the way it worked and the history of its demise. The main impetus for the distinction between judicial and administrative decisions came from the Report of the Donoughmore - Scott Committee on Ministers' Powers in 1932. This report classified administrative decision making into the judicial, quasi judicial and purely administrative.

“A true judicial decision presupposes an existing dispute between two or more parties, and then involves four prerequisites:

- 1) *The presentation (not necessarily orally) of their case by the parties to the dispute;*

¹³² The rules of standing and Order 53 are discussed in Part 2 above at fn 10.

¹³³ **Cooper v Wandsworth Board of Works**. [1863] 14 C.B.N.S. 180

¹³⁴ **Pyx Granite Co Ltd v Minister of Housing and Local Government** (1958) 1 Q.B. 544..

- 2) *if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence,*
- 3) *if the dispute between them is a question of law, the submission of legal argument by the parties; and*
- 4) *a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.*

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

Decisions which are purely administrative stand on a wholly different footing from quasi judicial as well as from judicial decisions and must be distinguished accordingly... In the case of the administrative decision, there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments or to collate any evidence, or to solve any issue, The grounds upon which he acts, and the means which he takes to inform himself before acting are left entirely to his discretion..”

The courts clearly recognised the judicial role since it was one they were engaged in and quickly followed the report's recommendations only to apply natural justice to the judicial and quasi judicial actions of administrators. Thus in **Errington v Minister of Health** 1935.¹³⁵ only three years after the report the courts refused to apply the rules of natural justice to events at a public inquiry since it was a purely administrative decision which was involved. Shortly after this the U.K. was involved in the Second World War. The need to give the executive all the freedom possible to facilitate the war meant that the judiciary were not likely to recognise any expansion of judicial review which might have resulted in the courts placing limits on that freedom.

It is clear that the courts were moving towards a more restrictive attitude towards the application of natural justice to administrative decision making even before the Donoughmore Report. Thus in **Board of Education v Rice**¹³⁶ Lord Loreburn remarked

“that regarding administrative decision making "It will, I suppose, usually be of an administrative kind ; but sometimes it will involve matter of law as well as matter of fact, or even depend on matter of law alone. In such cases the Board of Education will have to ascertain the law and also ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. Provided this is done, there is no appeal from the determination of the board under section 7(3) of this act.”

The significant factor here is that he did not attempt to exclude Judicial review or the rules of Natural Justice. Nonetheless he raises the idea of a duty of fairness and the concept of purely administrative action, both of which were to play a significant role in the development of the law in this area in future times. The case lies mid way between the era of protection of the individual and laissez faire, and the era of more active government participation in an ever widening range of communal services for the nation as a whole.¹³⁷

¹³⁵ **Errington v Minister of Health** [1935] 1 K.B. 249.

¹³⁶ **Board of Education v Rice** [1911] A.C. 120

¹³⁷ Compare the change in intensity of the interference of central government in the twentieth century with that in the nineteenth century. This is not to imply that state intervention is anything new. The nineteenth century saw a period of unprecedented intervention in many areas. Laissez faire might have been the economic flag ship of Victorian England, but under Chadwick (the influence of utilitarianism saw a rapid growth in sanitary legislation, poor law legislation) municipal acts, industrial safety legislation and the like. It is simply the intensity of interference that changed. By contrast at the present times the government is attempting to push back the frontiers of interference. The rhetoric in government and ostensibly in the courts is once more on personal liberty and freedom though the result in reality is not necessarily the same See also Loughlin 'Local Government in the Modern State'. (London, S &M, 1986) for an account of which frontiers of the state are being pushed back and which extended.

A more telling indication of what was to follow came in **Local Government Board v Arlidge**¹³⁸ where it was opined by Lord Shaw that :- *“the adjudicative model should not automatically apply to administrative decision-making, as judicial methods may, in many points of administration, be entirely unsuitable and produce delays, expense and public and private injury.”*

This attitude prevailed up till the mid 1950's and reached its nadir with the cases of **Nakkuda Ali v Jayaratne**¹³⁹ and **R v Metropolitan Police Commissioner ex parte Parker**¹⁴⁰ In **Nakkuda Ali** the Controller of Textiles of Ceylon had the power to revoke the licences of persons dealing in textiles. The Privy Council held that this was an administrative power. Certiorari could only issue to quash a judicial decision and not an administrative act and so the rules of natural justice could not be enforced. Similarly in **Parker** a taxi driver had his licence removed by the Police Commissioner after he received a report that Parker had been helping prostitutes by providing them with a taxi service. It was held that the decision was purely administrative and that Parker had no right to present his case and to be heard before the decision was reached.

The major turning point in the distinction between judicial and administrative decisions came with the case of **Ridge v Baldwin**¹⁴¹ This case saw the return of the older line of cases such as **Cooper v Wandsworth Board of Works** and concentrated once more on the interest at stake. The Chief Constable of Brighton, the plaintiff in the case had been unsuccessfully prosecuted on a charge of conspiracy. Nonetheless the judge had observed that perhaps he was not the ideal person to act as Chief Constable of a Police Force. The local watch committee subsequently summarily dismissed him. They claimed to be exercising their statutory powers. He was given no opportunity to hear the charges against him or to make representations. He sought a declaration that the dismissal was invalid, not because he wished to keep his job, since he was willing to take early retirement, but rather because he wished to protect his pension rights. The House of Lords granted the declaration. He could only be dismissed under the statutory powers if he had been negligent, or on grounds that he was unfit to carry out his duties. He had a right to know of the charges against him and should be given an opportunity to make representations in his defence. Natural justice applies to a wider number of situations to those described as judicial by the Donoughmore Report.

Ridge v Baldwin was the first of a series of cases which gradually dismantled the judicial / administrative distinction as far as the application of the rules of natural justice were concerned. The courts still had to resolve the question as to when the rules should and when they should not apply. What has emerged is a form of compromise, which at one stage threatened the whole concept of natural justice. As has already been remarked, in its original form the rules of natural justice either applied in full force to a situation or not at all. Clearly there were situations where an applicant could feel justifiably aggrieved not to get any assistance whatsoever from the courts though it would not be right to afford him the full protection of the rules of natural justice. In many situations an applicant might be heard to complain that the administrators should at least have heard his side of the story before making the decision, or that they could have told him what the objections to his application were, so that he could put his house in order and perhaps successfully reapply some time in the future. To meet such situations the courts seem to have evolved a sliding scale for the application of the rules of natural justice. At the top of the scale stand those situations where there is a legal right at stake, and where the administrator is acting in a judicial capacity. Hence the fact that the administrative / judicial distinction has not been completely eradicated in such a situation the rules of natural justice still apply in full. In situations which do not qualify for the full application of the rules of natural justice, watered down versions of the rules have been applied so that the complaints outlined above could be accommodated. The problem in such a situation is to develop a clear sliding scale of qualifications for the application of a sliding scale of justice. If this cannot be developed the result is palm tree justice, where an applicant can only discover what his rights are by applying to the court for a finding. This encourages uncertainty which obstructs the development of good working practices by the administrators since they need to have a clear guide as to what standards they must achieve in any department, and the likelihood that persons dissatisfied with the administration will apply to the courts for a finding in the hope that they might be lucky, whereas if the criteria were clearly understood by both sides the courts would only be involved in marginal cases.

¹³⁸ **Local Government Board v Arlidge** [1915] AC. 120

¹³⁹ **Nakkuda Ali v Jayaratne** [1951] A.C. 66.

¹⁴⁰ **R v Metropolitan Police Commissioners ex parte Parker**. [1953] 2 All E.R. 717

¹⁴¹ **Ridge v Baldwin**. [1964] AC. 40

Examples of the various degrees of conformity to the rules of natural justice that have been applied by the courts are too numerous to mention in a work of this size.¹⁴² Is it fair to describe these lesser forms of natural justice as applications of the rules of natural justice at all? Megarry V.C. chose to invoke the principle of fairness in such situations, in **McInnes v Onslow -Fane**¹⁴³, where he stated that

“if one accepts that 'natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying to the whole range of situations indicated by terms such as 'judicial', 'quasi-judicial' and 'administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation .. the more appropriate it is to reject an expression which includes the word 'justice' and to use instead terms such as 'fairness' or the 'duty to act fairly'.....”

This is fine as far as it goes. So one is applying the duty to act fairly rather than the rules of natural justice. It does not tell us what is fair in any given situation, merely that a higher standard of fairness will be demanded in situations closer to that where the administrator acts in a judicial capacity than otherwise. What criteria exist to show the parties where on the scale they stand, and what is required of the administrator to satisfy the duty of fairness in such a situation?

It is perhaps unfair to expect the courts to have developed from the very outset a comprehensive guide as to what standards applied to the various situations that might come before them. Inevitably they needed time to develop the criteria on a case by case basis. Some writers during the 1970's and 1980's were inclined to the view that some nebulous duty was about to swamp the rules of natural justice and replace them with an arbitrary and somewhat lower standard of justice altogether. These views are worth considering in that they provide an in-depth analysis of the developments in this area during the 1970's. The case studies within these analysis provide useful examples of the extent to which evidence via the rules of natural justice, and the duty of fairness, apply in the administrative decision making field.

In 1978 Martin Loughlin¹⁴⁴ contended that a new doctrine of Procedural Fairness was in the process of replacing the rules of natural justice as the primary mechanism of procedural control over administrative decision making. Loughlin chronicles the historic development of the law up to that time. He dates the time at which the courts adopted the judicial administrative distinction as 1920, in the case of **R v Inspector of Lemman Street Police Station, ex parte Venicoff**¹⁴⁵ where the courts held that in exercising his power to make a deportation order the Home Secretary was acting in an executive and not a judicial capacity, and consequently was under no obligation to act in accordance with the rules of natural Justice.

He suggests that at this time the courts had three choices in the way they might have reacted to the growing problem of dealing with the new administrative decision making powers that Parliament was creating. They could have chosen an activist, formalist strategy but since many administrative decisions involve policy factors this would have been unsuitable. They could have chosen an activist informalist strategy and engaged in a flexible supervisory role to ensure the fairness of procedures. This would have involved the courts in making policy decisions as to what is fair or riot fair which the courts are unsuited to. Therefore they chose the inactive formalist strategy of categorising functions.

Flexibility could still be achieved through the vehicle of the quasi-judicial decision. A conflict existed between the administrator's duty to act judicially and his administrative loyalties. The result was a facilitative compromise, which assumed the administrator owed his duty to Parliament via the minister in charge of his department. The test, as to when the rules of natural justice might apply, were not simple, rational or objective and resulted in the perceived injustice of the **Jayaratne** and **Parker** cases.

The law returned to the 19th century guidelines for a short time under **Ridge v Baldwin**, but then entered a new phase with **Re K an infant**.¹⁴⁶ per Lord Parker, with the introduction of the concept of a duty to act fairly regardless of the classification as an administrative decision making body.

¹⁴² Many examples are provided by Garner at pp145 - 156. Administrative Law, 6th edition.

¹⁴³ **McInnes v Onslow Fane**. 11978] 3 All ER. 211 at 219

¹⁴⁴ Martin Loughlin published a major contribution to the debate called “Procedural fairness. A study of the crisis in Administrative law theory” 28 University of Toronto Law Journal. 215 - 241

¹⁴⁵ **R v Inspector of Lemman Street Police Station, ex parte Venicoff** [1920]. 3 K.B. 72.

¹⁴⁶ **Re K an Infant**. [1967] 2 Q.B. 617.

Loughlin points to D.J.Hullan's criticisms of the development of procedural fairness which focuses on the lack of coherence and predictability inherent in the duty, and that it is liable to produce a reduction in administrative effectiveness.¹⁴⁷ In this article Mullan concludes that the courts should nonetheless adopt an activist informalist approach and tailor their remedies relative to the status of the interest at stake a legal right or a mere policy preference or something in between. That is in fact what the courts are doing.

Loughlin proceeds to examine a wide variety of the recent cases to try and determine whether this is in fact so. He concludes that

*".. the English case law suggests that in practice procedural fairness is far from being the flexible doctrine envisaged by Mullan. The basic problems seem to be 1) the reluctance of the courts totally to abandon the formal classifications, 2) a difficulty of adequately weighing the interests at stake as a precondition to implying procedural safeguards and 3) the tendency to hold that the existence of a procedural code is determinative of the issue of the fairness of the procedure. These problems are highlighted in Pearlberg where the court seemed to suggest that the weighting of interests was anathematical to its functions. Furthermore, the re-adoption of the distinction between quasi-judicial and administrative functions in this case virtually destroys the flexible approach to procedural fairness; this position, nevertheless, has received judicial and academic support."*¹⁴⁸

Loughlin then carries out an in depth study of a recent Canadian case, **Nicholson v Haldimand - Norfolk Regional Board of Commissioners of Police**¹⁴⁹ where a probationer Police constable was summarily dismissed from office. The Supreme court quashed the dismissal because he was not given notice of a hearing or given the opportunity to make representations, even though under the relevant statute he had no right of appeal against the decision. Procedural fairness would permit - even under The Pearlberg Formula - the court to fill the gaps left by the legislature to ensure fairness in all the circumstances of the case.

In **Pearlberg** it was held by the House of Lords that statute provided sufficient procedural protection regarding interim determinations of a taxpayer's assessments, and that accordingly there was no ground for the court to fill in a legislative lacunae and provide for a right of hearing. There was a similar result in **Re Pergamon**¹⁵⁰ where the revenue was not making an ultimate determination. It would be impractical to allow individuals to intervene and enforce natural justice during the initial stages of administrative action before any determinations affecting legal rights had been reached. Loughlin notes that whilst the Supreme Court was prepared to recognise Procedural Fairness it was not prepared to give more than lip service to Mullan's idea of a flexible doctrine.¹⁵¹ If anything there was a return to the old categorisation of judicial decision making warranting the rules of natural justice, and purely administrative decision making worthy only of a general duty to act fairly. While a duty to act fairly in a procedural sense exists, it is to be seen as complementary to rather than a modern replacement of the rules of natural justice. How attractive this gloss on the statute might prove to be when a clash of interests between an individual and an interest of the department arises is not so sure, in a situation where the legislature had already provided a procedural requirement, though one which was not sufficient without judicial support to provide for a hearing in the circumstances. The Chief Justice remarked that Nicholson had a lot to lose whereas the government did not. Loughlin comments

*"to adopt a cynical acid test it may be that a court is likely to balance in favour of an individual interest only when it is also to the benefit of the government interest that some form of hearing be required."*¹⁵²

In this instance the court felt that a hearing would boost public confidence in the police service. Loughlin quotes from **Board of Regents of State College v Roth**,¹⁵³ per Marshall J, where he comments, in a dissenting judgement,

¹⁴⁷ Loughlin p240, re Mullan views expressed in 'Fairness The New Natural Justice' 1975 U.T.L.J. 281.

¹⁴⁸ Loughlin. At p230.

¹⁴⁹ **Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police** (unreported) 30th October 1978. See Loughlin p230.

¹⁵⁰ **Re Pergamon Press Ltd.** [1971] 1 Ch 388 ; **Maxwell v Department of Trade.** [1974] 1 Q.B. 523.

¹⁵¹ Loughlin p235.

¹⁵² See Loughlin p236 where he comments on the fact that the Chief Justice observed that the consequences to the appellant in the case were very serious indeed if he wished to continue in office. The inference being that since the state department had nothing to lose whereas the appellant did the court was prepared to balance the interests in the appellant's favour.

¹⁵³ **Board of Regents of State Colleges v Roth** 408 T.J.S.564 (1972).

on the interests of the state. He argues persuasively that at least as far as the duty to act fairly is concerned it is always in the interests of the government, to promote confidence in the administration by giving reasons for its actions. He counters claims that it would be expensive to do so by saying that since any action taken must be based upon reasons, there should be no difficulty in giving those reasons. It is not necessarily so that a department has always firm sound supportable reasons for making a decision. The decision may be policy based, or personality based and providing no reason is required it might be more than indiscreet of the department to own up to the reason. Likewise in **R v Gaming Board ex parte Benaim and Khaida**, [1970]¹⁵⁴ the department may have sources of information which it wishes to remain undisclosed for good security reasons. It may be therefore that Marshall J in fact goes too far.

Loughlin concludes that the key to the problem lies in a "failure to recognise the pervasive influence in administrative law of the traditional model (i.e. the judicial / administrative distinction) and in particular to recognise the change in the method of legal discourse and function of the courts required if the informalist approach is to be adopted". He rejects the Mullan thesis on the basis that it is too wide and would eventually be reduced to the **Brandeis Brief** type of treatment where all the socio-economic factors involved in any given situation would be analysed ad infinitum, and this would ultimately destroy any basis for certainty which is an essential factor in any rule of law. Mullan's basic thesis¹⁵⁵ is that all statutes have a structure. The judge in any given situation should view the objectives of a statute from an overview and divine what its structure is, and then apply a hypothetical doppelganger approach and ask what decision a reasonable decision maker in the circumstances would have reached on the basis of the structure inherent within the statute regarding that given situation. The judges should not concentrate on defining fairness. Like an elephant fairness is not easy to define, but has the elephantine quality of being easy to recognise and so apply. Loughlin does not appear to support this view. From his conclusions it is difficult to establish what Loughlin does in actual fact support. Evidently, he feels that there are benefits to be derived from a duty of fairness but he is quick to point out the inherent dangers of a general duty of fairness and obviously feels that it would be a poor replacement or substitute for the rules of natural justice, though he sees it as a distinct possibility.

Loughlin does not help supply any criteria by which one can know what degree of fairness applies to what standard of right, interest or expectation. He merely posits the possibility that the courts might simply decide each case on its merits applying their own perceptions of justice to each situation as it comes up before them. The result would be some unknown quantity and quality of fairness at the expense of certainty. The general opinion of most of the academic lawyers seems to be that things are not developing too well in this field. Craig¹⁵⁶ welcomes the development of the duty to act fairly provided it is limited to the development of a new procedure to provide a remedy where there has been none up till now but not if it eventually consumes the older remedies of natural justice. Barlow & Rawlings¹⁵⁷ reflect Elliott's opinion¹⁵⁸ that neither the old classification system, nor the new flexible approach, can offer long term solutions and that the only way to provide a solution to the dilemma of balancing the special needs of the individual and the administration is to develop a new administrative procedure and separate administrative tribunals staffed by a personnel with specialist experience in the field. How the role of evidence might work in such a scenario is impossible to determine without formulating specific details for such a project, and so is outside the scope of this work.

Loughlin's work was published in 1978 and events have moved on since then. The courts seem to have moved away from the concept of structure outlined by Loughlin. Recent cases suggest that a new form of classification is emerging - even if Loughlin saw such a trend as the re-entry into the dark ages of Donoughmoreism. A new category has been developed around a concept of legitimate expectation. If a person has a legitimate expectation that an administrative decision should be exercised in his favour he has the right to a higher standard of interaction between

¹⁵⁴ **R v Gaming Board ex parte Benaim & Khaida** [1970] 2 Q.B. 417. In this case the department concerned controlled the issuing of licences for gaming clubs. The department had undertaken an investigation of the bona fides of the applicants. On the basis of information received from sources which the board did not wish to reveal the application for a licence by Benaim & Khaida was refused. There was a need to protect sources of information because there was a danger that the informants might come to harm if the applicants knew their identity. The information had shown that the character of the applicants was of too gentle a nature.

¹⁵⁵ Derived from Lon Fuller. see p237. Loughlin supra

¹⁵⁶ Chapter 8, Craig. Administrative law. 1983.

¹⁵⁷ Law and Administration. Law in Context Series.

¹⁵⁸ M.J.Elliott, "Appeals, Principles and Pragmatism in Natural Justice" 43 M.L.R. 66

himself and the administrator than if he has a mere hope of receiving a benefit.¹⁵⁹

The concept of legitimate expectation has evolved from two separate sources that have in the words of Ganz¹⁶⁰ been "telescoped together" to provide a new and separate ground for applying the rules of natural justice. The concept does not seek to describe natural justice and is not synonymous with natural justice. The basic grounds for the concept are variously that where a person enjoys a privilege, he acquires some form of right to continue to enjoy that privilege unless there are good reasons for removing it. If an attempt is made to remove the privilege then that person has the right to make representations on his own behalf. If the privilege has to be renewed then he similarly has a right to make representations on his own behalf e.g. where a person applies for a renewal of a licence, as in **Boyle v Wilson**, then that renewal will not be refused without first allowing that person as much of the rights of natural justice (though not necessarily all of those rights) as are necessary to ensure that the application is dealt with fairly that where there is an established practice that applications for privileges are conducted in a certain manner, they will continue to be conducted in such a manner until adequate notice is given of a change in procedure : that where a representation is made to a person that they might receive a privilege provided they fulfil certain criteria then that representation should be honoured. The two strands operating within the concept are firstly that a person with a "legitimate" interest should not be deprived of that interest, and secondly that some form of estoppel operates in favour of a person who has received direct representations that a benefit will accrue to him, or indirectly by way of an established practice that a benefit will accrue to him.

Both of these grounds have very insecure foundations. Estoppel in public law has a very limited application. It operates to prevent the promisor from going back on a representation whether made by words or conduct, either of a fact or of a future intention (promissory estoppel) in such a situation where the promisee has relied on the promise and acted to his detriment, or at least has changed his course of conduct in the light of that promise. The doctrine of estoppel is limited by the fact that it cannot be used to force an authority to comply with a promise involving ultra vires action, see **Rootkin v Kent. C.C.** [1981].¹⁶¹ The result would be to give the authority greater power than it has under the law. Estoppel cannot act as a fetter on the discretion of an authority.¹⁶² If an authority has a discretion, it must exercise that discretion each time it makes a decision. If a promise prevents the exercise of that discretion then the estoppel is ineffective.

The idea that the holder of a privilege has some form of right arises through the use of the word legitimate which can be construed as meaning that the person has some form of entitlement to hold that privilege which is recognised by the law. Barwick C.J. in **Salemi v MacKellar**¹⁶³ could not distinguish a legitimate expectation on this basis from a right. He then went on to discuss the decided law as to creation of rights through the expressed intentions of public servants in publicised policy statements, and decided that none were created. A proposed amnesty was not binding on the Minister of Immigration. He was entitled to change his mind and expel illegal immigrants who had surrendered themselves up to the authority on reliance on a promise of an amnesty. The dissenting judgement of Jacobs J is perhaps the most discerning in that he recognised the right that resulted from a legitimate expectation to be to a right not, to the privilege itself, but rather to natural justice. What is not clear is exactly why this right to natural justice arises or where it came from. Stephen J. in another dissenting judgement linked the legitimate expectation to the doctrine of estoppel. Lord Fraser in **A.G. of Hong Kong v Ng Yuen Shiu**,¹⁶⁴ adopted Stephen's reasoning and declared that a practice of treating illegal immigrants who had reached the urban areas of Hong Kong as safe from extradition, meant that when the policy was changed (due to a flood of immigrants) to allow deportation after due considerations of the merits of each case, the authorities were under a duty to allow him to put his case, even though he had no strict legal right to remain in the country. Thus as Ganz indicates the estoppel and rights ideas are telescoped together to create the concept of legitimate expectation.

The benefit of the concept of legitimate expectation is that it establishes a requirement for the adherence to the rules of natural justice, and therefore by implication the use of evidence, in the administrative decision making process in situations where none was previously required. As with many of the developing concepts within public

¹⁵⁹ See generally on legitimate expectation :- Gabriele Ganz. *Public Law & Politics*. Bd. Harlow. London. Sweet & Maxwell. 1986. pp145 - 162. Peter Cane. *Administrative Law*. Clarendon Law Series. Chapter 4, pp 73 -'74

¹⁶⁰ Gabriele Ganz. p145.

¹⁶¹ **Rootkin v Kent County Council**. [1981] 1 W.L.R. 1186.

¹⁶² **Birkdale District Electric Supply Co Ltd v Southport Corporation** (1926) A.C. 204,

¹⁶³ **Salemi v MacKellar (No2)**. 1977 C.L.R. 396.

¹⁶⁴ **Attorney General of Hong Kong v Ng Yuen Shiu (P.C.)** [1983] 2 W.L.R. '735.

law it has the advantage of being quite flexible. The standard of compliance with the rules of natural justice varies with the needs of the circumstance. The problem comes however when one attempts to establish ground rules to determine what standard of natural justice applies in what circumstance, and even to establish in what circumstances the expectation is raised at all. This is complicated by the need to distance the concept from situations where it might impinge on established rules of public law such as the rule against the fettering of discretion, and the need for standing. At present, it would appear that rather than attempt to formulate guidelines, the commentator is forced to describe situations in which the concept has been found to exist and ii he wishes to apply the concept himself to another situation, consider whether an analogy exists between the problem he has at hand and those decided cases. In reality it is yet another example of the palm tree justice which appears to prevail in administrative law at the present time. A few of the decided cases illustrate the problem at present.

Ex parte Khan.¹⁶⁵ The applicant received a Home Office circular advising him of the procedure that had to be followed if an entry clearance certificate were to be granted for a child whom he wished to adopt. Having fulfilled the conditions of the circular the child was refused admittance for an entirely different reason not included on the form, namely that the child's parents were capable of rearing the child themselves. Parker L.J. held that the Secretary of State should not be permitted to resile from the undertaking unless this was demanded by overriding reasons of public interest.

The Liverpool Corporation Taxi Case.¹⁶⁶ The corporation wished to increase the number of taxi-cab licences. The existing taxi owners association recognised that the number could be increased but wished to ensure that the market was not flooded to such an extent that no one could make an adequate living. The Corporation agreed not to increase the number until new regulations were introduced by Parliament. They reneged on the agreement. Denning upheld an application for an injunction to prevent breach of the agreement. Providing, as in that situation the Corporation was not prevented from fulfilling its statutory duties by the agreement the agreement would be enforced, Standing was fulfilled by the taxi owner's livelihoods which were at stake.

G.C.H.Q.¹⁶⁷ It was considered that the concept of legitimate expectation would normally operate to prevent the forced removal of a right to membership of a Trade Union from the workers at that establishment without prior notice and consultations, but for the fact that the order to give up membership was issued under the authority of the royal prerogative (though that would not have deterred all the members of the bench) and because the order was justified on the grounds of national security.

Re Findlay.¹⁶⁸ The Home Secretary made a statement in the House of Commons declaring a change of policy regarding the manner in which he would exercise his discretion to release prisoners on parole. Under the new policy parole would be less generous than previously. Four prisoners, who under the old policy would have been strong candidates for parole, and who had behaved in an exemplary manner in prison to enhance their chances of parole sought a declaration that the new policy only applied to new prisoners but not to existing prisoners who had served their time under the old regime. Scarman held that the only legitimate expectation they had was that their cases would be reviewed. The Home Secretary had not cancelled the review system so that even though under the new system they were unlikely to be paroled as a result of the review, provided their cases were reviewed then they would receive all that they might hope for. The men had a mere hope of parole not a legitimate expectation of it. The problem is that this states the conclusion reached by the court not the reasoning behind it, In fact the objection could have been clearly stated in terms of a fetter on the Home Secretary's duty to formulate policy, or even on policy grounds for national security. By failing to develop a clear set of guidelines the court simply makes a rationalisation of the rules of legitimate expectation even more difficult to formulate.

It cannot be denied that the rules of natural justice are a concrete example of a concept whereby evidence plays a central role in determining justice in administrative affairs. The rules as to when the natural justice will apply are complex. The modern trend towards tailoring the standard of justice to the situation at hand on a case by case basis means that it is difficult to formulate exact guidelines to predict in which given situations the rules of natural justice will apply. Even if this were so the varying standards passing through full compliance to the rules of natural justice down through procedural fairness to legitimate expectation further complicate the matter. Perhaps the least one can

¹⁶⁵ **R v Secretary of State for the Home Office Department ex parte Asif Manmood Khan** [1984] 1 W.L.R. 1337.

¹⁶⁶ **Re Liverpool Corporation ex parte Taxi Fleet Operator's Association** [1972] 2 W.L.R. 1262.

¹⁶⁷ **G.C.H.Q. Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 W.L.R. 1174

¹⁶⁸ **Re Findlay** [1984] 3 W.L.R.159.

do at present is to concur with Craig that at least remedies are available today in a wider gamut of situations than previously.

The perfect example of this is to review the probable outcome of a similar case to **Boyle v Wilson** under the present regime. Mrs Boyle and her predecessors had held a licence for the public house for over fifty years. She would therefore have a legitimate expectation that the justices might renew the licence. This would give rise to an expectation at least, that in a hearing to renew the licence she would be allowed to produce evidence as to why she should be allowed to renew the licence. If any charges were to be made against the renewal of the licence these charges might have to be justified. Bald statements of insanitary conditions without further proof might be insufficient. Mrs Wilson might be allowed to challenge that evidence. It is not possible to state with any degree of certainty which if any of these would in fact apply. In order to reinforce her legitimate expectation she would need to be told in advance what criteria had to be met to make a successful application for the renewal of her licence. Alternatively justice could be secured if the court were to tell her what actions she would have to take to remedy the situation so that she might successfully reapply for a renewal of the licence at some time in the future.

PART V

Conclusion.

Introduction

In Part 1 it was explained that the impetus for this work derived from the case of **Boyle v Wilson**¹⁶⁹ and the complete failure of evidence in that case. The general failure of evidence in many of the instances of administrative decision making discussed in this work is attributable to the fact that no principled approach to the use of evidence in administrative decision making has been developed in Public Law. To remedy this the administrative decision maker should be placed under a duty to provide reasons for his decision.¹⁷⁰ The giving of reasons for a decision will often disclose the evidential basis of the decision itself and can therefore ensure that there is not a complete failure of evidence. However, unless the reasons are adequate a duty to give reasons is insufficient.¹⁷¹ Further unless the reasons are supported by evidence little is achieved. Applicants for administrative decision making should be advised in advance of exactly what issues are at stake so that they can adequately prepare their case and present the decision maker with the appropriate evidence to support their application.

Part 2 discusses the conceptual problems of jurisdictional and non-jurisdictional errors of fact and law which have compounded the problem of courts in developing a coherent approach to evidence. It is suggested that a principled approach to evidence would render the distinction irrelevant. Any evidence upon which the decision was based should be proven. In situations where an administrative decision maker's powers are subjectively worded with regard to conditions precedent to the decision making process the principles used in **Khawaja**¹⁷² should be extended to cover a wider range of subject matter. The courts should not seek to replace the original decision-maker appointed by Parliament in a situation where Parliament intends that that person should be the final decision-maker. A review court is not an appeal court. Nonetheless there should be a minimum content of evidence available to the decision-maker upon which he bases his decision. If the review courts were to be entrusted with the task of ensuring that such a minimum content existed, provided they merely struck down the decision itself but left the original decision-maker free to make a new decision, this time based on the evidence available to him, rather than replacing that decision with one of their own, then the review court should not be seen as constituting an appeal court.. In many situations the result obtained under the heading of unreasonableness may be the same, but the rationale for the court would be quite different, and thus less open to criticism.

Given the inadequacies of jurisdictional and non-jurisdictional error of law as a method of ensuring that there is a sound evidential basis to administrative decision making, specially in situations where Craig's X and Y factors are subjectively worded so that they are the subject of the decision-maker's own opinion, it was hypothetically posited in Part 3 that **Wednesbury**¹⁷³ unreasonableness may be the best way to challenge the lack of evidence in such administrative decision making. However it was concluded that the Wednesbury Principles without more are inadequate.

There is a danger that the subjective opinion of the court replaces the subjective opinion of the decision maker. The court appears in the eyes of many critics to perform the function of an appeal court rather than a court of review. The judiciary have to decide on issues which, are frequently political in nature and they are likely to prejudice their independence by settling such issues. The fact that many of the issues are political should not in itself be a problem since all law can be viewed in a political light. The problem arises because of the apparent lack of objective legal criteria employed to settle the issues. This led the writer to suggest that a development of Galligan's principles of individuation would be of benefit,¹⁷⁴ especially if linked to the recently formulated principles of legitimate expectation. This would provide a principled, reasoned approach to the review process which would not leave the court open to political criticism.

The remedies discussed in Parts 1-3 were severely restricted in that judicial review has until recently only been

¹⁶⁹ See Part 1

¹⁷⁰ See Part 1

¹⁷¹ See Part 1

¹⁷² See Part 2

¹⁷³ See Part 3

¹⁷⁴ See Part 3

available to certain types of administrative decision making process. Legitimate expectation is discussed in Part 4 in the context of the modern developments in natural justice. In situations where the full rights and duties inherent in natural justice do not apply a new variable duty of procedural fairness has been evolved in conjunction with the concept of legitimate expectation. The principle of legitimate expectation is beneficial in that it enables challenge in circumstances where no challenge has been possible in the past. Nonetheless, problems still remain. Its development has been incoherent and its application is complex. It is difficult to predict in which situation the duty of procedural fairness applies and to know what standard is expected in any given situation. Great flexibility has been achieved at the expense of certainty. It should be remarked however that there is a direct conflict between the principles expounded in **Khan**¹⁷⁵ and in **Kynoch**.¹⁷⁶ According to **Kynoch** the discretion accorded to an administrator must be exercised, The administrator cannot fetter his discretion. Under the principles evolved through **Khan**, once guidelines for administrative decision making are made known to the applicant the administrator must operate within those guidelines. Whilst this is a useful development which the present writer commends, unless the content of such guidelines is controlled by clearly defined principles, there is a danger that such guidelines could act as a fetter on the exercise of discretion. The administrator's hands might be tied where new circumstances arise which are not covered by the guidelines. The decision-maker may have to decide in an applicant's favour even though the consequences of doing so might be undesirable. In such a situation there is a need for an escape clause allowing the administrator to act. e.g. *'the decision maker must follow any published guidelines but can take into account any other overriding considerations.'* However in such a situation one returns to the need for a concept of a *'minimum content of evidence'* if that escape clause itself is not to result in abuse by the administrator which would in turn negate the gains achieved by the courts in developing the concept of legitimate expectation.

Reform of administrative decision making and the exercise of administrative discretion has been debated on numerous occasions. The Donoughmore Committee report as long ago as 1936 concluded that there was little to criticize within the process of judicial review of administrative decision making at that time.¹⁷⁷ The Frank's Committee returned to the topic in 1957, prompted by the Critchel Down Affair and whilst they started out with a wide ranging review of the topic their recommendations were narrowed down to the topic of tribunals.¹⁷⁸ Craig¹⁷⁹ points out that much of administrative decision making is carried out beyond the pale of the tribunal and instances the large number of quangos in existence today. Continuing criticism of administrative decision making resulted in the Justice Report in 1960. Foulkes describes in considerable detail the recommendations of the Justices Report on the Principles of Good Administration.¹⁸⁰ The report provides little in the form of concrete proposals which can be adopted as principles of judicial review since they talk in general terms of the need for open government and impartial adjudication where possible. However, in the field of mal-administration the report recommended the setting up of an Ombudsman on the Scandinavian Model to review individual allegations of mal-administration. This was in fact adopted in 1969 when the office of Parliamentary Commissioner for Administration was created.¹⁸¹

¹⁷⁵ See Part 4

¹⁷⁶ See Part 3.

¹⁷⁷ The report made many recommendations to improve administration and had a considerable impact due to the categorisation that they applied to the various forms of administrative decision making.

¹⁷⁸ The Frank's Report did not in fact deal with Public Inquiries and the issues involved in the Critchel Down Affair at all. Thus even in the post *'Frank's Report Era'* much of administrative decision making was unaffected by the reforms which the report instigated.

¹⁷⁹ Craig. *Administrative Law*. Chapter 2. pp86 - 88. Harlow and Rawlings provide an in-depth analysis of the findings of both the Donoughmore Committee and the Frank's Report. Chapter 3 and Chapter 5.

¹⁸⁰ David Foulkes. *Administrative Law*. 5th ed. Chapter 16. pp416 - 449 at p417. re the Justice Report 1960 and the Ombudsman in general. Harlow & Rawlings. p152. Extract from the Justice report. "Administration under Law". 1971. Principles of good administration which could be put into a statutory code. The authors note that the report provides guidelines to good decision making not rules by which a decision maker would be bound. It should be noted that Justice has produced several reports on Administrative Decision Making which are discussed by Harlow and Rawlings.

¹⁸¹ The concept of the Ombudsman is sound. It affords a method of improving the standard of administrative decision making in situations where it would not be possible to subject the decision to judicial review and so provides a remedy where there was none at all previously. The major criticism leveled against the office of Ombudsman is that the Ombudsman has been given too little power, being a watchdog without teeth who only has the power to make recommendations to the administrators (albeit that the recommendations are extremely coercive and frequently followed). The Ombudsman can only be approached indirectly through a Member of Parliament filter and cannot take up cases independently on his own initiative. The office of Ombudsman contains the potential to solve many of the current problems within the sphere of judicial review and will be referred to again at a later stage.

A number of academic writers have stepped back and taken an overview of the current developments in Administrative Law and instead of analysing the case by case developments within the various categories of judicial review have instead questioned the whole basis of the development in general.¹⁸²

Craig,¹⁸³ for instance suggests the adoption of a "*Rational basis test*." Craig concludes that there is no rational basis behind the two opposing views of Limited and Extensive Review. They are based rather on subjective premises as to who is the most appropriate person to exercise the discretion in question. Gordon believes that the administrator is the most appropriate whilst Gould favours the judiciary. Gould regards the courts as the most appropriate body to deal with errors of law. Each word in an authorising statute has a legal meaning and to misinterpret such a word is to create an error of law. Thus the courts have extensive review. Craig believes that this would create a legal hunting ground for lawyers and result in excessive litigation and provide little benefit. Many words can have a variety of meanings depending on the context in which they are used. The courts are not necessarily the most appropriate body to decide the meaning of such words.

The rational basis test that he proposes would permit for an accepted range of meanings to such words and terms. The court could review a decision to ensure that the interpretation placed on a word was rational. If it was the decision would be left intact. This would leave the original decision-maker with a broader scope for decision making, in that he would retain a discretion to choose between alternative interpretations of words and terms in the enabling statute. The court would not substitute its preferred Interpretation but merely ensure that the original decision maker remained within a band of linguistic reasonableness. There is a subtle difference between the '*Rational Basis Test*' and the Wednesbury type '*Reasonableness Test*' in that there is no recourse to a specialised hypothetical doppelganger. Instead of asking "could a reasonable G.L.C have used this word in this way?" one asks "Is this a reasonable use of language?" Artificial premises as to what an imaginary double might have concluded, based on one's own conceptions of what the result should have been are avoided. Craig illustrates the use of this test in the U.S.A. with the case of **H.L.R.B. v Hearst Publications**.¹⁸⁴ He notes however that the Rational Basis Test is not consistently used in the U.S.A. At times the Supreme Court has used a Rightness Test similar to the Reasonableness Test which is purely subjective. Despite this Craig feels that it is preferable to the uncertainties of the Jurisdictional / Non-Jurisdictional Error Tests currently in use.

Craig commends similar tests to deal with all issues involving the exercise of administrative discretion, so that the court decides whether the discretion is exercised within a '*band of reasonableness*.' He operates from the premise that the decision maker is given the authority to act by Parliament and the courts should provide the widest basis for the exercise of such discretion whilst maintaining ultimate control through review. Writers such as Partington¹⁸⁵ have reached entirely different conclusions in that they feel the courts are not the ideal body to deal with administration at all and have discussed the possibility of an independent Legal Administrative System akin to the French '*Droit Administratif*' established.¹⁸⁶ The present writer feels that since such a system is unlikely to be adopted it is preferable to concentrate on methods of improving the present system which are achievable rather than speculating on improbabilities.

An analysis of Craig's recommendations will show that he is more concerned with who exercises the discretion rather than on what the actual decision is based. The label attached to something which is a condition precedent to jurisdiction can be subjected to the '*band of reasonableness*' test. The test can adequately ensure that ludicrous

¹⁸² Many academics have commented on administrative decision making and the exercise of administrative discretion. The Law Journals have been swamped with articles, many of which have been referred to in this work. This revival of interest has no doubt been created by the efforts of the courts in recent years to extend the scope of judicial review and the newly evolved criteria which their efforts have produced. many of the articles have concentrated on analysing these new developments seeking to justify or criticise the logic on which they have been based.

¹⁸³ Craig's Rational Basis test. p338. see also Chapter 2 p28 et seq for a discussion of the theories of limited and extensive review.

¹⁸⁴ **National Labour Relations Board v Hearst Publications, Inc.** 322 U.S. 111, 645.Ct. 851,88 LEd. 1170 (1944).

¹⁸⁵ M.Partington. Law, Legitimacy and the Constitution.

¹⁸⁶ Harlow & Rawlings. Law and Administration. Law in Context Series. See especially Chapter ii, Discretionary Justice pp348-352. The writers discussed the problems inherent within the present system, and discussed the possibility of a separate administrative system. However it would appear that Harlow is not in favour of a separate Administrative Law System because in her view it would create more problems than it would solve. See Carol Harlow, "Public & Private Law Definition without distinction." 43 M.L.R. 1980. 241-265.

labels are not attached. The Albert Hall could not be described as a furnished tenement since the Albert Hall could not be reasonably be considered to be within such a definition. However, the test cannot deal with the situation where the description applied to something would bring it within the band of reasonableness test, but where the evidence to show that that description is or is not apposite is questionable. Thus in the **Boyle v Wilson** situation the '*band of reasonableness test*' could be used to establish that sanitary conditions of premises being considered by the justices for licensing are covered by the terms of the enabling statute. The test could not however determine whether the correct evidence was forwarded to the decision maker upon which he could have concluded that the premises were in fact insanitary. This would have to be resolved by the '*Rightness of the decision test*' which is purely subjective and quite unpredictable. Craig's test therefore is useful in that it provides alternative and, it is suggested, improved tests for specific methods of challenging administrative decision making but does not resolve the underlying evidential problem inherent in all administrative decision making.

It is proposed that there should be a principled approach to the use of evidence in administrative decision making. Whenever an administrative decision affects the interests of an applicant in a material way be it of property or of prospective income or of any of the rights to social benefits¹⁸⁷ then any assertion of the existence of facts or of states of affairs that are used to justify the decision should be challengeable on the basis that such statements are not supported by evidence. Such a right would be barren unless the actual reasons for the decision are disclosed, and so this would have to be reinforced with a duty placed on the decision maker to disclose adequate reasons for the decision.

The author does not claim that this will solve all the current problems within administrative decision making. What it would do, is to minimise the situation. At present it is often necessary to analyse all the methods of review and to search for a method of challenging the decision. Many problems could be solved at an initial stage without having to go further. There would remain cases involving jurisdiction, improper purposes, unreasonableness and the like but they would be less than at present. Craig's proposals could further improve the conduct of such reviews which are not solved at the outset by a principled approach to evidence.

Such a reform could be implemented in a variety of ways. It could form a new category of judicial review to stand alongside jurisdiction, reasonableness and procedural impropriety. It could be created by Parliament as a new legislative as opposed to common law category. Equally it would not be beyond the creative abilities of the courts to evolve such a category. In certain areas the courts have already discussed the concept of a minimum content of evidence to support conclusions reached by administrators, as evidenced by the **Khawaja Case**.

It has been questioned in many quarters whether the courts are the ideal fora for the review of administrative decision making. Whilst it is not intended to debate the wider issues involved in such criticisms it is certainly true to say that the courts are not the most economic of fora. From this point of view the review of evidence and adequate reasons could be assigned to a separate body. It would be possible to create an administrative tribunal to deal with such questions. It has already been noted¹⁸⁸ that the Parliamentary Commissioner's Office is not being utilized to its full potential and rather than create yet another institution the author feels that the Ombudsman's Office could be easily extended to fulfil the functions advocated here. In essence the function is much like that of the magistrate who has to decide whether or not there is a case to answer before sending a prosecution on to the Crown Court for a trial. The Ombudsman would simply review the evidence used to justify a decision and the reasons provided for that decision and decide whether or not in the light of the facts disclosed in the application the evidence and the reasons in fact do justify the decision. If the decision is lacking in either respect he could order the decision-maker to reconsider the decision. There should be no inhibition on the decision-maker reaching the same result again provided he can establish evidence to justify that decision and provide adequate reasons for the decision. The Ombudsman's findings should be made binding on the decision-maker. An applicant for review by the Ombudsman should be able to approach the Ombudsman's Office directly. Some form of standing requirement could be used to ensure that persons

¹⁸⁷ It is important that a test for standing in such circumstances should not be modeled on the old rules of *locus standi*. Interest is not used in the sense of a legal right or legal interest, but rather that the applicant has some personal interest at stake. Today there are many new forms of wealth apart from realty and personalty as used in the sense of the Property Lawyer. The applicant for a license to carry on an activity may be as severely affected by a failure to secure that license as a person who is deprived of property. The successful application for a discretionary award may be a question of life or death to a person without means. Thus whilst there may be no legal right to a heating allowance, the Social Services have the discretion to grant one in extenuating circumstances. This can mean the difference between comfort and hypothermia for a pensioner.

¹⁸⁸ See Part 1.

with merely political interest could not abuse the process, to challenge policy decisions of administrators which are more appropriately dealt with by the traditional methods of political challenge through the ballot box and within Parliament and the Chambers of Local Councils. In particularly contentious cases the Ombudsman should be able to give leave for an appeal to the courts against his own findings. This procedure should not prevent applications for judicial review on the usual traditional grounds. Equally, where the traditional methods of review are used the court should be free to find that there is a defect in evidence or reason giving without having to refer the applicant back to the Ombudsman. Once in the court system the court might as well deal with the case. The object of establishing the process would be to minimise the number of cases which have to go to court rather than to deprive the courts of jurisdiction.

If such a process were to be adopted the system would be more able to deal with the type of situation dealt with in **Boyle v Wilson**. From Mrs Boyle's point of view she would be able to apply for review on the basis that there was insufficient evidence to show that her Public House was insanitary. The case would be returned to the licensing court for a reconsideration of the evidence. If the objector's to the renewal of the Licence could show that the premises were indeed insanitary then the licence should be refused. Mrs Boyle would then be afforded the opportunity of remedying the situation and making a fresh application. If the administrators wished to engage in slum clearance there would be no reason why they could not seek Parliamentary approval for such objectives. Whatever forms of compensation that Parliament might consider requisite in situations where residents suffered loss would then be available to the likes of Mrs Boyle if it turned out to be necessary to foreclose her property under such statutory authority. The same objectives could be achieved as witnessed in the original case, and yet a fairer result would be achieved for all concerned.

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