ADMINISTRATIVE LAW IN THE COMMON-LAW COUNTRIES: RECENT DEVELOPMENTS AND FUTURE TRENDS*

I

Administrative Law represents a major growth area in the present-day common-law legal world. Gone are the days, when, under the influence of Dicey's formulation on Rule of Law, Administrative Law was looked down by common-lawyers with derision, as 'continental jargon', as inimical to rule of law, because they had a distorted view of Administrative Law as something sactioning government arbitrariness and as favouring the government against the individual. It is well known that Dicey developed his idea of administrative law by a misreading of the system of administrative law prevailing in France at the time. Since his writings, several misconceptions and fallacies have been removed. One misconception that the French system unduly favours the administration as against the individual now stands exploded as it is conclusively established that this system gives not only adequate, but even more, protection than the common-law system does.[1] The French system has been characterised as highly developed, flexible and logical. Another misconception that administrative law is antithetical to 'rule of law' has been removed; administrative law insofar as it controls bureaucratic power is supplementary to rule of law. A third misconception that England has no administrative law also stands shattered. Only in 1963, in *Ridge* v. *Baldwin*,[2] Lord Reid had said that in England "We do not have a developed system of administrative law". But, today courts take pride in asserting that England has a well developed system of administrative law.[3] This is as it should be. Any civilised and democratic country having a well-ordered government, having faith in administration according to law, cannot afford to ignore the proper growth of administrative law.

The function of Administrative Law is to control and regulate bureaucratic power in its relation to the individual. An administrative lawyer

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[1]Brown & Garner, *French Administrative Law*, (1983), 180.

[2][1968] 2 All E.R. 66, 76.

[3]Lord Denning in *Breen* v. *A.E.U.* [1971] 1 All E.R. 1148. Recently in the *IRC* case, Lord Diplock has eloquently referred to "that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my life."

is not concerned with the policy-making role of the government. It is only when a policy is implemented and administrative measures are taken for the purpose, and the rights of the individual are affected thereby, that administrative law comes into the picture. Administrative law comprises of legal principles which the administration must observe in exercising its powers which at present are legion. Under the impulse of the political philosophy of a welfare state, the state has come to assume vast powers of affecting the interests of the individual. One characteristic of the welfare state is the increased power of public officials over individuals. Administration has become an all-pervading fact of life today. The most important question in the modern society therefore is: How far is power to be governed by law? The question of controlling power through legal means has engaged the attention of philosophers and jurists since the dawn of human civilization. According to a well known maxim of Locke, a natural lawyer: "Wherever law ends, tyranny begins." Power is a trust and is not to be exercised arbitrarily or misused. Administrative law thus seeks to promote administration according to law. As such, Administrative Law has great contemporary sociological value and relevance because pervasive social control and regulation is exercised by governments of today, and it has become inevitable to find some reasonable limitations on their powers so that rule of law can be maintained in the society. It is necessary that the powerful engines of authority have brakes also so that they are prevented from running amok. Administrative law is a friend and not a foe of good administration as it seeks to channelise bureaucratic power in proper directions. Administrative law only proscribes illegal exercise of power and helps in legal use of power. It is therefore a fallacy to regard Administrative Law as stultifying administration.

The topic of today has its own significance. While the countries which have received common-law share common legal heritage, traditions and values, e.g. they believe in rule of law or administration according to law, the level of sophistication to which Administrative Law has reached in these various countries share the same values, e.g. belief in rule of law or administration according to law is common throughout, the level of development of administrative law is not the same throughout. Even if the doctrinal basis is the same, there are many differences of approach, details and emphasis. In the area of Administrative Law, a comparative approach is very valuable because most of the administrative problems which arise in the various countries are similar and it is interesting to know how these problems are being tackled in various countries having the same common-law traditions. The basic problem of how the sprawling governmental machinery can be controlled in the interests of both the state and the citizen is common to all democratic and industrial countries. One country can thus learn a good deal from the experiences in this area of other countries. Thus, administrative lawyers in one common-law country can derive great benefit by a study of the developments in Administrative Law in other common law jurisdictions.

II

For long, Administrative Law was left to be developed in the common-law world to judicial creativity. Under the *impulse* of socio-economic forces, legislature conferred power on the administration but it was not conscious of the need to impose suitable controls and restraints on the exercise of administrative power. Thus, the burden of overseeing the administration and developing norms of administrative behaviour towards the individual devolved on the courts. The function of the courts basically is to control the legality of administrative action. But this also includes making the administration function and act in the exercise of its powers, for at times, the administration suffers from inaction in discharging its duties.

To start with, the courts did not exhibit much interest, enthusiasm and enterprise in this direction and followed the line of least resistance, even of deference, towards the administration. The administrative lawyers were very much frustrated at the passive way the courts were handling administrative law issues. They were criticising the judges for their static approach, lack of judicial creativity, in this area. Lawyers were exhorting the judges to show some dynamism, initiative and creativity in dealing with problems of administrative law. Writing in 1961, Davis, an American scholar, in his assessment of the English Administrative Law said:

> The English courts have fallen far short of providing the kind of review that protection against administrative injustice, especially administrative procedural injustice, requires.

However, since 1963, there has been a sudden explosion of judicial activity and dynamism in this area. The courts have displayed a creative genius in evolving the norms of administrative law. During the last two decades,the British courts have been trying to mould the administrative law into a system, and have been playing a great law-creative role. The judicial dynamism in England has been transmitted in course of time to other common-law countries as well. During the last two decades, Administrative Law has undergone a metamorphosis, and it has been all due to spontaneous burst of judicial creativity and dynamism. Administrative law mainly is judge-made law. Because of that, it tends to be untidy, unclear and inconsistent. From time to time there are contrary court decisions. The corpus of Administrative Law has been developed by the courts from one central doctrine known as the doctrine of *ultra vires* or error of jurisdiction which envisages that powers of the administration are limited by law and any exercise of power in excess of what the law has clothed an authority with is void. The courts have applied their creative genius to refine this doctrine and build up a body of Administrative Law.

But the judicial process has its own in-built limitations. It can evolve principles but cannot build new institutions. Realisation came over the governments in some common-law countries that bureaucratic powers have expanded to a level where individual rights are very seriously threatened and that, apart from judicial review, some new institutions, new principles

and new procedures were needed for regulating and controlling the administration. Enlightened governments have appreciated the need not only for conferring powers on the bureaucracy but also for creating proper control mechanism on those powers. So we see frenetic activity in countries like England, Australia, New Zealand, Canada to undertake reforms in the area of Administrative Law through legislative activity. Penetrative studies have been made in these countries through commissions and committees into the labyrinth of powers of the bureaucracy and how to control those powers.

Accordingly, I divide my lecture broadly into two parts. In the first part, I make a rapid survey of the judicial contribution to the development of Administrative Law, and, in the second part, I refer very briefly to some of the improvements which have been made therein through legislation and extra-judicial methods.

By its very nature, today's topic is extremely broad and, therefore, within the time-span available to me for this lecture, I cannot go deeply into the technical details of the law. What I can do is to highlight generally some of the prominent trends which are discernible to an observer in the area of Administrative Law in the common-law world.

III

A very significant trend in administrative law in the common-law world is the universalisation of the 'right of hearing' or 'natural justice' in administrative process. It is a judge-made concept. It is a procedural safeguard for those whose rights are affected by administrative decisions. During the last two decades, the concept of natural justice has made great strides. The reason underlying this trend is the judicial realisation that administrative bodies ought to follow some procedure before reaching a decision. Since the administration has come to possess vast powers to affect private rights without much substantive safeguards, the courts have come to insist that the administration follows due procedure before reaching a decision. It is being realised that some protection can be found to people's rights only if the administration follows due procedures. As Justice Frankfurther of the U.S. Supreme Court once stated: "The history of liberty has largely been the history of the observance of procedural safeguards".[4] It is also emphasized that it is better for the administration to reach a good decision in the first instance rather than review and change a bad decision later on. The right of hearing emanates from the common law maxim that no one should be condemned unheard. The present position is that, in a large number of situations, the courts apply natural justice even when the statute lays down no procedure. The courts imply natural justice in a statute. The truth is that not many provisions of law expressly lay down the requirement of giving a right of hearing to a person affected by administrative

[4] *McNabb* v. *U.S.*, 318 U.S. 332, 347.

action. If the courts were to interpret such a provision in a mechanical manner, by applying the canons of literal interpretation, then not many persons could have claimed any right of hearing. The creative genius of the judiciary has led it to superimpose the concept of natural justice over statutory language, for the law must be humane, that rule of law requires that the person be given an opportunity to defend himself before any adverse decision is taken against him, and that this is in the interest of democratic values and traditions that no one suffers an injury without having an opportunity to defend oneself.

The modern trend of expanding horizons of the right of hearing has commenced with the decision of the House of Lords in 1963 in *Ridge* v. *Baldwin*.[5] Before that the concept of natural justice had practically reached its vanishing point as the courts had refused to apply the same in such cases as cancellation of a trading licence, disciplinary cases, dismissal from service etc. The courts denied natural justice on many grounds, e.g., the function being discharged was administrative and not quasi-judicial; no duty to act judicially had been imposed in the specific situation; the proceeding was disciplinary in nature; it only raised a question of master-servant relationship; that only a 'privilege' and not a 'right' is being affected. At a time when right of hearing appeared to be a lost cause, the House of Lords infused a new life into it by its *Ridge* pronouncement where it was held that dismissal of the chief police constable without hearing him was void. Since then, the right of hearing has been conceded in many varied situations.

In the beginning, the right of hearing was regarded as an element of natural justice which was linked with the concept of quasi-judicial. This meant that the court must find some judicial element in an otherwise administrative action. At times, the whole exercise for the purpose seemed to be unreal. The concept also appeared to be restrictive as many functions were regarded as 'administrative' and hearing denied on that basis. Then there was a breakthrough. With a view to expand the horizon of the right of hearing, the courts started moving away from the traditional distinction between 'quasi-judicial' and 'administrative' and converted the concept of 'natural justice' into that of 'fairness'. Thus freed from its historical setting, the right of hearing, as a part of 'fairness', came to be applied to administrative decisions as well, for the courts could argue legitimately and plausibly that even administrative powers must be exercised with fairness. This new trend arose in 1967 with the Court of Appeal pronouncement in *Re K. (H) — An Infant*.[6]

Thus, the courts in England have insisted on the right of hearing being conceded in many varied situations, e.g., cancellation or renewal of a gaming or a trading licence, supercession of a municipal body, dismissal of an employee by a public authority even when it could dismiss him at

[5] [1964] A.C. 40.

[6] [1967] 1 All E.R. 226.

pleasure without assigning any reason therefor. Recently, in *R* v. *Hull Prison Board of Visitors,*[7] the Court of Appeal has ruled, dissenting from the position it took earlier in *Fry*, that the Board of Visitors while enforcing discipline in the prison has to act fairly. Right of hearing needs to be observed when preliminary investigation and report are being made into the affairs of a company as they may lead to serious legal consequences to some persons.[8] The process of expanding the right of hearing is still continuing. The frontiers of 'hearing' are being pushed further and further everyday.

This process of broadening the right of hearing has taken place throughout the common-law world. Reference may be made in this connection to the landmark case in the U.S.A., *Goldberg* v. *Kelly*.[9] Before 1970, a view was held in the U.S.A. that a person was not entitled to a hearing when a welfare benefit was being withdrawn by the government. The theory was that if an individual was being given something by government to which he had no pre-existing "right", he was being given a mere "privilege" which was not entitled to any protection. *Goldberg* has now changed all this by holding that it was subject to protection under the due process clause. All this has now been changed by the landmark decision in *Goldberg* v. *Kelly*. In this case, it was argued on the basis of the past precedents that a person was not entitled to a hearing when a welfare benefit was withdrawn, as only a "privilege' was being withdrawn and not a 'right'. This dichotomy between 'right' and 'privilege' had been drawn by the courts confining the right of hearing only to the former and not the latter. But this established notion was now rejected. The Supreme Court ruled that *public assistance payments* to an individual recipient could not be terminated without giving him a hearing as these were *statutory* benefits and not mere privileges. Thus the old dichotomy between 'right' and 'privilege' has been done away with for the purposes of hearing.

Goldberg is regarded as the watershed in the law of administrative procedure in the United States. Subsequent cases have extended the hearing requirement to virtually all privilege cases. Thus, the old dichotomy between 'right' and 'privilege' has been done away with for the purposes of the right of hearing. In this connection, what the court said may be quoted here:

> "Society today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licences, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from the government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for

[7] [1979] 1 All E.R. 701.

[8] *Re Pergamon Press Ltd.* [1971] Ch. 388; *State (Mc Polin)* v. *Minister of Transport* [1976] I.R. 93; *Norwest Holst Ltd.* v *Secy. of State for Trade* [1978] Ch. 201.

[9] 397 U.S. 254 (1970).

> individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy have not been effectively enforced."

A similar trend is visible in Canada. In this connection, reference may be made to an interesting case, *Nicholson* v. *Haldimand Norfolk Regional Board of Commissioners of Police*.[10] The Supreme Court has asserted that the courts can strike down even an "administrative" decision of an administrative authority if in making the decision the authority does not follow procedures conforming the minimum standards of fairness. A probationary constable in a municipality was dismissed without a hearing. There was a statutory provision requiring hearing for those who had crossed the probationary period. Still the Supreme Court of Canada ruled that the probationer must be treated 'fairly' and not arbitrarily. In the administrative or executive field there is a general duty of fairness. In the instant case, the consequences to the concerned person were serious. So, the appellant should have been told why his services were no longer required and given an opportunity to respond. The decision of dismissal was thus quashed by the Supreme Court. The moral of the case is that when a statute provides for hearing in some situations, the court can still read the right of hearing in other situations (not so provided for) on the basis of 'fairness'.

The High Court of Australia displayed an initial reluctance to follow *Ridge* v. *Baldwin* but in course of time came round to accept it.[11]

The Court of Appeal of New Zealand has held that the principles of natural justice must be observed in the statutory procedure for deporting an over-stayed immigrant. The judgment of Cooke J. firmly puts the subject into the general context of procedural fairness.[12] It has also been held in New Zealand, where royal commisions are statutory procedures, that their findings can be set aside for failure to observe natural justice.[13] It was a Royal Commission report on an air disaster which was under challenge. The report had contained a very severe criticism of some Air New Zealand officers and they wanted the report quashed *inter alia* on the ground of "unfairness and breaches of natural justice". An objection to the court's interference was that the report contained only 'opinions' and no 'findings'. The court ruled that the commission must keep within the limits of their lawful powers and comply with rules of natural justice. Thus, a liberal view of applicability of natural justice is adopted in New Zealand.

The frontiers of hearing have thus been pushed further and further with the passage of time.

[10](1979) 1 S.L.R. 331; 88 D.L.R. (3d.) 671 (1979).

[11]See, *Forbes* v. *New South Wales Trotting Club Ltd.*, (1979) 25 A.L.R. 1.

[12]*Daganayasi* v. *Minister of Immigration* [1980] 2 N.Z.L.R. 130.

[13]*Air New Zealand Ltd.* v. *Mahon*, 22 Dec. 1981. For comment see (1982) 4 *Auckland U.L.R.* 328.

In Malaysia, a similar liberal trend in respect of the applicability of natural justice is to be seen to some extent since 1971. The significant pronouncement in this connection is *Ketua Pengarah Kastam* v. *Ho Kuan Seng*.[14] Influenced by the English decision in *Ridge* v. *Baldwin*, the Federal Court enunciated a very broad principle regarding the applicability of natural justice to administrative process. The court noted that the principles of natural justice today "play a very prominent role in administrative law, particularly since the House of Lords invigorated them by a strong decision in *Ridge* v. *Baldwin*". The court pointed out that the rule requiring a fair hearing is "of central importance because it can be used to construe a whole code of administrative procedural rights". The essence of the English cases, the court observed, "is that drastic statutory powers cannot be intended to be exercised unfairly, and that fairness demands at least the opportunity of a hearing". The court emphasized that fairness "is required as a rule of universal application": it is "founded on the plainest principles of justice", and that "the silence of the statute affords no argument for excluding the rule, for the common law will supply the omission of the legislature". The court then enunciated the following broad principle regarding applying natural justice to administrative proceedings:

> '. . .the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter it is labelled 'judicial', 'quasi-judicial', or 'administrative', or whether or not the enabling statute makes provision for the hearing."

The court thus sought to make the application of the right of hearing a principle of universal application in all administrative proceedings which affect an individual adversely. This case expands the horizons of natural justice in Malaysia in accordance with the modern judicial thinking in the common-law world. This judicial trend has continued since then. For example, an order made by the Registrar of Trade Unions directing the concerned trade union to remove the names of 61 members from its register unilaterally on the complaint of the employers that they were involved in certain illegal industrial action, without giving them an opportunity of defending themselves was quashed. The court said: "If persons are to be deprived of their rights the rule of *audi alteram partem* must be strictly observed." Further, the court said: "Principles of natural justice demand that there should be fair determination of a question; and arbitrariness will certainly not ensure fairness."[15] The recent case, *Sarawak Electricity Supply Corporation* v. *Wong Ah Suan*,[16] which went up to the Privy

[14][1971] 2 M.L.J. 152.

[15]See, *Metal Industry Employees Union* v. *Registrar of Trade Unions*, [1982] 1 M.L.J. 46.

[16][1980] 1 M.L.J. 65.

Council, and where the Federal Court of Malaysia has been reversed, has held that before conditions can be changed in the licence, the licensee is entitled to a hearing. However, the broad principle as regards hearing stated by the Federal Court is not always adhered to by the court in practice. In this connection, a recent Federal Court case, *S. Kulasingam* v. *Commissioner of Lands, Federal Territory*,[17] may be mentioned in which the court has ruled that when an order acquiring land is made under the Land Acquisition Act, no hearing is envisaged. One of the arguments used to deny natural justice in this case was that the statute is silent as regards natural justice in land acquisition proceedings. But such an argument will lose much force when it is remembered that natural justice is an 'implied' and not an 'express' right.

In India, the Supreme Court has been playing a highly creative role in developing the concept of right of hearing in administrative law.[17a] This phase can be taken to start from 1970 onwards. The court has taken the right of hearing to great lengths. The precursor of the new trend is the *Kraipak* case,[18] which is an epoch-making case in the area of Administrative Law in India. A member of the selection committee for several posts in a Central Government service was himself a candidate and he was selected. On being challenged by some of the unsuccessful candidates, the Supreme Court quashed the selection. Refusing to characterise the proceedings of the selection committee as 'quasi-judicial' or 'administrative' because the line of demarcation between these two types of functions is 'very thin' and is being 'gradually obliterated', and that over a period of time many administrative powers have come to be characterised as quasi-judicial, the court insisted that even if the function were administrative, natural justice was applicable. The court emphasized: The concept of rule of law would lose its validity if the state instrumentalities do no discharge their duties and functions 'in a fair and just manner'. It was improper to have a candidate on the selection committee. This was a clear case of bias — another limb of natural justice. The court ruled that principles of natural justice could be applied even to the 'administrative' proceedings as contrasted to 'quasi-judicial' proceedings since the rules of 'natural justice' only aim at securing justice, or to prevent miscarriage of justice. After all, arriving at a just decision is the aim of both quasi-judicials as well as administrative proceedings. The selections were quashed as the decision of the selection committee could not be said to have been taken 'fairly' or 'justly' insofar as one of the members was a 'judge in his own cause', a circumstance abhorrent to the concept of justice. The court also ruled that the entire group decision would stand vitiated if one member of the group suffered from 'bias'.

Kraipak has great law-creative qualities. It has led to the vast expansion of the horizons of right of hearing in India. *Kraipak* demolished the artificial

[17] [1982] 1 M.L.J. 204.

[17a] See, Jain, *The Evolving Indian Administrative Law* (1983).

and conceptualistic distinction between 'quasi-judicial' and 'administrative' as well as the link between 'quasi-judicial' and 'natural justice'. *Kraipak* has had a profound impact on the growth of administrative law in India. The horizons of natural justice have been expanded a great deal in India since *Kraipak*. The idea was taken further by the Supreme Court in *Maneka Gandhi* v. *Union of India*.[19] where it applied the requirement of 'hearing' to the impounding of a passport by the government. The court characterised natural justice as a 'great humanising' principle which is intended to invest 'law' with 'fairness' and to secure justice. The soul of natural justice being 'fair-play in action', there can be no distinction between a quasi-judicial and administrative function for this purpose for fair-play is essential in both. As the Supreme Court has declared in *Maneka:* "Even in an administrative proceeding which involves civil consequences, the doctrine of natural justice must be held to be applicable."

The process of applying natural justice has been taken further by the court in subsequent cases as it has held that the election commission cannot cancel the poll in a constituency because of violence and malpractices therein without giving a hearing to the concerned candidates.[20] Even if the cancellation of the poll be regarded as an administrative function, that would not repel the need for applying natural justice. Referring to the argument that the Election Commission is a highly placed body, the court cautioned that "wide discretion is fraught with tyrannical potential even in high personages".

The court has applied natural justice when a municipal body is being superseded[21] by the government, or when the government is taking over the management of an industry.[22]

In Administrative Law, one big question which arises constantly is what constitutes natural justice or fairness? The idea here is that what is needed is not only hearing but a 'fair hearing'. The courts have refused to make 'natural justice' or 'fairness' a 'fixed', 'articulate' or 'rigid' concept unrelated to 'time, place and circumstances' for the courts realise that there are infinite varieties of administrative processes into which natural justice may have to fit and so it must remain a flexible concept. Thus, one can come across, on the one hand, a very attenuated from of natural justice (just a written reply may do), and, on the other hand, an elaborate hearing akin to a court hearing. Whether in a particular proceeding the requirements of natural justice have been complied with or not can give rise

[18] *A.K. Kraipak* v. *Union of India*, AIR 1970 SC 15. For details see, Jain & Jain, *Principles of Adm. Law* 159, 208 (1979).

[19] AIR 1978 SC 597.

[20] *Mohinder Singh* v. *Chief Election Commissioner*, AIR 1978 SC 851.

[21] *S.L. Kapoor* v. *Jagmohan*, AIR 1981 SC 136.

[22] *Swadeshi Cotton Mills* v. *India*, AIR 1981 SC 818.

to an acute difference of judicial opinion.[22a] This is illustrated in Malaysia by the *Sarawak Electricity* case.[23] In this case, the 20-year monopoly of the licensee to supply electricity was being curtailed by a government order to permit a state enterprise to supply electricity. The question was whether the licensee had had sufficient opportunity to present his objections to this course of action. The High Court answered in the negative. The Federal Court answered in the affirmative. But, on appeal, the Privy Council ruled that the concerned licensee did not have an adequate right of hearing. The Privy Council appeared to prefer a full-scale oral hearing involving "detailed evidence and argument" on the part of the licensee to show that his objections were not unjustified.

A Singapore case, *Tan Boon Chee, David* v. *Medical Council of Singapore,*[24] may be cited to show that in case of disciplinary action against a professional, such as cancelling or suspending his name from the register of the concerned professional body, a high standard of natural justice is needed. The body enjoys tremendous powers which may mar a man's professional career and so it should not exercise such a grave responsibility in a "light-hearted" or "slipshod manner".

The courts have also expanded the concept of 'bias' to ensure that justice is not only done but seen to be done.

A significant question in the area of natural justice has been: should the decision-making authority be obligated to give reasons for its decision? In this respect, the Indian courts have gone much far ahead of the courts in other common-law countries.[25] The Supreme Court in India has emphasised that only when decision-making authorities give sufficiently clear and explicit reasons in support of their orders, that their decision will carry credibility with the people and inspire confidence in the adjudicatory process.[26] Natural justice has been held to include 'reasoned decisions'. This is a very commendable and significant development.

IV

The present-day government enjoys not only powers of administration or of making decisions in individual cases, but also vast powers of legislation. In the terminology of Administrative Law, this is called delegated legislation, subordinate legislation or subsidiary legislation. Of the total

[22a] See, *Ostreicher* v. *Secretary of State for the Environment* [1978] 3 All E.R. 82; *Fairmount Investments Ltd.* v. *Secretary of State for the Environment,* [1976] 2 All E.R. 865; *R* v. *Hull Prison Board of Visitors, ex p. St. Germain,* (No. 2) [1979] 3 All E.R. 545; *H. Sebey Co. Ltd.* v. *Secretary of State for Environment,* [1978] 1 All E.R. 86; *R.* v. *Leyland JJ. ex p. Hawthorn,* [1979] Q.B. 283; *Mc Innes* v. *Onslow Fane* [1978] 3 All E.R. 211.

[23] [1982] 2 M.L.J. at 92.

[24] [1980] 2 M.L.J. 116.

[25] *Siemens Engg. & Mfg. Co.* v. *Union of India,* AIR 1976 SC 1785.

[26] The practice of giving reasoned decisions has recently been commended by the Law Reform Commission of Canada.

legislative output in any present-day democracy, only a small portion thereof is made directly by the Legislature; by far the larger portion thereof emanates from the administrative authorities. Because of a number of practical reasons, it is regarded as essential that powers of delegated legislation be conferred on administrative authorities by the respective legislature.

As the power of delegated legislation results in the accession of powers of the administration, the usual question of controls arises in this area as well. There is always the danger that, if left uncontrolled, such powers may not be properly exercised at all times. The power of delegated legislation is no less significant than the power of the legislature as it can vitally affect the rights of the people as legislation by the legislature. It has fallen to the courts to develop the norms for the purpose. On the whole, however, it may not be wrong to say that the judiciary has not evinced much of a will so far to control delegated legislation and the administration is by and large left free to exercise its powers.

In the U.S.A. and India, as a caution against the legislature delegating broad legislative powers to the administration, the courts have developed the doctrine of excessive delegation. Under this doctrine, the courts can declare too broad a delegation of legislative power as excessive and thus invalid.[27] Excessive delegation may amount to abdication of its power by the legislature. The doctrine envisages that power be delegated subject to defined standards, or prescribed ends and purposes, or procedural safeguards. The underlying purpose in view is that fundamental policy decisions are made by the elected legislature and not by some appointed official. In practice, however, the courts apply this doctrine not in a dogmatic manner but in a practical and flexible manner and permit large delegation of power accepting loose statements in the statutes as sufficient policy-statements to fulfil the requirements of the doctrine. In India, the courts also give much leeway to the legislature in the matter of delegation in respect of taxation, social legislation, and municipal bodies.[28] Only rarely does the court hold legislation *ultra vires* on the ground of excessive delegation.[29] Nevertheless, the doctrine of excessive delegation is reiterated by the courts from time to time. The practical value of the doctrine is that if delegation runs riot courts can vetoe it. The Legislature is careful that some standards, howsoever loosely worded, are included in the statutes to make delegation valid. If the doctrine of excessive delegation is applied faithfully by all concerned, then, it can go a long way to strengthen control-mechanism over delegated legislation.

[27] *Federal Energy Adm.* v. *Algonquin*, 426 U.S. 458, 599 (1976); *Gwalior Rayon Mills* v. *Asst. Commr., Sales Tax*, AIR 1974 SC 1660, 1667; *Registrar of Cooperative Societies* v. *K. Kunjambu*, AIR 1980 SC 350.

[28] *K. Kunjambu, supra; Amalgamated Meat Cutters* v. *Connally*, U.S.D.C. (D.C.) 337 F. Supp. 737 (1971).

[29] In the U.S.A., in its entire history, the U.S. Supreme Court has declared only two statutes invalid on the ground of excessive delegation: *Panama Refining Co.* v. *Ryan*, 293 U.S. 388; A.L.A. *Schechter Poultry Corp.* v. *U.S.*, 295 U.S. 495. Both cases arose at the beginning of the New Deal era.

No such doctrine of excessive delegation operates in any other common-law country. In England, the doctrine of Parliamentary Sovereignty prevails and so no restraint can be placed on the power of Parliament to delegate as much power as it likes. The same view has been carried forward to other common-law countries. In Malaysia, the court refused to accept any such doctrine in *Eng Keock Cheng* v. *Public Prosecutor*.[30]

A recent case, *S. Kulasingam* v. *Commissioner of Lands*,[31] may be taken note of in this connection. A statutory provision authorised the Yang diPertuan Agong "whenever it appears to him necessary or expedient so to do", for the "purpose of removing difficulties" by order to "make such modifications to any provisions in any existing laws as he thinks fit". *Prima facie*, it conferred an extremely broad power on the Government to make changes in Parliamentary law. But the Federal Court gave the provision a narrower interpretation. The court said that the power to modify statutes could be exercised either for the purpose of removing "administrative difficulties or modifications of such consequential nature" as may be necessitated by the establishment of the Federal Territory. The word "modification", ruled the court, meant an 'amendment which involved no change of policy'.

It may be pointed out that such "removal of difficulties" clauses are rather common and are dubbed as Henry VIII clauses to denote executive arbitrariness.

A usual control mechanism over delegated legislation is through judicial review thereof by applying the doctrine of *ultra vires* with a view to assess whether the rules made by the administration fall within the power delegated. The effectiveness of this technique depends on how broad the terms of the delegating formula are, how scrutinising an attitude the courts adopt and how broadly the courts interpret the delegating formula. Usually, powers are conferred in broad terms and so, in practice, it may be difficult for the courts to hold any piece of delegated legislation as *ultra vires*. Also, the courts adopt a liberal, rather than a critical, attitude towards delegated legislation. It is only rarely that a court will hold a regulation *ultra vires*. A recent example in Malaysia is *Port Swettenham Authority* v. *T.W. Wu & Co.*,[32] where a bye-law made by the port authority was held *ultra vires*. Such examples are however of rare occurrence.

It may be interesting to note that the doctrine of *ultra vires* is not confined mechanically to the terms of the delegating formula but is given an extended significance. For example, the courts can declare unreasonable rules as *ultra vires*, but only rarely will the courts hold any rules as unreasonable.

A valuable control mechanism over delegated legislation is through the Parliament itself. In many common-law countries, scrutiny committees have

[30][1966] M.L.J. 18.

[31][1982] M.L.J. 204.

[32][1978] 2 M.L.J. 137.

been appointed by Parliaments to keep delegated legislation under their scrutiny. Malaysia is an exception to this trend. Such a committee has been found to be a useful instrument as a parliamentary watchdog on delegated legislation made by the administration as a delegate of Parliament. It keeps the administration alert which avoids doing such things as the committee frowns upon.

In ths connection, the interesting constitutional situation in the U.S.A. may be pointed out. Basically it is a common-law country, but it has a written constitution based on the doctrine of separation of powers. In course of time, the system of congressional supervision over delegated legislation has been built there as well. As Schwartz observed:[33]

> "The use of the legislative veto in America is a direct reflection of the growing malaise over uncontrolled delegation. . . The movement to provide for legislative review has been spreading in recent years. . . There is strong sentiment in Congress for setting up an analogous federal system of general review of agency rules."

But, recently, a spanner has been thrown into this development of legislative review of delegated legislation, insofar as the Supreme Court has recently ruled in *Immigration and Naturalization Service* v. *Jagdish Rai Chadha,*[34] that such a scheme is contrary to the doctrine of separation of powers.

The provision involved authorized either House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to the authority delegated by Congress to the Attorney-General, to allow a particular deportable alien to remain in the U.S.A. The Supreme Court held the provision unconstitutional as it infringed the separation of powers doctrine. Much before the decision, doubts had been expressed in the U.S.A. about the constitutional validity of the mechanism of congressional supervision over rule-making by the administration.[35] These fears are now confirmed. However, the American model is not operative in the parliamentary system and so parliamentary supervision over delegated legislation will be in order.

Because of the reluctance of the courts to supervise closely delegated legislation, it is felt that it will be more effective a control if people affected thereby were given an access to the process of regulation-making. There is no doctrine of applying natural justice to legislative process as distinguished from Administrative process. Thus, in the area of rule-making by the administration, the aggrieved individual is not usually consulted before the regulations are promulgated. He would come to know only after the regulations are promulgated. In such a case, the individual has no redress, for judicial review, limited as it is, is not of much help to him.

[33]Schwartz, *American Adm. Law — A Synoptic Survey,* 14 Israel L.R. 413.

[34]Judgment delivered., June 21, 1983.

[35]Stewart, *Constitutionality of the Legislative Veto,* 13 Harv. J. Leg. 593 (1976).

There should be machinery which will, at the formative stage, consult him on draft regulations. This means democratisation of the rule-making process. In the U.S.A., procedures for the purpose have been evolved but in other common-law countries there is dearth of such procedures.

V

Another notable trend of consequence in administrative law in common-law countries is the expanding horizon of court-control over discretionary powers. It has become a fashion for the legislative draftsman to say in the law that a decision or action is to be taken by an authority in its 'opinion', 'if it deems fit', in its 'discretion' or 'subjective satisfaction'. If the canon of literal interpretation were to be applied to such a statutory provision, the decision of the authority may not be questioned in a court on any ground. But the courts propound the thesis that an arbitrary action or decision is contrary to the rule of law. Rule of law can tolerate discretionary powers but not absolute or arbitrary powers which is a contradiction of democratic values. Realizing this, the courts have developed some norms to control discretionary powers. *Padfield*[36] is the precursor of the new trend in the common-law world. The notion of unfettered administrative discretion has been totally rejected by the House of Lords in *Padfield*. In this case, the Minister had refused to take an action which he was authorized to do under the law. The Minister's argument was that under the relevant law, he had wide discretionary and subjective powers. But the court refused to accept the contention that his power was uncontrolled. The Minister had to use his power to promote the objection and policy of the Act. He could not refuse to take a decision on the ground that it would be politically embarrassing for him. Not giving reason for his decision does not immunize it from judicial review for the court could then presume that there was no reason to give in support of his decision. Since *Padfield*, there is now an increasing judicial sensitivity to the abuse of power. The courts propound the thesis that Parliament must have conferred the power on the administration to promote the policy and objects of the concerned Act. The courts now assume the power to review discretionary decisions if arrived at *mala fide*, or for an improper purpose, or if based on irrelevant considerations or if relevant considerations are ignored or the decision suffers from unreasonableness. The test of unreasonableness is a narrow one: a decision has to be so unreasonable that no reasonable authority could ever have come to it. Other grounds of judicial review are: non-application of mind by the decision making authority, if he acts mechanically, or if he has fettered his discretion. A newly emerging ground is 'misdirecting oneself to law', i.e. an action based on a misunderstanding of the law governing an action is liable to be upset in the courts'.

[36] *Padfield* v. *Minister of Agriculture*, [1968] A.C. 997.

These are flexible concepts and can be used creatively and expansively by the judges. Much depends on the individual attitude of the judge deciding a matter. Whether the judge is of the interventionist or the non-interventionist type? Some recent examples of quashing of discretionary decisions in England may be noted here. Certain conditions imposed by a planning authority were quashed as being unreasonable in *R* v. *Hillingdon*.[37] Although the law authorised the concerned authority to impose such conditions as it thinks fit, the court ruled that the conditions will be valid only when they fairly and reasonably relate to the permitted development and that the planning authority is not at liberty to use its powers for an ulterior purpose, howsoever desirable it may seem to be in public interest. A decision of an immigration officer refusing entry to an Iranian student was quashed in *Kharrazi's* case because the officer misdirected himself in law and took too narrow a view thereof.[38] In the famous *Greater London Council* case,[39] the court quashed supplementary rate issued by the council on London rate payers in order to give grant to London Transport Executive to enable it to reduce fares by 25% on transportation. The ground was that the council took an erroneous view of the law. At the time of the election, this was an item in the election manifesto of the party in power, but after election, the party members regarded themselves bound by the election manifesto and did not exercise their discretion properly. The members could have taken into account and given weight to what was said in the manifesto, but they ought not to have acted as if they were bound by it. In *Tameside,*[40] a direction given by the government to a local authority was quashed. The government could issue directions under the law only when the authority was acting 'unreasonably'. Disagreement between a 'Minister' and an elected local authority as regards implementation of policy be regarded as 'unreasonably'. The test was whether the authority had acted in a way no reasonable authority would have acted. A decision taken by a minister on 'purely political considerations', i.e. he may face trouble in Parliament, is a bad reason to take a decision. As Lord UpJohn said in Padfield: "This fear of parliamentary trouble. . . is alone sufficient to vitiate the Minister's decision which. . . can never validly turn on purely political considerations; he must be prepared to face the music in Parliament." In *Daymond* v. *South West Water Authority,*[40a] the court ruled that the statutory power to levy charges for services, etc. 'as they think fit', empowerd the authorities to levy charges only on those who actually used the services provided.

[37] [1974] 2 All E.R. 643.

[38] [1980] 1 W.L.R. 1396.

[39] *Bromley L.B.C.* v. *G.L.C.* [1982] 2 W.L.R. 62.

[40] [1977] A.C. 1014.

[40a] [1976] A.C. 609.

The principles developed in England to control discretionary powers have percolated to more or less extent all through the common-law world.[41] In Malaysia, *Pengarah Tanah dan Galian Wilayah Persekutuan, K.L.* v. *Sri Lempah Enterprises*,[42] is one of the few cases, where a discretionary decision of an administrative authority was quashed, on the ground of irrelevant considerations and improper purpose. Raja Azlan Shah, Ag. C.J., repudiated the idea of uncontrolled discretion. He said "unfettered discretion is a contradiction in terms" and that "every legal power must have legal limits". He further said: "every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression." He emphasized that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place." In this case, certain conditions imposed were held to be *ultra vires*. The discretionary power to impose such conditions as the authority 'thinks fit' does not confer an uncontrolled power to impose any conditions the authority likes. The conditions to be valid must fairly and reasonably relate to the permitted development. The authority is not free to use its powers for an ulterior object, however desirable that object may seem to it to be in public interest.[43]

In India, the Supreme Court has exhibited a good deal of creativity in controlling discretionary powers. Such powers abound in India becasue India believes in a regulated economy with centralised planning of socio-economic development. The court has exhibited a good deal of creativity in controlling discretionary powers and has used several strategies for this purpose. One, which distinguishes India from other common-law countries, is to use Article 14 (right to equality) to control the conferment of discretionary power itself. It is an established proposition now that too broad discretionary power conferred by law is discriminatory and will be hit by Art. 14. It means that the legislature must lay down standards and policies and safeguards subject to which the discretionary power is to be exercised.[44] 'Uncontrolled, unguided and absolute' discretion is not permissible. Two, the norms like *mala fides*, irrelevant considerations etc., as applied in other common-law countries, are fully operative in India. However, the Indian courts apply these norms rather vigorously. A number of cases may be cited where administrative decisions have been quashed

[41] For some cases in Canada see, *Roncarelli* v. *Duplessis* [1952] 1 D.L.R. 680; [1959] SCR 121; *Prince George (city of)* v. *Payne* [1978] 1 SCR 458; *Re Doctors Hospital and Minister of Health* (1976) 68 DLR (3d) 220.

[42] [1979] 1 M.L.J. 135.

[43] The Malaysian courts have referred to these principles in several cases. See, e.g. *National Union of Hotel, Bar and Restaurant Workers* v. *Minister of Labour and Manpower*, [1980] 2 M.L.J. 189; *Selangor Omnibus Co. Bhd.* v. *Perumal*, [1981] 2 M.L.J. 124; *Merdeka University Bhd.* v. *Govt. of Malaysia*, [1981] 2 M.L.J. 356.

[44] *Air India* v. *Nergesh Meerza*, AIR 1981 SC 1829.

on the ground of *mala fides*, e.g., an order of land acquisition was quashed because the court was satisfied that it was issued under the influence of the local member of the legislature who wanted to wreak a personal vendetta on the owners of the land.[44a] Several decisions of Ministers have been quashed on the ground of *mala fides*. Thirdly, if a statute lays down procedural safeguards,[45] or other statutory restrictions, on exercise of discretion they are usually treated as mandatory. Fourth, when a discretionary decision is challenged, the courts insist that the administration must disclose to it the reasons why that action has been taken. Absence of reasons may be taken to mean lack of any reasons making the discretionary order quashable. In quite a few cases, courts have quashed even such discretionary orders as orders of dismissal or compulsory retirement of public servants or orders of preventive detention on one ground or another,[46] e.g. relevant material was ignored and irrelevant materal has been taken into account. Lastly, courts quash any administrative action which is "arbitrary, discriminatory or unreasonable". The Indian courts are in a much stronger position to do so than courts in other common-law countries for they can invoke the 'equality before law' clause (art. 14) in the constitution.

Recently, land acquisition proceedings have been quashed in India because of long delay in assessing compensation for the land sought to be acquired.[47]

In at least two areas, the Indian Supreme Court has made spectacular progress over and above what other common-law courts have been able to achieve so far. One is the application of the concept of promissory estoppel to the administration which means binding the administration to a representation made by it on the basis of which a party has changed its position. The Supreme Court has put the doctrine on an equitable basis so that innocent and unsuspecting persons may be projected from being injured by acting on the representations made by government officials. The court has made the basis of the doctrine more broad-based than the detriment suffered by the promisee. As Bhagwati J. has expounded the doctrine: "The detriment in such a case is not some prejudice suffered by the promisee by acting on the promise, but the prejudice which would be caused to the promisee, if the promisor were allowed to go back on the promise." This juristic approach has vast potentiality to do justice between the government and the citizen. In many cases, the courts have held the administration bound by its promises to the concerned individuals. The high-water mark of the doctrine has been reached in the case of *Motilal Padampat*

[44a] *Punjab* v. *Gurdial Singh*, AIR 1980 SC 319.

[45] *Uma Charan* v. *State of M.P.*, AIR 1981 SC 1915.

[46] *Brij Behari Lal* v. *High Court of M.P.*, AIR 1981 SC 594; *Baldev Raj* v. *India*, AIR 1981 SC 70.

[47] *Satish Kapur* v. *State*, AIR 1982 P & H 276.

Sugar Mills v. *State of Uttar Pradesh,*[48] where a government undertaking to exempt new industrial units from sales tax for three years was enforced by the court when the petitioner had set up a factory in the State on the basis of this assurance. In another recent case,[49] the Government announced certain concessions for industrialists for five years. Acting on this assurance, the petitioner set up a cotton ginning mill. Then, the government sought to renegade on these promises after two years. The court ruled that since the petitioners had altered their position on the government's assurance, they must be allowed the concessions for full five years. Comparable cases in other common law jurisdictions are hard to come by because there the doctrine of estoppel against the administration is given a very restrictive operation.[50]

Another significant development is the control imposed by the courts on the state power to confer benefits. In the modern age, government has become the source of much wealth. It confers large number of benefits on the people such as jobs, contracts, licences, quotas, mineral rights, lucrative contracts for public works. Government expenditure reaches astronomical figures and there is competition for government favours. This area has hitherto been purely a discretionary area for the government, and these benefits were regarded as privileges. But now the Supreme Court of India has sought to extend control over governmental power in this area as well by invoking Art. 14 as well as general principles of administrative law. The epoch-making pronouncement in this area is *Ramana Dayaram Shetty* v. *The International Airport Authority.*[51] The basic premise is that the government cannot act arbitrarily or in an unprincipled or discriminatory manner even while conferring a benefit; it cannot give or withhold largesse in its arbitrary discretion or at its sweet-will; it must exercise its power for the public good; government is always a government and every governmental action has a public element in it. The government must act in a non-discriminatory manner; it must act in this area according to some standards which are not arbitrary or unauthorised. The beneficiary must also fulfil some norms of eligibility which are reasonable and non-discriminatory. The government is still the government in whatever it does and it cannot claim to stand in the same position as a private individual. In many instances, courts in India have quashed government action in this area. Thus, when quotas of raw materials were allotted to industries without following any rational basis,[52] the same were quashed. Where there was discrimination in allotment of land, allotment was cancelled by the

[48]AIR 1979 SC 621.

[49]*Kothari Oil Products Co.* v. *Gujarat,* AIR 1982 Guj. 107.

[50]Wade, *Administrative Law,* 341-4. (1982).

[51]AIR 1979 SC 1628.

[52]*Omprakash* v. *State of Jammu & Kashmir,* AIR 1981 SC 1001.

court.[53] Similarly award of contracts in an arbitrary manner is bad.[54] Parallels to such cases cannot be found in other jurisdictions except, to some extent, in the U.S.A. where also the Constitution has an equality clause.[55] In other countries, such an 'equality' before law is not guaranteed and the courts can thus apply only general principles of law. In India, Art. 14 has become a big reservoir of judicial power for the ocurts to control administrative action. The Malaysian Constitution also has an equality clause in Art. 8, but its full potentialities still remain to be explored. So far, it has remained a dormant provision here. We have alrady seen that even where a benefit is sought to be withdrawn, the affected person must be given a hearing.[56]

A recent case of the Gujarat High Court illustrates very forcefully the principle that the government cannot exercise its power to confer a benefit in an arbitrary manner. The Consumer Education and Research Centre (CERC) is a voluntary organization dedicated to protecting consumer rights. It used to receive grants from the State Government. It received such a grant during 1980. From time to time, CERC filed a number of court cases against the State Government. One of these was a writ petition challenging the government action of winding up the Macchu Dam Enquiry Commission which was enquiring into the Moorvi dam disaster. The High Court directed the State Government to continue the inquiry committee for a while to enable it to finish its work. In another case filed by the Centre against the State Road Transport Corporation challenging the hike in fares, the High Court held the rise in fares as illegal and asked the State Government to hold an inquiry. If the government comes to the conclusion that the hike was not justified, the goverment would have to use the entire money collected from the hike towards a special fund for creating more facilities for the travelling public. Similar cases of price increases are pending against the Gujarat Electricity Board and the Ahmedabad and Baroda milk dairies. The State Government did not find these cases very amusing. On the other hand, the government found these cases embarrassing. The Centre however assured the government that the cases were filed in the larger interests of the public and were not directed against the government as such. The government took the view that the CERC was utilising the grant given to it by the government to file cases against it. The government thus refused to give it any grant. The CERC again went to the High Court with a writ petition against the government and the High Court ordered the government to pay the grant to the CERC.

This case shows that the government grant is not regarded as a favour but as a public duty. If the discretion to give grant is not properly utilised, the court can quash the decision of the administration.

[53] *Parashram Thakur Das* v. *Ramchand*, AIR 1982 SC 872.

[54] *Barun K. Sinha* v. *District Magistrate, Murshidabad*, AIR 1982 Cal. 19.

[55] *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

[56] *Supra*, sec. III.

VI

In common-law, the judicial review of administrative action is of crucial importance.

The basic feature of the common-law is that conflicts between public authorities and the ordinary citizen are determined by the ordinary courts. This is fundamentally different from the Continental or the French system where specialised administrative courts exercise control over the public authorities. Under the common law system, the final authority to interpret the law rests with the courts; it is for them to define the legal limits of the area of operation of public authorities; it is for them to decide whether an action of the administration is in accordance with the law — law not in the Austinian sense, strictly as contained in the legal terms of the statute, but broadly interpreted by the courts including concepts of natural justice, implied substantive limits on discretion and so on. And it is for the courts to give relief to an individual when he feels aggrieved by a bureaucratic decision, action or non-action. In the common-law system, the role of the courts is crucial as a mechanism of control over the administration and redressal of grievances of the individual.

With the expansion of administrative action both in breadth and depth, need has been felt to correspondingly expand the parameters of judicial review as well. The courts and the administrative authorities, both being instruments of the state, and the primary function of the courts being to protect persons against injustice, there is no reason why the courts ought not to play a dynamic and creative role in overseeing the administration. Expansion of the concept of hearing and extending control over discretionary powers are steps in this direction.

One of the approaches in this direction, as already noted, is to obliterate the distinction between "quasi-judicial" and "administrative", and to apply the concept of natural justice or fairness to as large an area of administrative process as possible.

Another line of approach has been, as already noted, to expand supervision over the exercise of discretionary functions.

The third line of approach has been to liberalise the issue of *certiorari*. The purpose of *certiorari* is to quash a decision. Formally, *certiorari* was issued only to quash a quasi-judicial action, but now it can go to any body having legal authority to determine questions affecting the rights of the subjects, whether the body be set up under the statute or under administrative directions. The characterisation of its function as quasi-judicial is not necessary. It is now recognised as a general remedy to control administrative decisions affecting rights. It only effectuates the principle that power of decision must be exercised lawfully. Thus, *certiorari* has been issued to the criminal injuries compensation board set up by administrative orders,[57] to the board of visitors in respect of proceedings relating to of-

[57] *R. v. Criminal Injuries Compensation Board*, (1967) 2 All E.R. 770.

fences against prison discipline,[58] to a planning authority quashing planning permission to which *ultra vires* conditions had been attached.[59]

Another notable development has been liberalization of judicial attitude in the matter of granting declaration.

A great development has been to neutralize the 'privative' and 'finality' clauses in modern legislation. It is common practice now-a-days for statutes to contain clauses declaring the decision of an authority as final. Such a clause seeks to exclude judicial review. If such a clause were given a literal interpretation according to the strict positivist approach, then the result would have been to reduce the supervisory role of the courts over the administration. A large number of authorities exercising significant powers would be without any control. In such a circumstance, only the judiciary's creative genius could have saved the situation. So, the courts sought to neutralise the effect of these privative clauses by insisting that no privative clause can exclude judicial review of administrative action on the ground of 'error of jurisdiction' arguing that a decision arrived at in excess of legal powers was no decision at all and so could not be saved by any privative clause howsoever strongly worded it may be. Only such a decision of the administration can be saved as falls within its jurisdiction; a decision outside jurisdiction is null and void and so could not be protected.

A further step in the direction of neutralizing the privative clauses was for the courts to give an extended sense to the concept of 'jurisdictional error'. Any decision suffering from bad faith, lack of natural justice, lack of formal powers, ignoring relevant considerations or taking into account irrelevant considerations, all could give rise to jurisdictional error. This trend in judicial approach was initiated by the epoch-making decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission,*[60] and has since been followed in a number of cases all through the common-law countries. In *Attorney-General* v. *Ryan,*[61] the Privy Council treated the denial of natural justice in a citizenship case from the Bahamas as amounting to jurisdictional error which was not covered by the finality clause. Expansion of the concept of jurisdictional error' has not yet abated. Efforts are being made to make 'jurisdictional error' and 'error of law' practically synonymous.[62] The logic is that the distinction between the two concepts has become so fine that it can now be discarded, for any error can be described either as 'jurisdictional error' or as 'error of law within jurisdiction'. The underlying idea is that it is for the court and

[58] *R.* v. *Hull Prison Board of Visitors* (1979) 1 All E.R. 701.

[59] *R.* v. *Hillingdon,* (1974) 2 All E.R. 643.

[60] [1969] 2 A.C. 147.

[61] [1980] 2 W.L.R. 143.

[62] See Lord Denning in *Pearlman* v. *Harrow School,* (1979) Q.B. 56; Lord Diplock in *Re Racal Communications,* (1980) 1 All E.R. 634 and Lord Denning in *R* v. *Chief Immigration Officer, ex parte Kharrazi,* [1980] 3 All E.R. 373. Also Lord Diplock, Administrative Law: Judicial Review, Reviewed, (1974) 33 *C.L.J.* 233 & 243.

not an administrative authority to finally interpret the law and that no hindrance should be caused in the way of a point of law reaching the court for decision. No tribunal has any jurisdiction to make an error of law. If it does so, it goes outside its jurisdiction. If this view finds acceptance, then a finality clause would not be able to bar judicial review on a point of law. However, there are yet many who do not go along with this view. But the *Anisminic* approach is based on sound judicial policy, viz. that administrative bodies and tribunals must not be the sole judges of the validity of their own acts.

Another significant development has been that the courts have extended some control over findings of fact by administrative bodies by applying the no-evidence rule. Determination of facts must be based upon some acceptable evidence. If it is not, it will be regarded as "arbitrary, capricious and deviously unauthorised."[62a]

The position in Canada and Australia does not accord fully in this area with the position in England.

It needs to be pointed out in this connection that in England, as early as 1957, the Franks Committee had suggested that no privative clause should bar the issue of *certiorari* and that it should be possible always to take a point of law to the court for final decision. These two recommendations were translated into law by the Tribunals and Inquiries Act, 1957, which negatived all the pre-1958 ouster or finality clauses.

In India, judicial review stands guaranteed by constitutional provisions, mainly articles 32 and 226. Therefore, no statutory finality clause can curtail the judicial power to issue writs under these constitutional provisions.

In Malaysia, in the now famous case, *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Mfg. Employees Union,*[63] the Privy Council interpreted a finality clause broadly. The clause involved was S. 29(3)(a) of the Industrial Relations Act which ran as follows:

> ". . .an award of the court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called into question in any court of law."

The Privy Council ruled that this clause would exclude *certiorari* except on the ground of jurisdictional error. No *certiorari* could be issued to the industrial court only on the ground of error of law which does not affect its jurisdiction. In taking this view, the Privy Council deviated from the view being taken in Malaysia since 1967 that s. 29(3)(a) did not oust *certiorari* on the ground of error of law. The Privy Council's approach was also not in accord with the view advanced in England that error of law should be treated as jurisdictional error. *South East Asia* was decided ten

[62a] *R.* v. *Home Secretary ex p. Zamir* [1980] A.C. 930; *R* v *Hillingdon L.B.C. ex p. Islam* [1981] 3 W.L.R. 942.

[63] [1980] 2 All E.R. 634.

days before the House of Lords' decision in *Racal*. The Privy Council adopted 'orthodox and conceptualistic thinking'; it ignored march of ideas in England in recent times (Lord Denning and Lord Diplock) and took back the Malaysian law by a few years. The Privy Council perpetuated the conservative view that 'jurisdictional error' does not include 'error of law'. This means that administrative authorities can misinterpret law without worrying for court interference. The tribunal now becomes the final judge of law which is contrary to the basic premise of the common-law approach. The difficulty created by the *Fire Bricks* case can be got over if the Malaysian courts give a broader interpretation to the term 'jurisdictional error' and include 'error of law' therein. But the courts have not yet shown any such disposition. They include natural justice within 'jurisdictional error' but not mere 'error of law'. Of course, the ideal solution is not to put privative clauses into the law. Or else, there ought to be a provision for referring a question of law to the High Court.

In Malaysia, the question of finality clause is rather significant because of the liberal use made of such clauses, e.g. decisions of Ministers are invariably made 'final' by statutory provisions.

Another path traversed by the courts to expand judicial review has been to liberalise the rule of 'standing' to seek judicial review. Stricter the rule of standing, narrower the scope of judicial review and greater the change that many administrative orders and decisions will go unreviewed. So, to bring a large segment of administrative functioning under the scrutiny of the courts, it was necessary to relax the rule of standing so as to enlarge the class of persons who may come to the court to protest and seek redress against administrative action. The orthodox and strict rule of standing was that only a person whose own right has been infringed can seek a judicial remedy. But, over time, the law has been moving away from that strict view. In England, this trend is exemplified by the *Blackburn* and *McWhirter* cases.[64] Recently "sufficient interest in the subject-matter" has been adopted as the criterion for *locus standi* to challenge an administrative action.[65] But the contours of this rule are not yet clear. The one House of Lords' case, *Inland Revenue Commissioners* v. *National Federation of Self-Employed and Small Business Ltd.*,[66] in which the question of interpretation of this rule arose fails to throw enough light on the matter. The law at present is in the evolutionary stage. There was a suggestion made in this case that if a case has merit, it may not be dismissed on the ground of lack of standing. This was the sentiment expressed by Lord Diplock.

[64] *Regina* v. *Greater London Council, ex p. Blackburn*, (1976) 1 W.L.R. 550; R. v. *Metropolitan Police Commissioner, ex p. Blackburn* (1973) Q.B. 241; *Att. Gen.* ex rel. *McWhirter* v. *Independent Broadcasting Authority*, (1977) 3 W.L.R. 300.

[65] This was introduced first in 1977 by change in the rules of the court. It has now been incorporated in the Supreme Court Act, 1981.

[66] (1981) 2 All E.R. 93.

The present-day attitude of the Malaysian Courts is to interpret 'jurisdictional error' broadly so as to include failure of natural justice and a few other elements therein, but scrupulously keep questions of law simpliciter outside its fold and thus to deny themselves jurisdiction to review such questions in the face of privative clauses.[67] The Federal Court has specifically rejected[68] the approach of Lord Denning propounded by him in *Pearlman* and *approved* by the House in *Racal*.

The liberalisation of the rule of standing is not confined only to England. A similar trend is visible in other countries as well. For example, in *Thorson* v. *Att. Gen. for Canada* (No. 2)[69] and *Nova Scotia Board of Censors* v. *McNeil*,[70] the Supreme Court of Canada allowed individuals, as citizens and taxpayers, to challenge the constitutionality of certain types of legislation. Laskin J., said in *Thorson:*

> "It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour. . ."

In a New Zealand case, *Fitzgerald* v. *Muldoon*,[71] standing was granted to an individual to challenge a general administrative order relating to the compulsory universal superannuation scheme even when he was one of the million compulsory contributors.

These cases in effect make the question of *locus standi* discretionary with the courts where the interest of compelling public bodies to observe and obey the law can be served.

To some extent, a similar liberal trend is visible in Malaysia. *Lim Cho Hock* v. *Govt. of the State of Perak*,[72] illustrates this trend. The State Authority of Perak appointed the Chief Minister as the President of the Ipoh Municipal Council. The plaintiff sought a declaration that this was null and void. The plaintiff was a member of Parliament for the parliamentary constituency of Ipoh, as well as a member of the Perak State Legislative Assembly and also a rate payer within the Council area. The court conceded standing to the plaintiff as a ratepayer to seek the relief he wanted. However, on merits, the court dismissed the action and refused to issue the declaration sought for.

The most significant case in Malaysia on the question of standing is *Mohamed bin Ismail* v. *Tan Sri Haji Osman Saat*.[73] The appellant along with 183 others applied for State land in Mersing, Johore. Nothing hap-

[67] See, e.g., *Dunlop Estates Bhd.* v. *All Malayan Estates Staff Union*, [1981] 1 M.L.J. 249.

[68] *National Union of Commercial Workers* v. *Lindeteves-Jacoberg Sdn. Bhd.* [1981] 1 M.L.J. 242.

[69] (1974) 43 D.L.R. (3d) 1, 19.

[70] (1975) 55 D.L.R. (3d) 632.

[71] (1976) 2 N.Z.L.R. 615.

[72] (1980) 2 M.L.J. 148.

[73] [1982] 2 M.L.J. 133, 177.

pened for several years. Then he found out that several pieces of land in the same area had been alienated to the Chief Minister and a few other dignitaries. The High Court as well as the Federal Court held that he had *locus standi* to challenge land alienation to the Chief Minister and others. Both the courts laid down liberal rule of standing. A person having 'sufficient' interest in the matter can move the court. The appellant had sufficient interest in the instant case as he had an expectation for alienation of state land.

This brings us to another exciting development, viz., the question of 'public interest' litigation — a newly emerging subject in Administrative Law. The main emphasis here is not so much on the vindication of the individual rights of the plaintiff as on the vindication of public rights and on redressal of injuries to the 'diffuse and fragmented' interests of a broad class of persons similarly situated. Here an unlawful administrative action is challenged by one who may not qualify under the rule of standing as he may be only a public worker or doing it out of altruistic motives. There are many situations where an administrative act may be wrongful but there may be no one who may have standing to challenge it in a court. Should such an administrative act be allowed to go unchallenged because none has standing to challenge it? Law places many general public duties on the administration which it fails to discharge. There are many festering sores in society which lie hidden and dormant. These can be exposed through the strategy of public interest litigation.

In common law, the idea of public interest litigation has arisen in the U.S.A. where two groups — consumers and environmentalists — have been permitted to challenge administrative decisions affecting them.[74] The idea appears to have permeated recently to New Zealand where in an 'environmental'[75] case, the New Zealand Court of Appeal held that two environment protection societies had standing to bring proceedings alleging that the Governor-General in Council had not properly complied with certain statutory procedures relating to the procurement of consents for the construction of an aluminium smelter. The Court said that here the legality of government action was challenged. In such a case, in exercise of the court's discretion, responsible public interest groups may be accepted as having sufficient standing. The most liberal use of the technique of public interest litigation has so far been made in India. Here several questions of public law have been raised in courts through this technique.[76] Many cases involving questions of 'personal liberty'[77] as well as matters affecting poor and backward people have been raised. For ex-

[74] *United States* v. *SCRAP*, 412 U.S. 669 (1973).

[75] *Environmental Defence Society Inc.* v. *South Pacific Aluminium Ltd.* (No. 3), [1981] 1 N.Z.L.R. 216.

[76] *S.P. Gupta* v. *President of India*, AIR 1982 SC 149.

[77] *Sheela Barse* v. *Maharashtra*, AIR 1983 SC 378.

ample, a society for the protection of democratic rights of the people raised the question of non-observance of certain labour laws by contractors engaged on constructing works connected with Asiad.[78] The court gave directions to the Administration to ensure the enforcement of the laws. There have been several such cases[79] but time does not permit us to go deeper in this subject. But one hopes that the courts will encourage this trend in future.

Finally, reference may be made to the efforts being made by the courts in common-law countries to promote 'open' government. Too much government secrecy may adversely affect the efficacy of judicial review. If the government enjoys too large power to refuse to produce any document in the courts in the name of secrecy, security or national interest, then judicial attempt to locate flaws in the decision-making process can be thwarted and the person seeking relief through court-process against administrative action may be frustrated. The courts have thus sought to curtail the scope of this privilege of the government. The outstanding case in this area is *Conway* v. *Rimmer*[80] in which the House of Lords ruled that when government claimed privilege in respect of a document, the court could itself examine the document to decide whether such a claim in respect thereof is justified. The House of Lords propounded the famous equation: 'the court must balance the public interest in keeping the document secret against public interest that the administration of justice should not be interfered with'. The immunity has thus come to be known as the 'public interest immunity'. This has become the prevailing norm which is now observed in England and other common-law countries. In India, a similar view was propounded in *State of Uttar Pradesh* v. *Raj Narain*.[81] Government's claim of immunity for a document is never conclusive of the matter whether it should be produced in the court or not. The final decision in this respect rests with the court. Recently, the Supreme Court ordered the production of correspondence between the Government of India and the Chief Justices of the High Courts and the Supreme Court as regards the appointment of some Judges in the High Courts. Bhagwati J.in his leading judgment expressed faith in open government. Merely secrecy of the government is not a vital public interest so as to prevail over the most imperative demands of justice. Let the court inspect the document in question and then decide whether or not it should be produced in the court. One reason trotted out against production of certain kinds of documents was that people may feel inhibited from expressing their opinions with candour if they know that these papers may be produced in the courts. But

[78] *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473.

[79] *Labourers Working on Salal Hydro-Project* v. *State of Jammu & Kashmir* (2 March 1983); *Sanjit Roy* v. *State of Rajasthan*, AIR 1983 SC 328.

[80] [1968] A.C. 910. Also see, *Burmah Oil Co.* v. *Bank of England*, [1977] 1 W.L.R. 473, 492.

[81] AIR 1975 SC 865.

Bhagwati J. said that people are made of much sterner stuff and they would not be cowed down from expressing their views frankly only because some day in future the document may be made public.[82]

To the same effect is the law in Malaysia as laid down in *B.A. Rao* v. *Sapuran Kaur*.[83] Here the respondents had claimed damages for the death of a person as a result of the negligence of the medical officers in the district hospital. A committee of inquiry had held an inquiry into this incident. The respondents wanted the report of the committee to be produced in the court but the government claimed privilege in respect thereof. The trial court diallowed the objection and ordered production of the report. The Federal Court dismissed the appeal.

VII

So far I have been talking of judicial creativity in the area of Administrative Law in some common-law countries and have also given some instances of this phenomenon. But, in some of these countries, enlightened governments have also taken steps to improve by legislation certain aspects of Administrative Law and to develop some institutions to improve control mechanism over the sprawling bureaucracy with a view to protect individual rights and interests from being unduly affected by administrative action. This subject is quite a big one as a number of reforms have taken place. Here only a very sketchy idea can be given of some of these extra-judicial developments. It is worthwhile to note that there is frenetic activity going on in many common-law countries to improve Administrative Law.

a) The first institution which deserves notice is the Ombudsman institution borrowed from Scandanavian countries. The establishment of this institution is a recognition of the inadequacy of the existing methods of controlling the exercise of statutory powers by the administrators. In the common-law, New Zealand was the first country to introduce Ombudsman, with a view to oversee the administration. Impressed by its success in its designated area, recently the jurisdiction of the Ombudsman has further been extended to local governments. The New Zealand Ombudsman has served as the model for similar institution introduced in other common-law countries, such as England, Australia.

In England, the Ombudsman (as he is officially called, Parliamentary Commissioner) was introduced in 1967 to probe into "complaints of injustice caused by maladministration by the government or its officers in respect of matters where recourse to the courts or tribunals is normally unavailable." The term 'maladministration' has not been defined by the Act and thus the Ombudsman enjoys some discretion in the matter of his jurisdiction. The term includes corruption, bias and unfair discrimination, misleading a member of the public, failure to notify him of his rights, los-

[82] *S.P. Gupta* v. *President of India*, AIR 1982 SC 149.

[83] [1978] 2 M.L.J. 146.

ing or mislaying documents, sitting on a decision or an answer to a request for information for an inordinate length of time, failing to explain why a decision was made or why a situation had arisen when it was unreasonable to refuse, making a decision on the basis of faulty information which should have been properly ascertained and assembled, dilatory and superficial handling of complaints by public authorities etc. In fine, "any kind of administrative shortcomings may amount to maladministration". There is a parliamentary committee to give him guidance. Ombudsman has been found to be a useful institution to set and maintain standards of good administration for government departments.[84] The Ombudsman system has now been extended to other areas: health services and local government. Thus, commissioners for local administration investigate complaints of injustice suffered as a consequence of maladministration in connection with the execution of administrative functions performed by a local authority. There is a Health Service Commissioner as well.

The Ombudsman system has also been introduced in Australia. Each state in Australia has its own ombudsman. In addition, there is a Commonwealth Ombudsman established in 1976. In evaluating the work of the Ombudsman, it has been said that he deals effectively with a number of complaints and that he provides very useful assistance to ordinary citizens who are in conflict with the administration. His activities have led to several procedural reforms within the administrative structure.

b) Another significant development is the proliferation of the tribunal system — a method of adjudication of disputes, between one citizen and another or between a citizen and the administration — outside the courts. Tribunals are used for various purposes: (i) To make initial decisions instead of leaving them either to the courts or to the bureaucracy. Tribunal procedure is less formal than that of the courts but is more formal than that of the bureaucracy so it may be a good mean between the two extreme approaches. (ii) Tribunals can be used to hear appeals from, or review decisions taken by, the bureaucracy. When a decision is taken by one administrative officer, and appeal therefrom is heard by another officer, without the intervention of either a tribunal or a court, it is not regarded as a good system. The tribunal system has been developed with a view to safeguard more effectively the individual in his dealings with the state, as well as to rectify administrative abuse. To hand over a decision to a tribunal is also to insulate it from current political pressures which may otherwise be brought to bear if the decision is made purely within a department. A large number of tribunals function at present in common-law countries. Recently, a bold experiment has been made in Australia where a comprehensive Administrative Appeals Tribunal (AAT) has been established. The powers given to AAT are "far in excess of anything hitherto dreamed of in the United Kingdom". A radical innovation made is to authorise AAT

[84] M.P. Jain, The First Year of Ombudsman in England, 14 J.I.L.I. 159 (1972); Frank Stacey, *The British Ombudsman* (1971).

to adjudicate on the merits of an administrative decision and even on the propriety of a government policy.

c) An innovative development is the setting up of the Administrative Review Council in Australia to act as a continuing reviewing body to keep under review the structure of administrative decision-making generally. Thus, the council will review administrative procedures and suggest necessary improvements therein from time to time. The Australian body is the counterpart of the Council of tribunals set up in England in 1958. That body has a limited jurisdiction, viz. to keep under review the procedures and working of adjudicatory bodies. The Australian body, on the other hand, has a much wider function and role to play.

d) Finally reference may be made to the efforts being made in some common-law countries to reduce secrecy around governmental operations and to permit some more information flowing to the people about the functioning of the government. Thus, the Freedom of Information Act came into effect in the U.S.A. in 1967. Characterising the Act, Schwartz observes:[85]

> "Before the 1966 Freedom of Information Act (FOIA) the so-called people's 'right to know' was a journalistic slogan rather than a legal right which could be enforced in the courts. This has all been changed by the enactment of FOIA."

Government records are now available to any person within certain exceptions. The individual now has a legally enforceable right of access to government papers.

Now, in Australia as well, in the domain of Federal Government, the Freedom of Information Act, 1982, has been brought into force. This Act is based "inter-dependently on the right of the citizens to know, and on the principle of 'open government'."[86] But there are exceptions to this right as well laid down in the Act. This Act seeks to fulfil partially the Government's obligation under Art. 25 of the International Covenant of 1966 on Civil and Political Rights, now scheduled to the Human Rights Commission Act 1981 (C th) which article provides that "every citizen shall have the right and the opportunity. . . without unreasonable restrictions (a) to take part in the conduct of public affairs."

VIII

To conclude, Administrative Law in the common-law world is in ferment at present. It is being developed, reformed and refined both through judicial dynamism and creativity as well as through the efforts of the governments and the legislatures. Many new ideas are floating in the air for its improvement and some of these will be given concrete and practical

[85] *Adm. Law — A Casebook*, 221.

[86] 57 A.L.J. 61.

shape in course of time in some common-law countries. It will be quite some time however before Administrative Law settles down and stabilises as a viable, coherent and adequate system of law, in the context of the explosion of the powers of the administration. For the present, this law is in its advanced formative stages and is undergoing the pangs of growth.

There is one idea having vast potentialities which may fructify in course of time. This is to use the remedy by way of awarding damages against the administration for its acts of commission and omission adversely affecting an individual. Today, damages can be awarded only for an unjustified tortious injury. This is an extremely limited category.

There are many acts of the administration which may be unlawful, which may cause damage and injury to the individual, but for which no damages may be payable, for it does not amount to a tort in the traditional sense. Take for example, the case of a trader whose license has been cancelled. The court quashed the administrative order on the ground that there was failure of natural justice. But what about the loss which the trader has sustained because he had to suspend his business during the period he had no licence. The need to introduce some scheme of compensation for administrative lapses, faults and maladministration is being recognised grudgingly in common-law jurisdictions.[87] Perhaps, the question of awarding damages may be taken still further. It may be thought necessary and just to award damages to an individual when he suffers because of an administrative action without any fault on the part of the administration. Such a notion prevails in the Continental System to some extent.[88] The basis of the rule is why should the entire loss befall one individual when administration does something in public interest for social good. It is quite probable that in the near future, the subject of 'administrative torts' may come to be developed more and more.

In sum, it appears that an Administrative lawyer in the common law world is on the threshold of very exciting developments in the area of Administrative Law. A stagnant branch of law is on the forward march now. But, the pace of this development in several countries is going to be different — slow in some, fast in others. To a very large extent, this pace depends on how creatively and dynamically the courts discharge their functions, how soon they can shed their allegiance to the old, traditional principles which emerged in the *laissez faire* era, and how much consciousness there is in a country to develop a proper and adequate system of Administrative Law.

M.P. Jain*

*Professor of Public Law,
University of Malaya

[87]See, for example, the XV Report of the Public and Administrative Law Reform Committee in New Zealand.

[88]Brown & Garner, *Supra*, at 120-5.