EXCESS OF JURISDICTION— A PROBLEM IN ADMINISTRATIVE LAW*

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INTRODUCTION

The Law Commission in England, after years of debate and after two major conferences, has reported that the task of administrative law reform is beyond its powers. It admits that the necessary reforms are beyond the powers even of the courts and of the legal profession alone. There are so many defects in the whole system that a complete restructuring is needed, perhaps following a Royal Commission.[1]

All kinds of difficulties in this area are apparent and have long been so; the text books, the judgments and the reports of special committees, testify abundantly to them. The mass of undigested and indigestible cases over six centuries, the tortuous jungle paths surrounding the remedies, the outdated concepts of judicial, quasi-judicial, administrative and legislative powers, the lack of a co-ordinated appeals system are all familiar evils whose reform needs to be re-thought—although whether on European or United States models or otherwise is not so clear.[2]

But one central issue has of late become crucial. It is the whole relationship between the courts on the one hand and on the other hand, statutory tribunals and official persons whose doings may bring them before these courts concerning the issue of 'jurisdiction'. We know that the

* This paper aims at giving an account of some recent developments in Administrative Law and proposing some possible changes in terminology and attitudes which follow from these developments. It is therefore not a piece of research; citations and footnotes have been kept to a minimum. The student who requires fuller documentation and references will find an abundance of material in the works of such authoritative writers as de Smith, H. W. R. Wade, the Australian text by Benjafield and Whitmore, the case book of Brett and Hogg, and numerous articles readily accessible.

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[1] United Kingdom, *Report of the Law Commission (No. 20) on Administrative Law* (1969) Cmnd 4059. See editorial note in (1969) 43 *Australian Law Journal* 353. The Commissioners refer to some of the proposals that have been made by a large number of distinguished persons whose advice they sought in preparing the Report. These included the need for a thorough reform of the remedies, for improvements in the procedural process and for a sufficiently developed and coherent body of legal principles (referred to in para. 8 of the Working Paper (No. 13) prepared in July 1967). The general lack of expertise in administrative matters, and the insufficiency of the powers of the Parliamentary Commissioner for Administration, are also discussed (para. 8 of the 1969 submission). However, leaving aside the manner in which possible reforms should be investigated, neither the Report nor the Working Paper draws specific attention to the fundamental questions of Jurisdiction on which this article concentrates.

[2] Brett and Hogg, *Cases and Materials on Administrative Law* (2nd ed. 1967) 2-3, also de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968) 94-6; Benjafield and Whitmore, *Principles of Australian Administrative Law* (3rd ed. 1966) 172; K. C. Davis (sundry articles).

King's Bench quite early asserted a supervisory control over many officials and other bodies. Its purpose was dual: one, to see that serious errors of law were corrected so that the common law was enabled to assert its superiority; two, to leave to local and special bodies—especially Justices of the Peace, corporations and other local bodies, special commissioners and the like, the ordinary tasks of government, within the assigned spheres. Both principles were then valid; they are still valid. However in the last century, especially in the last forty years, much has happened that has confused and disturbed that ancient relationship and those balancing principles. We believe that all thinking for the future about reform must begin with the *scope of jurisdiction.*

For example, there would be in theory no difficulty about abolishing the various separate remedies—prerogative writs, declarations, injunctions and the structure of obsolete learning attached to them, and allowing a court to substitute an order suitable in the circumstances, whether directed to striking down subordinate legislation, reversing decisions or ordering acts to be done or not done.[3] But in the path stands the great obstacle: *how much, how far, how often, on what grounds* should the common law courts interfere? The historical essential balance has not been easily preserved; learned authors have described the fluctuating approaches of the courts since around 1880—in one period loath to challenge in the next perhaps over-ready to scrutinise, the official executive line. No formula can, of course, permanently establish and lock this balance. But it is the major factor in the whole hierarchical structure; it ought to be the first consideration in a scheme of reform. True, it involves a matter of attitudes, approaches, flexible yet firm policies, but that is the way, in preference to applying to a fixed set of *rules,* that any sensible system of law operates.

The main problem today is that no one can be reasonably sure when or why or how a superior court may decide to review. The advantage of the old system was that its very precise technicalities provided some certainty. *Mandamus,* prohibition, *certiorari,* were clearly available in certain situations and clearly unavailable in others. But the wide use of the declaration and the injunction, together with the blurring of the distinction between 'administrative' and 'judicial' decisions, has created high uncertainty, valuable as the new remedies have proved to be in getting at errors and injustices. Other doubts as to whether certain matters are matters of 'law' or of 'fact', or 'mixed fact and law', increase the uncertainty. Again, limits have been imposed since 1951 as to the extent to

[3] To the *Rules of the Supreme Court of Victoria* new rules 1A, 4A and 7A were added to those in Order LIII. These appear to confer such a power, but their meaning has not yet been tested in court.

which a tribunal is free to make certain errors of law.[4] Debates on this point have been intensified by the increasingly marked hostility of courts to 'ouster' (or 'privative' or 'exclusion') clauses.

A NEW PROBLEM?

Some recent decisions have accentuated a fresh problem concerning the situations in which a superior court may see fit to investigate the findings of inferior tribunals. Especially significant is the *Anisminic* case[5] where the House of Lords found that a Compensation Tribunal had misinterpreted its own Act, but there are others. In a Victorian case, *R. v. The Judge of the County Court; Ex parte O'Donnell,*[6] Smith J. pointed out that by section 77 of the County Court Act 1958, the Supreme Court was not able to issue *certiorari* against the County Court; therefore it could not investigate an error of law on the face of the record of the County Court. His Honour added, however, that this would not prevent the Supreme Court from investigating the proceedings in the County Court where there was 'want of jurisdiction' or perhaps where there was a 'manifest denial of natural justice' or of fraud.[7] In *Taylor v. Kent County Council*[8] a Divisional Court has recently found that an industrial tribunal 'had misdirected itself' on the meaning of the words 'suitable employment' in its Act and on this ground allowed an appeal from the Tribunal's decision, in accord with the statute. These cases recall numerous earlier situations in which tribunals have been held to have committed jurisdictional errors where they have taken wrong considerations into account, for example, the *Singapore Trust* case.[9]

These examples illustrate the defects of the traditionally 'simple' distinction between *want* of jurisdiction and errors made *within* the jurisdiction. That sharp dichotomy made sense in earlier days. First, because most of the lower tribunals and administrative bodies were then relatively small and unimportant. Secondly, because the courts were concerned primarily with situations in which a lower body (composed often of amateurs or eccentrics) had gone hopelessly beyond its allotted sphere. Such a body could not be allowed to arrogate a function to itself by its own fiat. Even later, where a tribunal had purported to fix wages in an industry which it was not established to deal with or where a rent committee had purported to deal with health requirements for buildings, a

[4] Since *R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] 1 K.B. 711 the latest and the most controversial view in this respect is contained in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 W.L.R. 163. See Wade, 'Constitutional and Administrative Aspects of the Anisminic Case' (1969) 85 *Law Quarterly Review* 198.

[5] [1969] 2 W.L.R. 163.

[6] (1968) 12 F.L.R. 491.

[7] *Ibid.*

[8] [1969] 3 W.L.R. 156.

[9] *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] A.C. 898.

blatant lack of jurisdiction could be made out. Today, the whole picture is changed. The 'lower tribunals' are far more numerous, and more sophisticated; they now have to interpret Acts and Regulations of awesome size and complexity. Moreover, it is very rare for them to go completely outside their sphere, because they usually have competent legal advice, and many are staffed or presided over by trained lawyers. Yet they are often reviewed or their decisions overturned. You may not have complete 'want' but you have something which the superior courts still regard as resulting in jurisdictional incompetence.

The new problem usually arises from a misinterpretation of legislation, not in a gross degree but on some relatively minor point; and it is the possibility of this kind of mistake that now causes most anxiety to administrative and inferior bodies which have to make decisions on matters of law that do not 'go to jurisdiction' in the old sense but which depend on their taking a particular view of their powers and duties as set out in the relevant legislation. It has thus become important to bring out some interesting consequences of a problem that has become central to administrative law.

As usual, the first difficulty lies in the semantics.

CONFUSIONS OF TERMINOLOGY

Many terms used in administrative law have always been notoriously vague and confusing.

(1) *Without*, in the phrase 'without jurisdiction', has often been equated with 'want' or 'lack' or 'absence'. The test most generally accepted is whether the body has any right at all 'to enter on the inquiry'. This corresponds to what Lord Reid in the *Anisminic* case called the narrow sense of jurisdiction.[10]

(2) Similarly, *excess* has been used widely to describe either any kind of mistake or, more specifically, some narrow facet of lack of jurisdiction,[11] so that the phrase 'it exceeded its jurisdiction' might mean almost anything.

(3) *Within* is used generally to relate to matters which the tribunal was free to decide for itself without raising any suggestion of jurisdictional error. However, after reading the list of matters in Lord Reid's speech in the *Anisminic* case which he believes are now reviewable, it almost seems that the only power still left within an administrative tribunal's jurisdiction is the right to find facts.[12] Any given decision which has been

[10] [1969] 2 W.L.R. 163, 170.

[11] Benjafield and Whitmore, *op. cit.* 186; see also the extract from the judgment of Browne J. in *Anisminic*, printed in (1969) 27 *Cambridge Law Journal* 230, 238.

[12] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 W.L.R. 163, 170 (*per* Lord Reid). See also Brett and Hogg, *op. cit.* 73.

in fact upset may have been done so for a host of reasons, including reliance on wrong considerations, denial of natural justice, error of law on the face of the record, errors of mixed fact and law, and so on.

(4) *Jurisdiction* itself has been well described as 'an expression which is used in a variety of senses and takes its colour from its context'.[13]

Despite the official phrases that 'the tribunal is entitled to go wrong' and that 'a decent respect should be paid to its expertise', more and more doubts arise today concerning the meaning of words in the Act itself in which the tribunal's freedom and its expertise seem to count for little. The crucial point is that it is difficult to say whether this kind of question falls now 'within' or 'without' jurisdiction in the old sense of the term. Situations like those in the *St. Pancras* and the *Singapore Trust* cases[14] are quite difficult to identify in this respect.

For the older cases, Lord Sumner's terse distinction was the clearest and most definite. His Lordship described the difference as one between the *area* of the inferior jurisdiction of a lower body and what it does in the *course* of its exercise.[15] Griffith and Street say correctly: 'Properly defined, jurisdiction is the marking of the area of power: something ascertainable at the outset of a process, the conditions on which the right of a body to act depends',[16] citing in support the view expressed by the Privy Council in *The Colonial Bank of Australasia v. Willan.*[17] But 'area' has now many boundaries undefined on the legal map.

JURISDICTION OR ULTRA VIRES?

Brett and Hogg point out that action not within power may be expressed in terms of *jurisdiction* or in terms of *ultra vires,* and that the two terms developed from separate historical sources. Jurisdiction was developed as a concept in the course of supervising Justices of the Peace and later was applied in relation to inferior courts and to 'tribunals' of a judicial or semi-judicial character. *Ultra vires* developed in the course of dealing with 'judicial supervision of local bodies, railway companies and other bodies which were not akin to courts; hence it is often now applied to bodies exercising administrative and legislative functions'.[18] But the line between the three notions of legislative, judicial and executive activities has become so blurred that either the word *'jurisdiction'* or the term *'ultra vires'* will generally suffice to describe an act going beyond powers committed to a person or body.

[13] Diplock L.J. in the Court of Appeal judgments in the case of *Anisminic Ltd. v. Foreign Compensation Commission* [1967] 3 W.L.R. 382, 394. There are excellent comments in the article by Wade n. 4 *supra.*

[14] *R. v. Vestry of St. Pancras* (1890) 24 Q.B.D. 371; *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] A.C. 898. Both these cases are simple instances of the tribunal being misled by apparently expert advice.

[15] In *R. v. Nat Bell Liquors Ltd.* [1922] 2 A.C. 128, 155.

[16] Griffith and Street, *Principles of Administrative Law* (4th ed. 1967) 214-5.

[17] (1874) L.R. 5 P.C. 417, 443.

[18] Brett and Hogg, *op. cit.* 42-3.

Such distinctions as formerly were preserved by the forms of the *remedies* are also growing fainter. Technically *mandamus* will not go if the act is within jurisdiction, but what is 'within' is now very limited. Prohibition and *certiorari* have both been stretched far beyond their former limitation to judicial bodies; and Lord Parker asserted in one case that the exact limits of *certiorari* have never been fixed.[19]

Lord Esher in 1888 tried to separate those facts which a tribunal has been given authority to decide for itself so that they come within its general jurisdictional area, from those other facts that must be shown to exist before it has jurisdiction.[20] But this is now not so helpful, and can even be confusing. The concept of 'jurisdictional' or 'collateral' facts has been the subject of long and sharp controversy; it is complicated further in Australia by the concept of 'constitutional' jurisdictional facts, which has the result that the Commonwealth Parliament may not, by reason of constitutional limitations, authorise a tribunal to determine certain preliminary facts conclusively.[21]

ORTHODOX CATEGORIES OF ERRORS OF JURISDICTION

The decided cases seem on orthodox approaches to reveal four categories in which possible errors on the part of administrative tribunals may be grouped.[22] Let us look at these traditional categories more closely.

1. The question of *want* of jurisdiction. Here the tribunal goes wrong at the outset. It ventures on an inquiry in a field in which it is not permitted to enter. This category would include of course such obvious instances as an industrial tribunal purporting to regulate tariffs or grant a divorce; it would also include a 'jurisdictional fact' question where the tribunal makes an incorrect finding as to the existence of a fact which is necessary for the exercise of its jurisdiction; instance the case of a tribunal invested with the power to fix the rent of 'unfurnished houses' assuming jurisdiction by virtue of an unsupportable finding that a house in fact furnished was 'unfurnished'.[23] The remedies here are the writs—*mandamus* prohibition or

[19] *R. v. Criminal Injuries Compensation Board; Ex parte Lain* [1967] 2 Q.B. 864, 882 'the exact limits of the ancient remedy by way of certiorari have never been and ought not to be specifically defined'. But see note in (1969) 85 *Law Quarterly Review* 471.

[20] *R. v. Income Tax Special Commissioners* (1888) 21 Q.B.D. 313, 319-20.

[21] Brett and Hogg, *op. cit.* 202-4.

[22] Since writing this we have seen the reprint of the remarkably clear judgment of Browne J. in the *Anisminic* case and noticed that a somewhat different classification was apparently there used by him—see the extracts from this case (1969) 27 *Cambridge Law Journal* 230, 239-46—but the difference relates mainly to the scope of 'excess of jurisdiction'.

[23] Brett and Hogg, *op. cit.* 201-2. It is difficult to go as far as de Smith in his statement that there is 'no such animal' as a jurisdictional fact, 'Judicial Review in Administrative Law: the Ever Open Door' (1969) 27 *Cambridge Law Journal* 161, 165.

certiorari—or a suit for declaratory judgment. In this class of case the purported decision is a complete nullity and any privative clause attempting to exclude the jurisdiction of the courts is ineffective.[24]

2. The situation of *excess* of jurisdiction. Here a common link is that the tribunal correctly *commences* its inquiry, *i.e.* it does not mistake its general field nor assume a jurisdiction it does not possess by wrongly finding a preliminary fact. What happens is that the tribunal, at some stage of its inquiry, takes a wrong step which is regarded as vitiating its authority. However, within these broad limits all colours of the spectrum may be revealed. We may have (a) the case of excess of jurisdiction in the literal sense, *i.e.* the tribunal, correctly dealing with its general field of inquiry, grants a remedy in excess of what it is allowed. For instance, an industrial tribunal, with power to reinstate a dismissed employee and power, when ordering a reinstatement, to direct payment of wages in arrears not exceeding six months, makes an order for twelve months' arrears of wages. There is (b) a broader situation, of which the *Anisminic* case[25] is an example, where a tribunal correctly embarking on its inquiry misinterprets the meaning of one significant term in the empowering statute which it has to apply. There is a further situation (c) where the administrative body 'misconceives the nature of its function' and 'applies criteria which are irrelevant'. This may possibly be regarded as only a special instance of the tribunal misinterpreting its own statute. However it is submitted that it represents a somewhat different species of what may be basically the same genus; it represents the class of case where what is involved is the concept of the *application of some kind of community standard involving a value judgment.* Thus we have 'unfit for human habitation',[26] 'proper performance of stevedoring operations',[27] 'infamous conduct in a professional respect',[28] 'is of opinion that an anomaly exists'.[29] Finally, we have (d) the difficult cases of denial of natural justice (including bias) and improper purpose or fraud. In this general area the remedies available to the aggrieved litigant are the same as in (1) and as in the case of (1) a privative clause is *in general* not available.[30]

. The case of an error of *law* which is *not jurisdictional* at all. This is he area vividly identified by the phrase that an administrative tribunal

[24] *Anisminic* case [1969] 2 W.L.R. 163.
[25] *Ibid.*
[26] *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* [1937] .C. 898.
[27] *R. v. Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring o. Pty. Ltd.* (1953) 88 C.L.R. 100.
[28] *Hoile v. Medical Board of South Australia* [1960] Argus L.R. 430.
[29] *R. v. Connell; Ex parte The Hetton Bellbird Collieries Ltd.* (1944) 69 C.L.R. 07.
[30] See the cases mentioned by Brett and Hogg, *op. cit.* 555-6. *Contra* Browne J. (1969) 27 *Cambridge Law Journal* 230, 246 and, so far as fraud is concerned, *nith v. East Elloe R.D.C.* [1956] A.C. 736.

acting within jurisdiction 'has jurisdiction to go wrong'.[31] Usually there are no remedies given by administrative law unless:—

(a) the error 'appears on the face of the record' (in which case *certiorari* may be used) or,

(b) the relevant statute obligingly provides an appeal.

The remedy of suit for declaratory judgment here will not lie.[32] A privative clause *will* be effective to exclude the jurisdiction of a superior court to inquire into validity.[33]

4. Errors as to *fact*. Here there is no remedy save in the case where the error of fact is one of the 'jurisdictional fact' type (as in *R. v. Hickman; Ex parte Fox*[34]), or where the statute grants an appeal on questions of fact as well as of law, *i.e.* a re-hearing.

Over the whole topic hangs the cloud of the *void/voidable* distinction drawn in relation to decisions in disregard of natural justice (and made more murky by the *dicta* in *Durayappah v. Fernando*[35]). We do not comment in detail on the obscurities of this particular case except to say that, apart from this case, there is a fair amount of authority that a decision in disregard of natural justice is 'void' or 'null' (on the footing of being without jurisdiction) and not 'merely voidable'.[36] If the *Durayappah* decision[37] says that such a decision is voidable, the voidability thereby introduced is a most peculiar kind of voidability, in that the impugned decision is void against one person and voidable against a the others.[38] Further complications ensue from the fact that apparently the effect of bias is to render a decision voidable only[39] and thus conceivably to take this case out of the jurisdictional area altogether. In relation to the question of a decision obtained by fraud we have the case of *Smith v. East Elloe R.D.C.*[40] which in this area purported to ascribe effective force to a privative clause, thus cutting across what would surely be the norm conclusion, *viz* that fraud makes a decision a nullity.[41]

[31] *R. v. Governor of Brixton Prison; Ex parte Armah* [1968] A.C. 192, 234 (*per* Lord Reid).

[32] *Punton v. Ministry of Pensions and National Insurance (No. 2)* [1964] W.L.R. 226.

[33] *Bradley v. Canadian General Electric Co. Ltd.* (1957) 8 D.L.R. (2d) 6 *Anisminic* case [1969] 2 W.L.R. 163, 180 (*per* Lord Morris).

[34] (1945) 70 C.L.R. 598.

[35] [1967] 2 A.C. 337 (Privy Council).

[36] *E.g. Banks v. Transport Regulation Board* (1968) 42 A.L.J.R. 64, 70. There are of course expressions of opinion to the same effect in *Ridge v. Baldwin* [1964] A.C. 40 but that case does not reveal unanimity on the point.

[37] *Supra* n. 35.

[38] *Ibid.* 355; see Wade, 'Unlawful Administrative Action: Void or Voidable' (1967) 83 *Law Quarterly Review* 499, 519.

[39] *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 759, 10 E.R. 301.

[40] [1956] A.C. 736.

[41] The force of this case has been considerably reduced by the *Anisminic* decisio

MAJOR OR MINOR EXCESS

In this article we are primarily concerned with the second class, that s to say with what is often described as 'excess', or at least with some parts of it. For it is here that new explanations are now required to clear up confusion. The battle between Parliament and the courts about 'ouster clauses' is a direct legacy of the compromise political agreement that followed the 1689 Revolution. The Whig interpretation of history encouraged high notions of Parliamentary absolutism; and the courts cheerfully concurred with Dicey and Macaulay. But Parliament, wisely, did exercise strong legislative self-restraint, rarely letting itself be drawn nto conflict either with the judges or with the fundamental principles of aw and justice. Today the expansion of state control and ownership, (the legislative creation and management of the enormous network of public works, charitable relief and education) has revived in a novel setting the ancient disputes of Stuart times—except that it is Parliament hat now theoretically claims Divine Right. Perhaps it can do so, up to hat level where it would infuriate public opinion or reduce the common aw institutions to open servility. Politically, it cannot easily, in our democratic society, prevent judicial inquiry into abuses of official power at lower levels. The courts in the past have fluctuated between submission and self-assertion; but ultimately an explosive situation was inevitable. Since 1964 a series of cases[42] has brought the tension out into the open and turned it into a conflict.

Lawyers however have to face the fact that the orthodox concepts may not fit a large area of cases, which though apparently accommodated within the class of 'excess of jurisdiction', really demands a separate name and a different approach.

The fact that in the *Anisminic* case the Court of Appeal and Lord Morris took one view, and that four members of the House of Lords took the opposite view, of a statutory term, throws the spotlight on a major crisis. We have had many cases in Australia in which our judges have struck down statutes and denied jurisdiction to important tribunals in spite of the obvious intent of the legislatures, though one must concede, often for reasons relating to the Constitution. Now the equivalent issue has come to be seen more clearly in England as one of vital constitutional importance, as it has always been here.[43] A serious debate is under way between the supreme powers of Parliament on the one hand and the basic notions of the common law, as asserted by the courts, on the other. For example, it would now seem extremely difficult to devise a really watertight 'ouster clause' although in the *Anisminic* case it was quite plain (as Lord Morris' speech showed) that Parliament had

[42] Beginning with *Ridge v. Baldwin* [1964] A.C. 40 and including *Banks v. Transport Regulation Board* (1968) 42 A.L.J.R. 64.

[43] See the approach of Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' *Jesting Pilate* (1965) 203.

intended that the Compensation Commission should have considerable autonomy.[44] The Commission *did* in fact enter on the matter it was supposed to deal with; it was staffed by very competent personnel; its procedures were just; it took solid legal advice at every point; its views of the meaning of the key phrase 'successor in title' were upheld by the Court of Appeal; yet in the House of Lords the legislature's intentions were flatly frustrated.

DEFECTS OF THE ORTHODOX APPROACH

The way in which the whole concepts are traditionally classified gives rise to a number of questions, *viz*:—

1. One query which might well be asked either by the practising lawyer or the intelligent layman is whether this separation of areas does *matter* or *ought* to matter. If the decision was 'bad' then it ought not to be important whether the court went wrong at the beginning, the middle or the end. Is there *any* point in emphasizing these distinctions? We think there is. There is an important issue of policy difference. Where a body has obviously 'gone beyond' its allotted area, for instance, if a Wages Board were to grant a divorce or (less fantastically) were to fix the quality of goods sold in shops, then the decision is clearly a nullity and plainly the court should declare it such or (if that course be necessary) quash it. Surely Parliament would not go to the pains of defining limitations on power if it intended them to be blatantly ignored.

However, in the case where the tribunal is tackling the very matter it is supposed to tackle but it is argued that it has wrongly interpreted a statutory phrase such as 'successor in title'[45] or has applied wrong standards such as 'unfitness',[46] then there is a real question whether the judgment on an issue of interpretation or on the standards of proper behaviour should not be left to the administrative tribunal whose expertise probably induced the legislature to entrust the matter to its decision. If the superior courts exercise an uninhibited power of inquiry in such matters then the concept of 'jurisdictional error' seems to be limitless in extent. For as Lord Morris points out, in a lengthy modern statute with its mass of regulations any one of thousands of terms used therein may be said to have been wrongly interpreted so that the tribunal may be argued to have misdirected itself.[47]

2. Under the enlarged scope of 'excess' of jurisdiction implied in recent cases, the frontiers between 'without jurisdiction' and 'within jurisdiction' may well be so ignored that the distinction comes to be

[44] *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 W.L.R. 163 especially 179-83; de Smith, *op. cit.* (1969) 27 *Cambridge Law Journal* 161, 16 stresses this same point.

[45] As in the *Anisminic* case.

[46] As in *R. v. Australian Stevedoring Industry Board; Ex parte Melbourn Stevedoring Co. Pty. Ltd.* (1953) 88 C.L.R. 100.

[47] *Anisminic* case [1969] 2 W.L.R. 163, 185.

'll-nigh meaningless. For, under the *Anisminic* case approach, it is ry pertinent to ask what area of operation is left to the third of the sic areas under the orthodox approach, that is to say the case of n-jurisdictional error of law. Are all the cases of error of law now pable of being taken care of by the prerogative writs through the ıcept of excess of jurisdiction so that the particular remedy used in : *Northumberland* case[48] is no longer necessary? This question is very ficult to answer. It may be that the result in the *Anisminic* case ans that *all* errors of law may be forced into the mould of jurisdictional or. As to the *Northumberland* case itself it is perfectly plausible to ue that the compensating tribunal 'misinterpreted its statute' or 'introced the wrong considerations' in deciding what periods of service by : applicant should be brought into account to determine his compenion.[49] It indeed becomes somewhat difficult to conceive of errors of v which do not involve either want or excess of jurisdiction. Perhaps ongful rejection of evidence may be one such case;[50] but after all s would hardly constitute a major instance, as most administrative ɔunals are not bound to observe the rules of evidence.

3. Under the approach involved in some of the recent cases the ıcept of 'error of law on the face of the record' would now seem be virtually meaningless. This was a convenient concept to fit the se where the court thought the error should be put right but felt elf unable, in compliance with the older ideas, to regard the defect jurisdictional in character. However the courts never made much ɔgress in deciding what exactly constituted the 'record';[51] and if under : newer approach the borderline between errors 'within' and errors thout' becomes increasingly nebulous, the effort would not seem to be rthwhile. Even if one regarded the distinction between 'within' and ithout' as one still likely to be meaningful,[52] the device now adopted the United Kingdom and likely to spread in Australia,[53] of requiring ministrative tribunals to give written reasons for decisions would mean ıt *all* errors of law would be reviewable.

4. The present position is not explainable in terms of the distinction tween questions of *law* and questions of *fact*. It becomes increasingly ficult to discern what is a question of law,[54] and this is of particular

[48] *R. v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1951] .B. 711.
[49] See also judgment of Browne J. extracted in (1969) 27 *Cambridge Law Journal* , 240.
[50] See the Queensland case of *R. v. Tennant; Ex parte Woods* [1962] Qd.R.
[51] *E.g.* the confusion evinced in *Baldwin and Francis Ltd.* v. *Patents Appeal ɔunal* [1959] A.C. 663.
[52] De Smith also regards this distinction as simply 'hair-splitting' *op. cit.* 164.
[53] Tribunals and Inquiries Act 1958 (U.K.). In Victoria the Chief Justice's Law form Committee in 1969 made a recommendation along the same lines as are ɔodied in the British Act.
[54] See *Edwards v. Bairstow* [1956] A.C. 14.

moment when the question is one as to the making of value judgme involving community standards such as that involved in the use of t word 'unfit'. The question whether a medical practitioner who sleeps w a nurse during hours of duty is 'unfit' in the sense of professional eth is hardly a question of fact. As to whether anything ought properly to called a 'mixed question of fact and law' so that a judge may agree w it if it is a fact and disagree with it (if he wants to) on the ground that is a question of 'law' or a 'mixed' question, the whole concept receiv caustic criticism from Windeyer J. in 1968.[55]

It should also be remembered that one inquiry of jurisdictional relevar may concern itself very much with matters mainly of fact. This is t inquiry involved in the issue of 'jurisdictional' or 'collateral' facts. T sort of inquiry more usually involves issues of fact than law, for instan if the jurisdictional area is 'furnished houses' or 'inter-state industr disputes' the very initial delimitation of area (that is to say the ba question of 'want') will depend on factual issues.[56]

5. The recent extension of the concept of 'excess of jurisdiction' invol a great extension of the area into which courts can inquire. The point can *anything* remain hidden? Previously the courts were able to say w fair assurance that they would only look into errors of jurisdiction or, the legislature had inserted a privative clause, into errors showing *manif* lack of jurisdiction.[57] It is obvious that the High Court in *R.* v. *Murr Ex parte Proctor*,[58] especially Dixon C.J., was still prepared to give so effect to a privative clause in certain situations; but the enlargement of concept of jurisdictional error involved in the *Anisminic* approach m well erode even this position. If then the court can look into everything nothing is hidden from it, it can be argued that this will lead more a more to the courts being over-ready to substitute their own opinions those of tribunals, especially in situations where social considerations p a part, despite the historical fiction of immunity on the grounds of c venience and swift justice. Is the position coming to be virtually same as a proceeding on appeal so that the borderlines between processes of review and appeal will disappear?[59]

DIFFICULTIES OF A 'FRESH START'

It seems that it is not merely a question of re-stating the differe between *total* 'want' of jurisdiction on the one hand and the concept 'excess' on the other. 'Want' of jurisdiction is of course a basal con

[55] *Da Costa v. The Queen* (1968) 42 A.L.J.R. 184, 188.
[56] See *supra* n. 23 as to this.
[57] *Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417, 442.
[58] (1949) 77 C.L.R. 387.
[59] De Smith, *op. cit.* 163-4 makes the same suggestion.

ıich can never be ignored, but it itself may revolve on the question niceties which we feel may well be left to the technical expertise of the ;ministrative tribunal concerned. Thus in the *Hickman* case,[60] whilst it ıs of importance that the tribunal be kept to dealing with the coal-ining industry because that was its statutory charter, the nice question ıether carting coal in trucks belonged to the coal-mining industry or the carting industry was surely a matter to be left to the technical owledge of the tribunal. That after all was what it was picked for!

Nor does this problem exhaust all the issues which could be included der 'excess' under the orthodox approach. Thus the issues which are ually referred to as 'denial of natural justice', 'bias' and 'fraud', which uld be linked together under the phrase of 'procedural due process', ve little in common with the matters we are here discussing. It is obvious ıt these three are matters of which courts of law should not be prevented)m taking cognizance. We therefore need not dwell on this area save to press the hope that the procedural requirement of natural justice will more completely spelt out in the course of decision and that the courts ll finally make up their minds on the void/voidable issue.[61]

A SUGGESTED NEW APPROACH

If the technicalities (now almost meaningless and certainly confusing) the various remedies were to be simplified so that a court could simply ıke an appropriate order for relief, what should the judicial approach the future be to minor and debatable misinterpretations of legislative)rds? If not hampered by the technicalities of procedure, the courts ght be more or less strongly tempted to interfere on any issue at all, ıether of law or fact. It would seem more desirable that they adopt attitude of correcting a possible misinterpretation only if it was *gross* d *obvious,* so unreasonable that 'no reasonable body of men could ve made it'. Should not other possible mistakes be left within the wer of the authority of the body itself, if that is what Parliament has ted or clearly implied? If it is found to have misused this authority, n the proper remedies are either a change in the statute or a direct ht of appeal on a point of law, without having to torture the situation o one of jurisdictional defects so as to utilise the prerogative writs or the claratory judgment.

What criteria can be applied to distinguish between *gross* and *trivial* ajor and minor) errors of interpretation? The distinctions so far

(1945) 70 C.L.R. 598.

If notwithstanding the ill-conceived *Durayappah* decision [1967] 2 A.C. 337, the ent trend towards regarding decisions taken in disregard of the requirements of ıral justice as void *ab initio* is maintained, then some step should be taken to xamine the holding in *Dimes v. Grand Junction Canal* (1852) 3 H.L.C. 759, E.R. 301 that a decision tainted by bias is merely voidable. The rule against bias fter all, only one aspect of the natural justice principle and should not fall under parate rule.

applied may be rather too general and empty of content.[62] But *can* th be spelled out with more exactitude? A tribunal ought to be able proceed without incessant interruption, provided it keeps to its area, dc not behave irrationally and does not deny substantial and honest hearin to both sides. These seem more practical tests than 'Parliament's intentio

On the other hand it is an undoubted truth that the ancient comm law presumptions protecting the individual must be carefully observ by such tribunals: that statutes are not to be read retrospectively, vest rights destroyed, one-sided verdicts delivered, or fanatical crusades e barked on. We have previously insisted that the courts must still left to inquire into cases of bias and denial of natural justice. No o wants to extend official, bureaucratic authority at the expense of hum rights. The dilemma remains and may be thus stated:

> *How do we protect the citizen from harsh, abrupt, biased official d cisions based on official misreadings of their authority, without at t same time destroying the efficiency of necessary administrative task*

The solution lies in the approach of the superior courts to the functioni of administrators and tribunals. Of late there is a tendency (a) to tr nearly all errors of law as 'jurisdictional' (in the broad sense) a reviewable, and (b) to say that if they are not jurisdictional then, they appear on the face of the record, they can be set aside. This tre itself represents a reaction against the 'judicial permissiveness' of t period 1930-60. It may be better now in this really central core administrative law again to slightly alter course into the mid-chann This would involve:

1. Not upsetting a decision on arguable points of interpretation unl it is 'one which no reasonable body of men could have come to'. T includes the drawing of inferences of law from facts.
2. Not substituting its own standards of what is 'fit' or 'proper' 'suitable' or 'in the public interest' for the standards set by an exp tribunal, unless again these are manifestly outmoded, contrary either common sense or to some major principle of law or reason.

The danger of putting too much emphasis on the technical niceties jurisdiction has often been stressed by judges. Thus Lord Reid in *Armah* case[63] declared in the matter involved there:

[62] Lord Denning drew a firm line between degrees of errors: 'I would say that tribunal or body is guilty of an error which goes to the very root of the determi tion, in that it has approached the case on an entirely wrong footing, then it d exceed its jurisdiction', *R. v. Paddington Valuation Officer; Ex parte Peachey Prop Corporation Ltd.* [1966] 1 Q.B. 380, 403. This remark, one agrees with resp makes good sense in that case; but the degrees of wrongness are a sort of c *tinuum*: how bad a given mistake is cannot be always easily classified. The sa difficulty as to contracts—'what goes to the root'—is similarly hard to solve.

[63] *R. v. Governor of Brixton Prison; Ex parte Armah* [1966] 3 W.L.R. 828, 8 These remarks were misunderstood in some quarters and Lord Reid had occa to explain his meaning more fully in *Anisminic* [1969] 2 W.L.R. 163.

> In my view jurisdiction has nothing to do with this matter. If a magistrate or any other tribunal has jurisdiction to enter on the inquiry . . . and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction. Whether or not there is evidence to support a particular decision is always a matter of law, but is not a question of jurisdiction.

'his is not unlike the liberal attitude of Fullagar J. in *Blakeley's* case[64] iat 'if the jurisdiction depends on matter of fact, considerable weight attached to the view of the facts taken by the inferior court'. He cited aacs J. and Griffiths C.J. in support, especially the assertion of the itter that the High Court 'will decline to interfere when it is very doubtil whether the facts are different from what the inferior courts have)und'.[65]

We should recall the rather neglected judgment of Dixon C.J. in *Parienne Basket Shoes Pty. Ltd. v. Whyte*[66] where His Honour showed his luctance to regard a clear procedural error as going to jurisdiction. (Very ten of course, the vague boundary delimiting the classification of preliminry or procedural requirements as *mandatory* or *directory* allows a)urt to decline to interfere.)

Our field of investigation is primarily Australian law today. We iturally rely on many views expressed in English courts in modern nes, partly because of the respect felt here for the decisions of the ghest English courts and partly because they have problems of review appeal similar to our own. We have not discussed even summarily the sults of the enormous volume of case law and juristic writing in the nited States; but no one should ignore, in coming to conclusions more finite than those we are prepared to make as yet, the thorough amination which has been given to the issue of when and why courts law should reverse the findings of inferior tribunals. Professor K. C. avis has described the United States position with his customary)roughness and vigour. He shows that sometimes superior courts will set findings, on other occasions accept them, on no consistent policy. e admits it is not a simple matter of competence, there are points on

[64] *R. v. Blakeley; Ex parte Association of Architects, etc., of Australia* (1950) C.L.R. 54, 92. *Mandamus* would only go 'if his decision could not be regarded a real decision'.

[65] Lately in England, Salmon C.J., in *Wisdom v. Chamberlain* [1969] 1 W.L.R. 3, while accepting the *dicta* in *Edwards v. Bairstow* [1956] A.C. 14 held, despite findings of the Judge in the court below, that 'with great respect to the Judge, is in my opinion impossible to say that the view expressed by the Commissioners s not a view at which any reasonable tribunal could arrive'.

[66] (1938) 59 C.L.R. 369. Benjafield and Whitmore, *op. cit.* 164, see this case as example that '[t]he High Court has consistently maintained the distinction ween the procedural breaches and jurisdictional error', and briefly set out the posing contentions of jurists. They point out too (p. 187) that Dixon J. stressed difference between want of jurisdiction and the manner of its exercise. This, think, reinforces our view that only serious defects should cause a superior rt to upset a lower tribunal's activities and conclusions.

which the judges are more competent than non-lawyers, others in whic they are less competent; others again in which both are competen Certainly the right question is not 'is it a matter of law or fact?' Perhap the most telling case is the decision in *N.L.R.B. v. Standard Oil Co.*[66]

> At first blush it might seem . . . to be no different from that involved i deciding for example what actuated an employer in discharging a employee: i.e., whether he was trying to maintain discipline, or to ri himself of a troublesome union organizer. We should have a review c that question, for we should be as competent as the Board to deal with i but the question of how deeply an employer's relations with his employe will overbear their will, and how long that influence will last, is, c at least it may be thought to be, of another sort, to decide which board, or tribunal chosen from those who have had long acquaintanc with labor relations, may acquire a competence beyond that of an court. That there can be issues of fact, which courts would be altogeth incompetent to decide, is plain. If the question were, for exampl as to the chemical reaction between a number of elements, it would b idle to give power to a court to pass upon whether there was 'substantia evidence to support the decision of a board of qualified chemists.

Hence the often-used phrases about being reluctant to upset sensib decisions or keeping a decent respect for the opinions of expert officia or bodies, are not always empty slogans. They confirm our contentic that, in practice, courts on the whole do cut across the strict lines 'within' or 'without' jurisdiction, that they look to the 'merits of the cas in the sense of inquiring whether what was done was sensible and not t far removed from the purpose of the Act. It is only recent developmer that give rise to a fear that this may be forgotten in a new trend regard everything as 'jurisdictional'.

Keeping to the middle of the stream will, of course, require wisdom a delicacy. Judges, jurists, teachers, practitioners, freely admit the co plexities of such 'leeways'. Yet one has to face them as soon as th arise, remembering Lord Reid's optimistic yet practical advice in *Rid v. Baldwin*,[67]

> [w]e do not have a developed system of administrative law—perhaps becau until fairly recently we did not need it. So it is not surprising that in deali with new types of cases the courts have had to grope for solutions, a have found that old powers, rules and procedure are largely inapplica to cases which they were never . . . intended to deal with. But I see nothi in that to justify our thinking that our old methods are any less applica today than ever they were to the older types of case.

In fact the older methods of judicial review can be reshaped and ma to apply to new types of case. Some groping is required, of course; th is what we are doing here. There seems to be no magic however, trying to characterize fact situations as 'within' or 'without' jurisdictic once we get away from the basic fallacy that jurisdiction is anything mc than a power to act in a given area.

[66A] (1943) 138 F.2d 885, 887; Davis, *Administrative Law Treatise* (1958) ch.
[67] [1964] A.C. 40, 72-3.

THE QUESTION OF A SEPARATE SYSTEM

Is Administrative Law different?

The conclusion so far does not involve the advocacy of any drastic change in past judicial reasoning but rather a new attitude, *viz* to approach the administrative tribunal in its new and rather different setting with less rigorous inquiry into jurisdictional exactitudes.

We have so far assumed (a) that *administrative* bodies should not be treated, so far as judicial challenge is concerned, in quite the same way as inferior courts of law; and (b) that the whole system of administrative justice should not be removed altogether from the domain of the courts of law. Yet both assumptions might be challenged from two very different points of view.

Some people will, on the one hand, demand to know why inferior administrative tribunals should be placed in a privileged enclave. They point out that in every other area the discontented litigant can take his complaint up to the highest court on matters of law, and in many cases on questions of fact and inference from fact. This applies to matters of contract, tort, taxation, company matters and so on. What then is so different about our administrative judicial tribunals? It is this:

1. The common law has always treated them as different, allowing them relatively wide freedom in matters of local and specialized concern so as to leave the courts free for graver issues, matters more appropriate for the exercise of judicial skills.

2. Parliament also has obviously decided to hand over the great bulk of administrative detail to such bodies in this century so that it can get on with its own major task of framing policy. What we have now is a new kind of 'pluralist' judicial structure, necessarily decentralised.

3. Traditionally the courts were always more unwilling to interfere with the doings of 'elected bodies'[68] than with those set up and controlled by ministers and officials, but this policy never entirely derogated from a general principle of maximum autonomy involving the recognition of some capacity to err. The history of removing many matters from 'the record', as traced in the *Northumberland* case,[69] shows the principle that if autonomy is unduly restricted, the whole hope of a decentralised judicial and political process becomes illusory.

4. More delicate and more important too is the whole area of 'discretion'. While it is now clear, on Privy Council authority, that mere words importing a discretion do not allow a person or body to do whatever it likes,[70] the very gift of discretion implies that some particular

[68] See the *dicta* in *Kruse v. Johnson* [1898] 2 Q.B. 91.
[69] *Supra* n. 4.
[70] *Durayappah v. Fernando* [1967] 2 A.C. 337, 348.

exercise of a discretion will not be set aside, unless it was plainly wrong-headed, arbitrary or unjust. When is a discretion used excessively? The answer is not found by referring to the discretion as being 'within' or 'beyond' power. Reviewing the latest work of K. C. Davis on 'Discretionary Justice' an American reviewer points out that

> the exercise of discretionary power by governmental agencies is more important than the formal process of adjudication and formal rules of law and, as a consequence, the exercise of discretionary power ought to be given much greater attention than it has in the past to insure that it is properly confined, structured and checked.[71]

Discretions now matter more than ever, whether they are those of a Minister of State, of great public agencies or of humble policemen. They cut across jurisdictional issues and involve directly the question whether the discretion was used 'excessively', which means 'unreasonably in the circumstances'. That is a more realistic test than that of 'area' or 'in the course of acting'.

5. Whilst care should go into the staffing of administrative tribunals, it can be strongly argued that once appointed they simply have to be trusted, unless and until they make egregious blunders. After all they are appointed in their quality as experts! There is no parallel to this situation in other areas of litigation except in commercial arbitration; and courts notoriously dislike upsetting arbitrators' findings.

6. Admitting the desirability of having some appellate or review structure, one tribunal should be enough. The average citizen ought not to be dragged through court after court by wealthy opponents or powerful departments as for instance happened in *Hinchy's* case[72] and *Heaton* v *Bell*.[73] Protection against such oppressive tactics is even more necessary in the area of administrative law.

7. The well known defects of the so-called rules of statutory interpretation make the task of finding the legislative intent particularly difficult in the areas where public bodies are assigned special and limited power for the general good. The problems of whether there is a 'plain meaning' for any word apart from its whole context and history, the contradiction between the various canons of interpretation and the obscurities of the purpose for which powers are given, make the task of interpretation especially uncertain in this area. Often no one can tell with assurance what Parliament meant in relation to possible disputes which it could not conceivably have anticipated. Here is another argument put forward by many Americans for giving the utmost discretion to the administrative

[71] Remington, Review, (1969) 36 *University of Chicago Law Review* 884, 888.
[72] *Inland Revenue Commissioners v. Hinchy* [1960] A.C. 748.
[73] [1969] 2 W.L.R. 735. In this dispute each of the four courts concerned upset the decision of the body below it in the hierarchy on the meaning for laxation purposes of the word 'perquisite'.

agencies provided they use them not too unreasonably. No meaning is plain except in a context. Litigated cases are debates about contexts—statutes, social conditions, purposes, and so on. So it becomes harder to say, as a mere exercise in interpretation, what Parliament meant to be within or without power, especially since its attempts to oust review or appeal cover both jurisdictional and procedural issues.[74]

Once upon a time it could be said that administrative law was simply the common law tempered by statute, or, equally, statute tempered by the common law. In Dicey's view it was primarily a matter of private law rules. It was a system that was made workable mainly by the self-restraint of most superior civil servants and the good sense of most judges in the superior courts. But this loose and haphazard approach, admirable in its legal subtlety and its tight-rope balancing, will not do for a modern nation. If we have decided that enterprises of great pitch and moment are to be carried on by large organisations, we need a new set of legal criteria. Whether the 'enterprise' be public or private it is encompassed by the legislative web. Neither can move a foot without being entangled in rules about companies, taxes, investment controls, export restraints, central banking limitations, urban planning schemes, industrial awards or building regulations.

The small entrepreneur too, is caught in the same web. Our system is one of the 'controlled transaction'. All one's life, from birth to death, every act is regulated by the official power to license, to register, to encourage or prevent, to give or take, to grant or refuse. So private law will not do for a structure of controlled transactions; we need a separate system of public law with its own first principles, its own checks and balances, its interlocking forces, its procedures and adjudications made by specially skilled lawmen and managers. This is what most European nations have discovered for themselves: that it is fundamental that disputes between citizens and the State can no longer be regulated by the same set of attitudes as those deciding disputes between citizens. A sound system of administrative *public law* has to be different from that of the ancient *private law.*

Is a separate court system needed?

Does this analysis bring us to the conclusion which might be regarded as the other extreme, *viz* that the nature of administrative law requires the existence of a set of special courts, divorced even in point of review from the ordinary courts? Whatever the correct answer, this essay is not the place to assess the relative merits and defects (so often the subject of controversy in the last twenty years) of the continental systems of

[74] See the numerous criticisms of the accepted canons of interpretation made in United Kingdom, *Report of the Law Commission (No. 21) on Statutory Interpretation* (1969).

administrative law. But it is not out of place, now that this special difficulty in our system of 'balance' becomes notorious, to inquire why our recent attempts have been so different from the techniques under the structures established in Italy, France and Germany. It is not because the historical origins of English special and local courts were so different from those in other lands in the Middle Ages or even up to 1800. Nor is it because the law became more centralised in England after 1700. Similar centralization and uniformity had occurred by 1900 on the Continent. Nor finally does the difference lie in the peculiar temperament of various peoples. The Englishman is neither more practical nor less theoretical than the Italian or the German in ordinary affairs, though doubtless he is more cautious and pragmatic in his expression of forma propositions and arguments. Temperament does count, but not that much! In all these countries there have been, and still are, local and provincia magistrates whose ideas of justice and sense of freedom are not so very different from ours.

The misty fictions of a special and superior 'Englishness', beloved o the Whig historians, are now being dissipated, as Milson and the newe historians have been doing of late. The difference is that long ago th Continentals recognized the facts of modern social, business and politica life and saw that the new administrative problems (and their management were *different*. They needed different styles of adjudication, still operatin by 'the rule of law', but independent in a practical sense both of the stat officials and of the normal skills and interests of the orthodox legal pro fession.

Our concern here is merely to suggest there is merit in the view tha the ordinary courts should manage the ordinary law and special court should manage the special laws. Historically, if we were to set up Droit Administratif we should not be betraying the English tradition, bu returning to it in the spirit in which it operated in earler times, whe pluralism was the common feature of the English legal order.

A rigid system of administrative courts with a Council of State at th top is probably not required in Australia. More vital is an appreciatio by the ordinary courts that the good sense and practical and loca knowledge of special tribunals, if composed of intelligent, broadminded an practical-minded men, should not be frustrated and brought to naught b judges largely inexpert in these peculiar fields, except for the grave reasons. What is first needed is, as the Law Commission has hinte a drastic new look, and it is in the field of 'excess' that the prese attitude (those criteria of interference or abstinence) needs re-thinking.

The rest is a matter of techniques (not too difficult to devise) in orde to secure cheap, swift, honest and competent justice, while respectin the harassed administrator doing an honest and capable job. On the who

our lesser tribunals do their work well. They do need supervision, but of a special kind, and by persons qualified by their training to do the supervising. This feature seems to have given the continental systems their special efficacy.

The need then, it seems, is for the present doctrines relating to 'excess', and perhaps even some of the more subtle exercises involved in the determination of 'want', to be replaced by an approach which preserves a balance between the need to give recognition to the competencies of specialized administrators and the need to prevent the occasional waywardness or even 'craziness' which sometimes affects them.

One does not deny the need for changing the present machinery for review by replacing the obsolete prerogative writs by a simple system of control, perhaps for creating a special court to hear administrative appeals. Merely to change the forms, however, is not enough.

It may be indeed that the problem of supervising what is now called excess' may prove too great a strain on the common law courts; another completely organised hierarchy of special courts, including lawyers and other experts, *may* prove the only workable solution. But, in whatever way it may best be performed, the task of allowing sufficient and proper discretions to housing bodies, municipal authorities, suppliers of power and fuel, police, universities and so on must be tackled without delay. The older distinctions of jurisdiction have become inadequate to perform the balancing technique which is necessarily involved.

CONCLUSION

This essay was triggered off by recent developments that appeared to upset traditional opinions about types of jurisdiction and indeed to push the notion of 'excess of jurisdiction' to a point where little freedom of movement would be left to administrative tribunals. The particular area of so-called 'excess' where it might appear that the recent approaches of some courts should be tempered, seems to depend on 'modes of statutory interpretation', taking this phrase in the broad sense of signifying both the meaning of words and the application of social value judgments. Unless it is necessary for the court to explore these concepts in order to determine what is the broad area of the authority of the administrator, it seems to be misplaced ingenuity to regard the interpretations of them as going simply to jurisdiction. A broad rule that what the administrative body has done will not be set aside, unless it is the sort of thing that no reasonable person would do, seems to do justice to the balancing of interests that are involved.

In short there seem to be three levels in inquiry appropriate to a court exercising a function of judicial review.

There is first, the inquiry made necessary when the allegation is that the tribunal was dealing with an area which is *simply beyond its reach.* Obviously this question must remain one for a superior court, at least under the common law system of judicature. This is properly called a question of 'jurisdiction', though it is difficult to see what is wrong with ignoring the quirks of historical development and referring instead simply to *ultra vires.* Thus G. Nettheim has sensibly declared that jurisdiction cannot be talked of except in the sense of *ultra vires.*[75] Though one must concede this essential function to the law courts, it still seems that, where the determination of 'area' is dependent upon nice questions of fact, as may happen in the 'jurisdictional fact' situation, more scope should be left to the lower tribunal when the determination of the fact situation lies within the special qualifications of its members.

Secondly, there is the area of what we have previously called *procedural due process*—the restraints involved in the concepts of natural justice, bias and fraud as applied to the proceedings of administrative tribunals. This hardly seems to involve any issues of 'jurisdiction' or *'ultra vires'* at all, save by using a very sophisticated dissecting knife. Acceptance of this fact should not however prevent the courts from regarding proceedings which infringe the rules as involving *voidness* rather than mere *voidability* In this sphere it seems that for the time being at any rate the courts must still hold the reins. Administrators often tend to be in too much of a hurry to respect, as much as they should, the obligation of listening to both sides. Once again, however, the courts should not fall into the error of requiring administrative tribunals to conform too closely to the procedure of courts. On present indications they are not likely to do so.

Thirdly, there is the area we have been examining: the area of interpretation of words and concepts in the governing statutes. Here, we believe, the word 'jurisdiction' should be banished and should be replaced by an inquiry into the reasonableness of 'what the body has done', to the intention that an administrative decision should not be upset unless firstly it relates to matters of substance and secondly it involves the type of decision at which no reasonable body of men would arrive.

'Excess' might then acquire both greater precision and a more realistic function. It would not, in our view, require specific legalistic checks on judges, but rather a higher degree of trust on their part in the goodwill common sense and experience of special tribunals.

[75] G. Nettheim in a book review (1969) 6 *Sydney Law Review* 296, 300 says 'Since *Ridge v. Baldwin* and *Durayappah v. Fernando* a wider range of action will fall within the ambit of [the writs of *certiorari* and prohibition] and the old distinctions between *vires* and jurisdiction will crumble'. This tends to strengthen a view that the whole issue should be: was the particular act beyond power?