"THE MISCHIEF OF THE WAR CASES IN ADMINISTRATIVE LAW WITH EMPHASIS ON NATURAL JUSTICE"

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BY

PETER E. MAUNDU

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In general, the law is stated as at May 1, 1981. The views and mistakes expressed in this paper are, however, mine, unless otherwise stated.

ABBREVIATIONS:

PERIODICALS:

C.L.P.	-	Current Legal Problems
Cam.L.J.	-	Cambridge Law Journal
E.A.L.J.	-	East African Law Journal
L.Q.R.	-	Law Quarterly Review
M.L.R.	-	Modern Law Review
N.Z.U.L.R.	-	New Zealand University Law Review
P.L.J.	-	Public Law Journal
Univ. of Tor.L.J.	-	University of Toronto Law Journal

CASES:

A.C.	-	Appeal Cases
All.E.R.	-	All England Reports
B and S	-	Best and Smith
Burr	-	Burrow
C.B.NS	-	Common Bench New Series
Co Rep	-	Cox Criminal Reports
K.B.	-	Kings Bench
Mod	-	Modern Reports
N.Z.L.R.	-	New Zealand Law Reports
Q.B.D.	-	Queens Bench Division
U.G.L.R.	-	University of Ghana Law Review
W.L.R.	-	Weekly Law Reports

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I N T R O D U C T I O N

The origin of my thesis is the cursory treatment given to war decisions. There has never been a full treatment of the war and immediate war decisions and their impact on later decisions especially during peace times. Many authors and commentators have only summarily confined them to those peculiar situations of the war without much else to say. In my view, this is a parochial treatment. The impact of the war broke the boundaries of the war situation, flooding the whole peace time period with decisions that echo those difficult times especially during the two imperial wars. The impact of those decisions especially on the principles of natural justice and judicial review is immense as is shown below. The result has been patchwork reforms to ameliorate the impact of those decison; an affair that the author of this paper is diametrically opposed to. Hence his 'motto' back to the status quo ante.

As a preamble, let me examine what administrative law is about. It is difficult if not impossible to give a concise definition as to what administrative law means. Text book writers like Wade have not concerned themselves with what administrative means but what it is concerned with, he says:

> "Administrative law is mainly concerned with the operation and control of powers of administrative authorities with emphais on function rather than structure." 1

Peter Sevareid[2] has said that since the people are sovereign and elect popular representatives who make laws, the work of the government is to administer them. Administrative law is also concerned that the government, in carrying out the laws made by the representatives of the people, does so in a proper manner and does not unduly oppress the public nor infringe on their personal rights.

> Others like J.P.W.B. McAuslan have said that "Administrative law is the law relating to the administration, it determines the organisation, powers and duties of administrative authorities.[3]
>
> Kenneth - Culp Davis has said that "administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action .... administrative law is limited to the law concerning powers, procedures, and judicial review.....[4]"
>
> Thus we see the emphasis is not the meaning but the function and control of administrative action, the problem always being how to keep a powerful government within the legal bounds and how at the sametime to help it work efficiently.[5]
>
> A further dimension to the function of administrative law is supplied by J.F. Northey when he notes that "it is generally agreed that administrative law is concerned with the relation between the state and its citizens and between domestic tribunals and those subject to their jurisdiction. It also deals with controls over the exercise of subordinate legislative power and the exercise of discretions by statutory and domestic tribunals."[6]

It has been said that administrative law is a recent phenomenon by such scholars as J.F. Northey.[7]

> "It is less than ten years ago that Lord Reid declared that the U.K. did not have a developed system of administrative law, he added that this was perhaps because until recently it was not needed".

Thus having seen that administrative law concerns itself with functions and powers and that it is a recent development, it is necessary that those who are concerned either as administrators, judges should endeavour to create a coherent system that does not mystify issues. It is my contention that he who decides anything must be guided and indeed be governed by the rules of natural justice; that is in making a decision he should give a party a chance to present his case and that he should not be biased. This position was laid down by the famous case of Cooper v Wordsworth Board[8]. The law then was on the right footing. However, after the first World war things took a drastic turn and the judicial train derailed; thus confusing the law. The fact that administrative law is a recent development is not the cause of this derailment but the excuse of many authors; however, it must be added that the impact of the two great wars has left an indelible mark on the law as it is today, such calls for rectification.

Against this background, the author will proceed in Chapter One to analyse this rules of natural justice, indicating any major derailments occassioned by the two great imperial wars and how these rules applied before

the wars. The concern of Chapter Two is to profound a rationale for the decisions made during the war and indicate how the principles of discretion and reasonableness were applied as to whittle completely their usefuness in later decision. Chapter Three, will deal with the actual mischief on decisions made after the war and indicate how they cannot be justified in their particular circumstances. In other words, how the rules of natural justice were blurred together with the principles of reasonableness by precedence of the war cases.

Finally, I will proceed to give recommendations for the necessary reformand conclusion.

FOOTNOTES TO THE INTRODUCTION

1. Wade, Administrative Law (2nd Ed. Oxford Calrendon Pr. 1967) pg.2

2. Peter Sevareid, An Introduction to Administrative Law in Kenya p.3

3. J.P.W.B. McAuslan, "Administrative Law in Kenya - A General Survey" In East African Law today B.I.I.C.L. Commonwealth Law Series 5, London (1966) P.23.

4. Kenneth Culp Davis, Administrative Law Text (1959) S.I.01

5. Supra note 1 at p.1

6. J.F. Northey, 'The changing face of Administrative Law 3 N.Z.U.L.R. 1969 at p 429

7. J.F. Northey, 'A decade of change in Administrative Law 6 N.Z.U.L.R. 1967-75'.

8. Infra; note 1 chapter one.

CHAPTER ONE

THE APPLICATION OF THE RULES OF NATURAL JUSTICE

A. BEFORE THE TWO GREAT WARS

Before the advent of the two great wars, a line of decisions had it very clear that the rules of natural justice had to be observed in making any decision affecting an individual. In cooper-v-wordsworth[1] it was held that the rules of natural justice are of "universal application and founded on the planiest principles of justice[2]. Where a statute authorising the interference with individuals property or civil rights and the statute was silent on the issue of notice and hearing the courts will apply "justice of the common Law to supply the omission of the legislature".[3]

These rules of natural justice are, a right to be heard and that a man should not be a judge in his own cause that is, the rule against bias. The rule against bias was used even in the middle ages.

Secondly, the 'audi' rule is alleged to have been traceable to the dawn of time. Portescue J. in R-v-chancellor of cambridge University[4] stretches it as far as the Garden of Eden. He said:-

> "The laws of God and man both give the party an opportunity to make his defence if he has any. I remember to have heard it observed by a very learned man upon such ocassion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam(says God) 'Where art thou?

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Has thou not eaten of the tree whereof,
commanded thee that thou shouldn't eat"

This we can say the rule to be heard is a maxim of antiquity.

These rules of Natural Justice can be traced back to medieval precedents. Dr. Bonhams Case[6] gives a classical example of the rule against bias. Dr. Bonhams a physician at Cambridge University was fined by the College of Physicians for practicing in the city of London without the licence of the college of physicians, the college acted under a statute which provided that half of the fines should go to the King and half to the College so that the college had a pecuriary interest in its own judgement, this made it a judge in its own cause. Chief Justice Coke said that the court could declare an act of parliament void if it made "a man a judge of his own cause".

In 1701 another great judge, chief justice Holt, approved Cokes opinionand said that a statute which provides that the same man should be party and judge would be void Act of Parliament. Holt C.J. said that such a proposition was far from entravagancy "for it is a very reasonable and tru saying"[7].

In another early case [8] it is shown that canon lawyers looked on the concept of Natural Justice as one of the rules of eternal truth, connecting it with religion. In this case the University deprived a man of his degrees without affording him an opportunity to be heard. The decision was set aside. Today Natural Justice is no longer looked upon as a means of destroying enacted law but of fulfilling it. Thus we have seen that before the great wars the rules of

natural justice were elastic and covered everybody who was rested with the power of deciding anything. This is made evident by Coopers case. The decision in Cooper was followed by Hopkins-v-Smethwick Local Board of Health[9] Wills J. pointed out that "in condemning a man to have his house pulled down, a judicial act is as much implied as fining him £5[10]. This meant that the dichotomy between'judicial' and 'administrative, as seen in war cases and after meant little if the rights of a man were interfered with, he had to be accorded natural justice. The interpretation of these rules was wider than today. This fact is carried further by the case of Board of Education v-Rice[11] where the House of Lords said that an administrative authority must act in good faith and listen facily to both sides, for that is a duty lying upon every one who decides anything. The dis distinction drawn during the wars times between 'judicial' and 'administrative' actions is the mischief wrought by the war cases today.

(~~W~~) Let me now turn to the rules of Nature Justice and see how they have been applied since 1911.

B. RULES OF NATURAL JUSTICE SINCE 1911

(C) THE RULE AGAINST BIAS - ITS SCOPE

At common law there are two types of disqualifying bias (a) No man is qualified to adjudicate in proceedings in the outcome of which he has a pecuriary interest.

(b) No man is qualified to adjudicate in any matter in which he has any non-pecuriary interest likely to result in bias for one side.

These rules are taken for granted in the administration of justice. It was settled as early as 1852 that a judge is disqualified from hearing any case in which he had a pecuriary interest. A classic example is Lord Cottenham who in 1852, in a chancery suit had made a number of decrees in favour of a Canal Company in which he was a shareholder. His decrees were set aside in the house of Lords on account of his pecuniary interest in the matter.[12] There is no justification why the rule should not be applied in administrative proceeding as it has been applied to judicial.

The fact that during the development of administrative Law so many agencies were legally established is not enough justification that the rules of natural justice as applied in the courts should not apply to administrative bodies. It would be ridiculous if on the same issue the court grants Natural Justice and the administrative body turns it down. It is my thesis that the courts at one time deviated from the path of righteousness due to inevitable circumstances but continued to do so when the circumstances were surmounted.

The application of these rules of natural justice has been hampered by the concepts of "acting Judicially", and "within jurisdiction" the word judicial has brought much confusion in the field of administrative law though it was accepted that the bias rule applied to any person or body of persons with a duty to "act judicially". There who no clear definition of what acting judicially meant.

Let me examine the development of the term 'Judicially'

first in the English legal world. As I will point out later in the third chapter the development of such words was a great prop to administrative law and were the tools used to circument the harsh decisions of the war times.

Early development of this term are traceable to the 19th Century in the case of Cooper-v-Wordsworth Board of Works[13] concerning a 'right to a bearing rule the term 'Judicially' was given some meaning. Under an Act in 1855 it was provided that no one would put up a building in London without giving seven days notice to the local board of works. The Board was empowered to demolish such buildings. Cooper build a house without the prerequisite notice. The board embarked on demolishing the building and in court it was held that the board should have afforded the order man to be heard in his defence.

Earle C.J. said that the appeal clause would evidently indicate that in exercise of their power the board would be acting Judicially.

According to Byles J. the board was acting judicially because they had to decide a case and apportion a remedy. He further stated that though there was no positive word in the statute requiring application of natural justice yet the common law justice will supply the omission of the legislature.

From this case it is clear that acting judicially meant as a matter of course having to determine the offence and apportion the punishment as well as the remedy. This definition was applied until the decision of R-V-Electricity Commissioner[14] an aftermath of the war cases appeared on the scene. As I will argue later this decision was

intended to remedy the mischief of the war cases, however it brought much confusion. In this case Lord Askin said

> "Whenever anybody of persons, having legal authority to determine questions affecting the rights of an individuals and having the duty to act judicially .....[15]".

Hear it is clean beyond any paradventure of doubt that Lord Arkin had changed the meaning of acting Judicially despite the decision in Cooper (supra). Here he seems to be talking about two elements, that a body of persons should have legal authority to determine disputes and should also have a duty to act judicially. This criteria brought a lot of disparity of opinion in that some thought that Atkin was just quoting the rule as laid down in previous cases and applied it accordingly, while others thought that Lord Atkin meant that there were two separate requirements. An endeavour to reconcile these views did more harm than good.

Confusion continued to prevail in the 1950's in an appeal from Ceylon to the prioy council in Nakkuda Ali-v-Jayaratine[16]. An Act of Ceylon provided that a controller of textile had power to cancel a dealer's licence "where the controller has reasonable ground to believe that the dealer is unfit to be allowed to continue as a dealer[17]".

The privy council held that a fair hearing had never been necessary. The judgement of Lord Radcliffe stated that there was no ground for holding that the controller was acting judicially, that he was not determining a question of rights of subjects put the regulations suggested that he need proceed by analogy to

judicial rules.

H.W.R. Wade[18] maintains that primary principles of law were abandoned in favour of the misleading doctrine, resting on no authority that a licence was a mere privilege and not a right.

It is my thesis that the confusion over the definition of a judicial act stemmed from Lord Atkins principles which were purposely to justify, and give administrators, wide horizons of making decisions without recourse to rules of Natural Justice. This was an experience of the first world war where administrators had wide powers to make fast and quick decisions on matters of policy and issues related to war and powers on the re-construction scheme after the wars.

Some judges instead of taking into account this likely influence of the war time, took upon themselves to create even more confusion from Atkins doctrine in seeing the doctrine as setting up two criterias.

Until 1964 it was no longer possible to determine or predict what the courts would consider as judicial or when they would say that because an act was administrative it could not be controlled by courts. This confusion reigned until a decision reinterpreted "acting judicially". In the case of Ridge-v-Baldwin[19] which concerned a right to a learning Lord Reid re-formulated the Atkins doctrine as to mean "Whenever there is power to make a decision or order, there is always a duty to act judicially"[20].

According to Lord Reid, power and duty go hand in hand. In summation, he said Lord Atkin might as well have said:-

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'Whenever anybody of persons having authority to determine questions affecting the rights of subjects and accordingly having a duty to act judicially"[21].

This definition of Lord Reid is not even complete, it ignores the question of privilege and permissions and by such ommission purports to support the decision of Nakkuda Ali[22]. This is another manipulation to pass through the thicket of confusion to the status quo as shown in Cooper.

As though the manipulation in Electricity Case (supra) and Ridge (supra) were not enough, another doctrine of "acting fairly" was ~~lounged~~ launched. Where the strict rules governing the application of Natural Justice are ignored and that a tribunal must act fairly and in good faith. In Re H.K. (An infant)[23] it was held that "an immigration Officer had a duty to act fairly without having to act judicially"[24]. In another case, Lord Denning said that it is not possible to lay down hard and fast rules as to the application of the rules of natural justice, everything should be left to depend on the circumstances.

This seems to suggest that there is no universally accepted definition of the term "acting judicially" the definition depends on the particular circumstances of each ease. Lord Denning added to the confusion in his Dissenting Judgement in Re Perganon Press Ltd,[25] where he maintained that it is now settled that a statutory body entrusted by a state to make a decision must act fairly.

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At this juncture we may pause, and ask what does "acting fairly" mean? We may argue that it means following the necessary procedures of which natural justice is one or acting on grounds of good conscience which means that 'acting'fairly' assumes a subjective test, this would be a prop to good administration as understood by reasonable men. For those who argue that the distinction between "judicial act" and "administrative act" exists, it is clear the rule of bias is most abused and does not apply as it did since time immemorial.

As pointed out about this duty to act fairly commonly called the 'New Natural Justice[28] the use of this idea of fairness stemmed from a diction by Lord Parker. The impression given by this concept is that the duty to act fairly is confined only to judicial proceedings which distinction was rejected in Ridge (supra). The very purpose of adoption of the notion of fairness as was explained in Re H.K.[27] was to avoid such a categorization and to allow each case to be determined according to the circumstances and subject matter under consideration. Some might argue that such development is healthy but, it is, submitted that it is not, in the first place, its perimeters are extremely vague and Lawton L.J. who I agree with argues that defining it is like "defining an elephant," because it is a very broad concept[28].

(ii) THE RIGHT TO A HEARING

NATURE TO A HEARING

The right to a hearing requires that a person be afforded an opportunity to know the proceedings he is to meet, an opportunity to know the case, a chance of answering it and a chance to have his own case through. The denial of

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the above opportunities either due to the inadequency of notice or lack of the same will enable one to argue that he has been denied Natural Justice. The notice must be informative enough as to enable the order party to prepare his defence. The notice has also to specify the charge against the party. In the case of Flect Mortgage-v-Lower Maisonette,[29] The applicant was completely unaware of the proceedings against him. The Landlord here sought forfeiture of a lease but after an agreement with the tenant the fofeiture was suspended on condition that the tenant comptied with certain stipulations. The original Landlord later assigned his reversion, without giving any notice to the tenants the assignee Landlord applied to a Master for leave to issue a writ of possession on the ground that the tenants were in breach of the stipulation contained in the consent order. The Master gave him this writ of possession at the time the premises unoccupied as the tenants were away. The tenants came only to find doors locked.

Pennyecwick V.C. in setting aside the Masters order said:-

> "..... It appears to me too clear for words that natural justice required that notice of this application should be given to the tenants, the idea that an order can be made against a man who had no notification of any intentions to apply for it has never been adopted in this country"[30].

Also in Malloch-v-Aberdeen Corporation[31] where the teacher under statute was dismissible at pleasure, the

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House of Lords held that he should have been given a notice.

The notice should be precise to give the affected parties due opportunity to make representations, the notice must be served in sufficient time to enable the representations to be made effectively [32]. It would be contrary to natural justice to be either vague or too brief to be the basis for the preparation of the defence. He cannot do this effectively if he gets a notice that does not give him all the facts and information from which he can make his defence. The notice has to contain all the charges of which the applicant is accused so that he may know what to say on all of the counts.

In the case of Maranda Mosque-v-Badiudi Did Mahmud[33] where notice was only given of one charge it was held that the managers of the school should have been given notice of all the charges.

The greatest difficult in the question of hearing arises when we start to assess whether the hearing should be oral or written, this is where I argue that the rules of Natural Justice have been diverted in that courts have tended to assume that written statements constitute enough hearing. This kind of hearing does not give the party an opportunity for his demeanour to be assessed nor his veracity in an open dialogue. After all, it is not easy to put everything that one wants to say in black and white; other issues relevant to the charge might arise and in so doing may enable all the parties to expand. Their Horizons of argument and defence further if an oral hearing is granted.

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War cases have been followed as indications of what the form of a hearing should be and this is one mischief in our law the case of Local Government Board-v-Arlidge[34] endorses this. During peace-times the same is true as indicated in an East African case of Re Manles Application[35] the applicant contended that when he appealed to the minister he was not given full opportunity to put his case in writing. There was no need for an oral hearing it was said. Here in Kenya an oral hearing is not a necessity as evidenced in the case of Immigration Control Board-v-Singh[36].

Connected with the idea of an oral hearing is cross-examination. Where there is an oral hearing there is a right to cross-examination of a witness; lack of a hearing will usually be a denial of natural justice[37].

In another case[38] it has been said that a party has to ask for it and if he doesnt then he cannot be heard to say that he has been denied natural justice. This decision based on a war case; Arlridge[39] assumes so much of parties called upon to speak for themselves. First and foremost, it assumes that all persons are conversant with the law and can clearly and bravely cross-examine witnessses competently to secure their own defence. This becomes clear when viewed against the illiterate citizentry of the Kenyan populace.

The other question of a right to a hearing is whether legal representation is part of Natural Justice. There are points for and against; those who argue that legal representation is not a requirement state that counsel will confuse tribunals or will make an administrative action be as procedural as a court of law. But one wonders what is wrong

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with this if it is the only way to mete justice. Those who support it argue that some people are not versed with the law, they become nervous and hence the necessity of a person trained to speak fluently and aware of legal technicalities should represent him to exhaust all the points in a bid to secure success for the party.

Lord Denning in Pett-v-Greyhound Racing Association[40] seemed to be of the opinion that legal representation could be allowed before a tribunal not because it would otherwise be in breach of natural justice but on the basis of agency. In coming to this conclusion, he considered the gravity of the charge. To this contention of Lord Denning, I submit, it is a wrong criterior, he misunderstood the implicatious of legal representation. Legal representation implies that, a person is incapable of preparing and making out his defence as best as he would have liked; he appoints a legal expert to execute that for which to him is difficult to do but beneficial to him if done by a legal expert. To state that the gravity of the charge is a necessity in awarding legal representation is naive.

I think, a right is a right wherever big or small. An individual will value his rights be they as trivial.

I submit that legal representation should be determined by the circumstances and not the issue and such circumstances should be so special, so much so, that to allow representation would cause irreparable damage to the state or to a sizeable group of persons in the society. I

C. NATURAL JUSTICE IN EAST AFRICA

It is a fact that the English common law principles doctrines of equity and statutes of general application were

received in E.A. through the Doctrine of Received Laws. The Common Law principles included the concept of natural justice.

The concept was first mentioned in East Africa as early as 1898 in the case of Postwalla-v-Secretary of State[41]. This case involved a dismissal of a railway employee without first giving him a hearing. The court held that Natural Justice applied in this dismissal because the employee had lost his job.

What constitutes a judicial function is found in Shekh Brothers-v-Control of Hotels Authority[42]. In this case the hotel authority ordered the percentage of monthly residents in the Salibuty Hotel in Nairobi raised from 85% to 100. One of the issues before the court was wherever the authority had a duty to act judicially. The court observed that where facts have to be found and weighed and considered an obligation rests with the authority to exercise it discretion. The court concluded that the authority had to act judicially. This supports the decision in Electricity (supra). Much has been said about Lord Atkins argument.

The other element remaining is what is the effect of a decision arrived at in contravention of the rules of Natural Justice. The issue is whether a decision reached without a hearing or by a biased tribunal is void or voidable. Alot of opinion has been raised on this issue[43] apparently no general agreement has been arrived at. The new issue has been a new question which has suddenly began to complicate administrative law. Another writer[44] argues that this hybrid creature has brought a mess. Contrary and

conflicting views to the above have been expressed,[45] the writer maintains that the term voidable is not new and quotes cases to support his submission. He quotes such early cases as Dimes (supra) but this submission has been rejected in that the observations in Dimes were obiter and not the ratio of the case. The Mr. Lord Denning, submits a decision arrives without natural justice is void[46]. See Firman-v-Ellis 1978 3 W.L.R1

Wade strongly argues that a judgement made by a biased tribunal, means that it was improperly constituted, so that is without jurisdiction and therefore its decision void[47]. This has been applied where the doctrine of ultra vires is involved[48].

As far as ordinary appeal is concerned, it would appear that where there is a right of appeal the previous decision is valid until it is reversed on appeal when it becomes void while where the only remedy is not an appeal but by way of review the decision is void ab intrio. In other words the two words appear together in the former case where because the first decision is subject to reversion on appeal it is voidable and becomes void when reversed but in judicial review the decision is either valid or void since it cannot be reversed on substituted but only declared to be one way or the other.

Void or voidable may be an old question but the sooner they are settled the better. It is not a question of which is 'right' to apply but which is to apply. The only purpose voidable seems to serve is that it gives the person a chance to have his case reconsidered in accordance

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with the law but this does not prevent the authority concerned to reach the same conclusions and the courts have discretion to refuse remedies as it deems fit. As things stand the void view appears to command more potential votes and its supporters have increased.

As it will appear later, the 'voidable' view is an excapist attitude of the courts in a bid to grant administrative bodies powers that are unnecessary during post-war times, in that their decisions could stand until they are challegged a declaration that a decision is void ab intio could have undesirable reparcussions especially during war times.

If there is a failure of natural justice Lord Wright in General Medical Council-v-Spackman[49] thought that such a decision would be void.

"If the principle of Natural Justice is violated..... it is immaterial whether the same decision would have been arrived at in the absence or departure from the essential principles of Natural Justice. The decision must be declared to be no decision at all".

Denning L.J. (as he then was) was of the same view in Annanimhods-v-Oil Field Workers Trade Union[51]. In Ridge-v-Baldwin[52] Lord Reid, Horris and Hodson (majority decision were of the view that such a decision was voidable.

These decisions can be contrasted with Bryne-v-Kinematograph Renter Society[53] where the court held that breach of natural justice does not necessary vitiate a decision. Harman J. said,

"Breach of Natural Justice was not fatal.... if therefore she had been allowed a right audience, she could not have altered the results[54]."

Hence, as submitted above, immediate action is necessary to remove this undesirable anormaly in the healthy development of administrative law.

FOOTNOTES TO CHAPTER ONE

1. (1863) 14 (CBNS) 180
2. Ibid., atp190
3. Ibid., at P. 194
4. (1723) Strange 330
5. Ibid., at 551
6. Per Lord Loke C.J. in Dr Bonham's Case (1610) 8 COR 136 at P 118A.
7. City of London-v-Wood (1701) 12 Mod. 669
8. R-v-University of Cambridge (1723) 1str. 557
9. (1890) 24 Q.B.D. 712
10. Ibid at P 714
11. [1911] A.C. 181
12. Dimes-v-Grant Junction Canal (1852) 3 H.L.C. 759
13. Supra., note 1
14. [1924] 1K.B 171
15. Ibid at P. 205
16. [1951] A.C. 66
17. Ibid., at P. 78, per Lord RADCLIFFE.
18. H.W.R. Wade, Administrative Law (3rd ed.,)199
19. [1964] A.C. 40
20. Ibid., at P. 81
21. Ibid at P. 82
22. Supra note 16.
23. [1967] 2Q.B 617
24. Ibid., at P. 630
25. [1971] ch 388, at P. 439.
26. Expression coined by Mullan, in 'The New Natural Justice' 28 University of Toronto Law Journal 281
27. Supra note 25
28. Maxwell-v-Department of Trade (1974) Q.B. 533 at P. 539
29. [1972] 2 All. E.R. 737

30. Ibid at P. 744

31. [1971] 1 W.L.R. 1578

32. R-v-Liverpool Corporations (1972) 2QB 299

33. [1967] A.C. 13

34. [1915] A.C. 120

35. [1958] E.A. 153

36. [1956] K.L.R. 40

37 R-v-Edmonton J.J. ex. parte Brooks [1960] 1 W.L.R. 697

38 University of Ceylon-v-Fernandes [1960] 1 W.L.R. 223

39. Supra note 34

40. [1969] 1Q.B. 125

41. (1898) 1 EAPLR 8

42. [1949] 23 (2) K.L.R.1

43. H.W.R. Wade; 'Unlawful administrative action: void or voidable' (1968) 84L.Q.R (1968) pg. 95

44. M.B. Akehurst 'Statements of Reasons for Judicial and Administrative Decisions M.L.R. Vol. 33 (1970) pg. 154

45. De Smith; JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (5th Ed 1974) pg

46. Firman-v-Ellis [1978] 3 W.L.R. 1

47. Supra note 18

48. Anisminic Ltd -v- F.C.C. [1969] 2A.C 147 at P. 171

49. [1943] 2 All.E.R. 337

50. Ibid., at P. 345

51. [1961] Ac 945

52. Supra note 23

53. [1958] 1 W.L.R. 762

54. Ibid at P. 848

CHAPTER TWO

WAR CASES: A RATIONALE

My task in this Chapter is to examine whether there is any justification for decisions made during the war times and how the courts administered the rules of natural justice. This will be done via the two concepts known to administrative law: reasonableness and discretion.

From very early times the courts have been unwilling to enforce administration which is unreasonable. It is clear in New Zealand that both in 1883 and 1891 judges of the supreme court refused to enforce by-laws which they considered in their opinion to be unreasosble.(1) However the Courts have never stuck to this enthusiasm. What factors then actuated the Courts in reducing the scope of reasonableness?

There are several factors that have caused this reduction. Firstly, in determining the reasonableness of official action it is apparent that the Courts have found most help and have placed most reliance upon a balancing of the advantages accruing from the action in question against the disadvantages caused thereby, and a comparing of the action in question with action taken by other officials in similar circumstances.(2) The balancing test is difficult to apply unless one has accurate information as to the effects of the action, and the large the number of persons affects and the more tangile the effects the more difficult it is to apply the balancing technique. Again the comparison test is only available where there are similar officials operating in substantially similar circumstances and the more differe the other officials and the more different the other circumstances the more difficult it is to apply this guide for determining the unreasonableness of any particular action.

Secondly, even if sufficient information were available, ones training might obscure the necessary assessment of circumstances and more so where the balancing of one of intangible benefits is involved as again tangible ones. These major difficulties in the way of testing the unreasonableness of official action would have become increasingly apparent to the Courts as the 20th Century advanced and especially economic dislocation and depresion and above all the war times. It is a fact that the evil that one tries to avoid in war times is obvious. A single mistake by an official could see the annihilation of a whole nation.

The issue that has been a cause of judicial divergence is what degree of unreasonableness is necessary before Courts invalidate an action. In the last Centrury it appears that Courts asked only that they be satisfied upon the normal standard of proof applicable in the type of proceedings in which the issue of unreasonableness was raised and said nothing to indicate any unwillingness, on the one hand, or eagerness on the other to hold official action to be invalid on account of unreasonableness.

However, since the turn of the Century there has been a clear tendency on the part of the Courts to treat the official action of local authorities benevolently and not to hold them unreasonable unless a very high degree of unreasonableness is shown. This has been the case especially in times of grave emergency. In such times the Courts may decline to undertake any inquiry as to the reasonableness of a decision. In Liversidge-v-Anderson[3] the appellant was detained under the order of Sir John Anderson the Home Secretary. The order was issued under the powers conferred upon the Minister by Regulation 18B of the Defence (General) Regulations issued under emergency powers Act of 1939. Regulation 18B paragraph 1 provides:

> "If the Secretary of state has reasonable cause to believe any person to be of hostile origin or associations or has recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or investigation of such acts and that by reason thereof it is necessary to exercise control over him he may make an order against that person directing that he be detained."

Mr. Liversidge claimed by his suit a declaration that his detention was unlawful and applied for particulars of the grounds on which the respondent had reasonable cause to believe that he was a person of hostile associations, it was necessary to exercise control over him. The House of Lords dismissed the appelants claim holding that where the Secretary acting in good faith makes an order which recites that he has reasonable cause to believe a person to be of hostile associations and that by reason thereof it is necessary to exercise control over him and directs that the person be detained a Court of Law will not enquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter is one of executive discretion of the Secretary of State.

This case raised much controversy. Lord Atkins dissenting judgment is that the term 'reasonable cause' has up to the date of this decision, had one clear meaning, and one plain effect, in every branch of our law, whether common or statutory. It has involved an <u>objective test</u>, by an independent tribunal of the reasonableness claimed for the conduct which is impugned. Lord Atkin has supported this proposition by abundant illustrations, andhas stated categorically that there is no known exception to it and that no other meaning has ever been suggested. As to the 'subjective' meaning contended by the Secretary of State, it had never at any time occured to the minds of the Counsel or judges that the words are capable of meaning anything so fantastic. Lord Atkin further submits that the objective test:

> "exists against any person, rich or poor, powerful or weak, including any member of the executive whether Secretary of State or not".

The learned authors of the Law Quarterly Review[4] agree that "none of this is denied or even challenged in respect of English Law up to November 1941". Thus Liversidege-v-Anderson, places an entirely new intepretation on a very familiar term of art, and, by admission, opens up what Iork Atkin calls the era of "subjective" Cause.

It is here submitted that Liversidge was the author of the dichotomy or origin of subjective test as apposed to an objective one; this peculiar interpretation of discretionary powers has been one of the root cause of the mischief in our law as will become evident in Chapter three. However, it is argued that this decision has put the cloak to a day that Englishmen found it necessary to declare that the power of the executive had increased and was increasing and ought to be diminished. It is a case whose principle of 'subjective' test has been followed. Professor de Smith[5] submits that such formula may be assumed that it will not be repeated save in extra-ordinary circumstances, when the Courts may consider that judicial review of executive discretion would be highly detrimental to the national interest. The expected change has not yet come, the case of Associated Provincial Picture Houses Ltd-v-Wednesbury Corporation[6] is in point; Lord Greene M.R. pointing on reasonableness said that:-

> "It is true to say that if a discretion or a competent matter is so unreasonable that no reasonable authority could ever have come to it, the Courts can interfere.....; but to prove a case of that kind would require something overwhelming[7]"

These words whittled down the efficacy of the doctrine of reasonableness This rigid formulae cannot be justified in peace times except in war times and other times of civil necessity the dictum of Greene has held sway not only in the immediate post war years but long after.[8]

The concept of reasonableness is tied-up with the idea of discretion, it is power given to do something but unreasonably exercised or not exercised at all. Discretion however, is room for decisional manoeuvre possessed by a decision maker. Discretion may be constrained too by non-legal factors such as the amount of available resources, time, professional norms, and the political pressures to which the decision-maker is (or perceives himself to be) subjected.

Professor de Smith (9) submits that the legal concept of discretion implies power to make a choice between alternative courses of action. Consequently, it should not be equated with arbitrariness and ought not to be regarded as the antithesis of the rule of law. Discretion is necessary and desirable in the interest of efficiency and justice. But, today there is too much unregulated discretion and too much of it is exercised unpredicatably, capriciously and even unlawfully. It has been said that "discretion is a matter of degree and ranges along a continuum between high and low"(10) where he has a high degree of discretion, the decision maker will normally be guided by reference to such vague standards as "public interest" and fair and "reasonable".

Discretionary administrative powers are classified as qualified and absolute. Qualified administrative powers must be exercised with a 'judicial discretion' that is exercised not arbitrarily or capriciously but in accordance with certain standards of propriety. This means that in practice the authority invested with the power must genuinely put his mind to the matter, must act in good faith, must have regard to relevant considerations and disregard the irrelevant, must not use its power for unauthorised purposes and must not act with gross unreasonableness. An administrative body that disregards the above rules acts ultra vires.

During the war high ranking officials in the administration are excluded from any examination by the courts. This point is illustrated by the New Zealand Education Act of 1914 and by section 6 of the Education Amendment Act of 1915 where the governor general was empowered to make regulations generally for all purposes which he thought necessary in order to secure the due administration of the Act. On the Act being challenged there were two conflicting views. On the one hand the crown contended that the word of the power were plain. If the Governor-General thinks that a particular regulation is necessary to secure the due administration of the Act, he may make it. The foundation of the power is the Governor-General's opinion, and the Court cannot inquire whether that opinion is well founded. Needless to stress, heavy reliance was placed on Liversidge-v-Anderson. Deciding Read-v-Smith[11] (The case that arose from the statute) Turner J. pointed out that the cases which mostly favoured the crowns argument had usually arisen under war time emergency statutes obviously designed to confer the widest powers on the executive. And secondly, he noted that the courts in deciding cases arising under such powers had understandably been influenced by the atmosphere of national emergency in which they were heard, and by the possibility of public danger in the disclosure of official information on which the executive opinion has been formed. Thus the war becomes a relevant matter, to be taken into account but if peace has reigned, proceedings must take account of the tranquil atmosphere.

It has been clear for two centuries[12] that the courts can control administrative or inferior judicial bodies exercising such powers, despite their apparently limited scope. Thus in Leader-v-Maxton[13] in 1775, the court acted against the wapping paving commissioners for their misfeasance in acting "arbitrarily and tyrannically" in unnecessarily blocking off an

The judgement of courts in early cases indicate that war was a relevant matter in making any decision. In an old case of Malverer-v-Spinke[16] in 1537 during the reign of Henry VIII in which the judges said:

> "We will agree that in some cases a man may justify the comission of a tort, and that is in cases where it sounds for the public good; as in time of war, a man justify making fortifications on another land without licence."

In the case of Saltpetre[17] in the reign of James I, when the court resolved that:

> "By the common law, everyman may come upon my land for the defence of the realm as appears in 8 Edward IV, 23; and in such a case, on such extremity, they may dig for gravel for the making of bulwark, for this is for the public and everyone could benefit by it; but after the danger is over the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance".

The nature and extent of the prerogative pwers for the purposes of the defence of the realm were further discussed in the reign of Charles I in Hampdens' Ship Money Case[18]. In this case it was freely admitted that the case of the defence of the realm is entrusted by law to the crown, and in their judgements against the crown the judges were equally firm in pronouncing the principles of the royal prerogatives in times of war. Sir George Coke said that in case of necessity and danger the King may command his subjects, without parliament to defend the Kingdom and he added :

> "Royal power, I account, is to be used in case of necessity and imminent danger, when ordinary courses will not avail....as in cases of rebellion, sudden invasion. But in times of peace no extreme necessity, legal courses must be used, and not royal power".

It is clear from the cases that the prerogative rights of the crown are paramount in so far as the defence of the realm is concerned in time of war. The extent of the royal prerogative in time of war was recently discussed again in Re a Petion Right[19] and the authorities above referred were fully considered. It is interesting to observe that in this case the existence of the royal prerogative in the circumstances already set out was never questioned, but it was contended that the right was limited to a

case of actual invasion. Warrington L.J. in his judgement said:

> "it cannot, I think, be disputed ..... that the King as the supreme executive authority was and is now by virtue of the prerogative entitled in certain circumstances of national emergency to take and use the property of a subject or otherwise interfere with private rights in order to provide for the safety of the public and the defence of the realm".

The royal prerogative exists constitutionally for the preservation of the realm and for the good of the state as a whole. Which is the primary consideration for defensive purposes the crown must have the unrestricted power to enter upon lands and to commandeer whatever property may be reasonably considered necessary. Questions of compensation and the private rights of individuals are secondary consideration, when the safety of the state is at stake.

The prerogative of the crown is, in fact, unconditional, and the individual who suffers loss in consequence of its exercise appears to have no legal remedy.

> "The only condition, said Warrington L.J., which it would appear must be fulfilled is that the act in question having regard to existing circumstances, must be necessary for the public safety and the defence of the realm, and on this matter the opinion of the competent authorities, who have sufficient knowledge of the facts, provided they are reasonably and in good faith, should be accepted as conclusive".

In war, things have to be done quickly - sudden decision, immediate action and secrecy are essential. That is why in England His majesty in council was in August 14 of 1939 empowered by statute to make regulations "for security the public safety and the defence of the realm". The first legislations were few and addressed to obvious military risks. However, with the passage of time and the war they increased so much so that their legality was questionable. Departmental actions were seldom challenged until hostilities were over; in the meantime administrative convenience and patriotic acquiescence combined to encourage the belief that prerogative powers in time of war were practically without limit.

The war-time unification of effort and resources naturally stimulated extensions of the administrative structure. It is clear that in England ministries were created for the purposes of the war, that some of them died away after the war. Those that remained continued to execute the duty that parliament all the time wanted to delegate.

Thus we see war powers are to be construed broadly and the courts will uphold any measures that reasonably to be considered as necessary to prosecute the war and bring it to a successful conclusion. It must be exercised within the provisions of the constitution which applies equally in time of war and in peace. This is the test of necessity to safe the nation from annihilation from warfare. However, where the war has ceased there is no necessity and hence, discretion should be such as to be in accord with changed circumstances. Ordinary conceptions of judicial review must give way in times of pressing emergency, as Lord Atkinson said in Rex-v-Halliday[20]

> "However, precious the personal liberty of the subject may be, there is something for which it may well be to some extent sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement".

It is clear then that discretion during war-times is differently exercised because of the special circumstances that prevail. The issue of discretion appears to be well settled especially by cases that were decided before the great-wars and the principle governing the matter is expressed in R-v-Vestry of St. Pancras[21] where Lord Esher M.R. held that:

> "if people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion". and that

> "the legislature has entrusted the sole discretion to them, and.... no mandamus could go to them to alter their discretion, but they must fairly consider the application and exercise their discretion on it fairly, and not take into account any reason for their decision which is not a legal one".

This quotation does not deny that War is a relevant matter that ought to be taken into account. All what Lord Esher meant was that it is clear that review by courts is not assential whenever an executive officer or body has been given the power to decide cases during the war.

However during the first war the courts drew a distinction between judicial discretions and executive discretions as a measure to give the executive power for the proper execution of the war. Here most discretions given connoted a total bar to any appeal or judicial review and this practice has been copied variously by many Acts. Today as Prof. de Smith submits[21a] the courts will always draw the distinction so that if it is a judicial action they imply powers of review but when it is an executive one they are reluctant. This attitude provoked the authors of the learned work of 'State Administrative' Coper F.E. at pg 31 to say:

> "while discretion has been described by enthusiastic administrators as the lifeblood of administrative process, it is viewed with less enthusiasm by many state courts which regard it as a virus which may infect the process".

Hence then, Wartime and immediate post-war time decisions ought not to be treated with reverence. The Emergency legislation of the second world war gave the executive vast powers over persons and property - the wording of the grants of power was sufficient, on a literal interpretation, to support the validity of almost any act purporting to be done in pursuance of them. Not only did the courts give a strictly literal interpretation to subjectively worded formulae (They only gave lip-service to the doctrine of acting in good faith). In their anxiety not to impede the war effort they declined to give a literal interpretation to a formulae which prima facie enabled them to review the reasonableness on the grounds for exercising a discretionary power authorising summary deprivation of personal liberty as evidenced in Liversidge-v-Anderson.

It is evident from the foregoing analysis that decisions during the war are justified on the basis of civial necessity by using the two intertwined principles of discretion and reasonableness. Much as these decisions are justified in times of peril, they are erroneous if they are followed through precedent in peace times. Thus as stated above the doctrine of civil necessity provides the doing of an action that is otherwise unlawful to achieve a lawful end. It involves as Granville Williams states (22):-

> "The choice of a lesser evil. It requires a judgement of value, an adjudication between competing 'goods' and a sacrifice of one to the other."

The doctrine does not operate outside the Law but is an implied exception to particular rule of law. It qualifies the Law for the purpose of averting the threatening danger. It is the embodiment of the principle of salus popul Suprema lex. This rule has recently been applied in the case of R-v-Secretar of State for the Home Department, ex parte Hosenball[23] where a Unites States citizen working in U.K was issued with a deportation order for being a threat to public interest. The court noted that where national security was involved the rules of Natural Justice Stand to be modified and always Public Order takes the upper hand, in the same case the tenderncy for the courts to put the rules of natural justice in a straight jacket was noted by the Solicitor for the applicant when he said:-

> "The Home Secfetary had pressed it too far when he refused to give further particulars of the allegations against Mr. Hosenball".

On the whole we can safely say that the courts will modify the rules of natural justice as outlined above to meet an emergency situation but afte the emergency they should do no more, the Status quo must be maintained. This is the concern of the third Chapter.

FOOTNOTES TO CHAPTER TWO

1. D.E. Paterson; 'Aspects of unreasonableness in New Zealand Administrative law.' N.Z.U.L.R. Vol.3 p.52 (1968-9)

2. McCarthy - v - Madden /1914/ 33 N.Z.L.R. 1241

3. /1942/ A.C. 206

4. 'Regulation 180 AND REASONABLE CAUSE' L.Q.R. Vol.58 p.232 (1942)

5. De Smith: Judical control of Administrative Action (3rd ed.1974) p.307

6. [1948] 1 K.B.223

7. 1 bid, at p.230

8. Supra note 5 at p.310,311

9. Supra note 5 at p.246

10. Jeffrey Jowell: 'The Legal Control of Administrative Discretion' P.:.J. (1973) p.179

11. Reade-v-Smith [1959] N.Z.L.R. 996

12. Paul Rovertshw; 'Unreasonableness and Judicial Control of Administrative Discretion' P.L.J. (1975) at p.115

13. 95, E.R. 1157

14. R-v-Boteler (1864) 4B and S 959, 964 per Cockburn C.J.

15. R-v-Askew (1768) 4 Burr. 2186, 2189

16. (1 Dyer 36)

17. 12 Co. Rep 13.

18. 3 How State Trials p.826-1306.

19. [1915] 3 K.B.D. 649 at p.665, 666

20. [1917] A.C. 260 (H.L.) at p.271

21. (1890) 24 Q.B.D. 371, 375-376.

21a. Supra note 5 at p.307.

22. Granville Williams; 'The defence of necessity' C.L.P.(1953) p.216.

23. [1977] 3 A II.E.R. 453.

of administrators if arrive d without natural justice but this was not held so. The Ministers functions were merely administrative.

Again two years after the second World War, the case of Franklin-v-Minister of Town and Country Planning[3] came up. The Courts at this time were not looking at the effect of decision on the individual but rather scrutinized the formality of the decision. They assumed that the duty to observe the rules of Natural Justice occurred only when the body was under statutory power to do so. There arose more confusion when Courts attempted to draw a distinction between rights and mere privileges, The deprivation of a mere privilege did not import a judicial duty; disciplinary powers could not during this time be interferred with by calling them judicial acts.

Lord Atkins decision in Electricity Commissioner[4] said that certiorari would only issue to:-

> "anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially."

The case introduced confusion in that even if a decision affects the rights of individuals but the procedure followed was not judicial type, natural justice would not be said to apply. In this kind of analysis the Courts delved into further confusion.

The decision of Nakhuda Ali-v-Jayaratine[5] stressed the same point. Here the controller of textile dealers licence in pursuance of a power to revoke a licence when he had reasonable grounds to believe that its holder was unfit to continue as an holder; the dealer applied for certiorari to quash the decision but it was held that, the controller was not acting judicially and was not bound to follow the rules of Natural Justice and hence certiorari would not issue nor bound by the audi alteram partem rule.

The reasons given for this decision are that certiorari would only issue to an authority acting analogously to a Court. They also stressed that the controller was not determining a question affecting the rights of subjects but was merely taking executive action to withdraw a privilege. This had gone a long way off from the time when the Courts had decided that no deciding body could deprive any of Her Majestys subjects of his right be they property rights or civil rights or livelihood without reccourseto the rules of Natural Justice. To hold that a licence was privilege and therefore did not require judicial deliberation is absurd to say the least. This is so because a trader who has no other employment, relies heavily on a licence for his subsistence, a denial of that right, in the name of a privilege, makes his life and that of his family harzadous and in fact amounts to a denial of the preservation of ones life, a thing that the constitution guards jealously. This misdirection came from the decision of Atkin who by his use of language put a lot of stress on a right so much so that later decisions drew a distinction between a right and a privilege.

In R-v-Metropolitan Police Commissioner ex. P. Parker[5] here a cab driver wanted the Court to quash an order of the Commissioner which had revoked his licence. He said that the decision should be quashed because the Commissioner had not given him an opportunity to rebut the allegations made against him. The Court refused to quash the order and held that the Commissioners functions were not judicial but administrative and in fact that they were disciplinary. Lord Goddard said that the Commissioner if he wished could summarily withdraw a licence without any sort of haring. He went on to say that the Commissioner was exercising:-

> "what I may call disciplinary authority and where such powers are exercised it is most undesirable that he should be fettered by threats and orders of certiorari and so forth because that interfers with the free and proper exercise of the disciplinary powers which he had"

That disciplinary powers should be beyond control was a new thing indeed. A disciplinary power is a power to inflict punishment either on the person or property of the offender, this definitely infringes on his personal or property rights, hence, if anything, the due process of Law is necessary by according to the offender the rules of Natural Justice.

Thus, the Law in England is based on this undesirable dichotomy of finding whether a body is acting judicially or administratively. However, there has been dicta that this distinction is no longer valid. Lord Denning[7] in his book quoting from his decision argues that the distinction is no longer valid; but this is an overstatement. The speeches in Ridge-v-Baldwin[8] do not say the distinction was abolished but that "in a proper case, an administrative body may be bound to give an affected person an opportunity to make representations". This indicates that the distinction still lasts. Moreover, even quoting Lord Parker, Lord Denning MR does not abolish the distinction but merely side-steps it by introducing another principle; the duty to act fairly as seen by Lord Parker in Re H.K. (an infant)[9] where he says

> "....even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him.
>
> That is not, as I see it, a question of acting or <u>being required to act judicially, but of being required to act fairly</u>."

This is a new standard set, it does not destroy the distinction, it leaves them aside, for whatever reasons, and now imposes the duty to act fairly. Whether this duty is part of natural justice or replaces the distinction between judicial and administrative is a moot problem. It is the submission of the author that the distinction holds sway, but to avoid the technicalities involved thereof, a duty to act fairly is imposed on all those who decide anything.

Back to Lord Dennings denial of the distinction now. Having quoted all these judgements Lord Denning does not reconcile his present view as expressed in Schmidt-v-Secretary of State for Home Affairs[10] with his decision in Rex-v-Governor of Brixton Prison Ex Parte Soblem[11] where he says that a deportation order under the Aliens order is not a judicial but an administrati action. Here he upholds the decision. He does not make an attempt in his book to explain why he changed so instantaneously within a time period of 3 years. Also in Re H.K. (an infant)[12], it was concluded that the decision of an immigration officer is an administrative act. Ungoed - Thomas J. In Schmidt states that:

> "it is firmly established that the rules of natural justice, at any rate as ordinarily understood do not apply to such acts".

The duty to act fairly had virtually replaced the rules of Natural Justice and other lesser rules of fair procedure imposed on administrative bodies; but the dichotomy between judicial and administrative still lasts.

The recent case of Selvarajan-v-Race Relations Board[13] to those who would like change must be seen as a draw back. For while the appeal judge initially referred to fairness, both Lord Denning MR and Scarman L.J. reverted to a conceptical analysis of functions, the very corollary of the traditional cencept of natural Justice which the concept of fairness was intended to eradicate. In this case the plaintiff to the Race Relations Board alleged that his employer, the Inner London Education Authority had discriminated against him on grounds of race and colour because they promoted another applicant who was less qualified and less experienced, The complaint was the subject of lengthy investigation by the conciliation committee and later the employment committee of the Board which eventually determined that there had been no discrimination on grounds of race or colour. The

plaintiff applied to the Courts for an order of certiorari, the substance of his complaint being the entire investigation machinery and procedure of the Board. The application was refused by the divisional Court and his appeal to the Court of Appeal was dismissed.

The ratio decidendi of the case that the procedure followed by the Board was fair is not in question but what is open to Criticism is some of the reasoning adopted in the judgements. It is unfortunate enough that Scarman L.J. should have spoken in terms of"Natural Justice" particularly since Lawton L.J. expressly rejected that notion in favour of fairness, but both Lord Denning M.R. and Scarman L.J. proceeded to make distinctions in required procedure on the basis of judicial or administrative functions. Lord Denning, having referred to the duty to act fairly, then sought to draw the very distinction which is not only unnecessary on that approach but also more seriously, tend to undermine the purpose of the notion of fairness, thoug vague as it is. He did so in this centext:-

> "if this had been a judicial body, I do not think that this would be right .... the maxim 'delegates non potest delegare' applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary inquiries[14]".

And Scarman L.J. stated:

> "The Race Relations Board does exercise judicial functions ..... The Board is an administrative agency, charged with a number of critically important functions in the administration of the Law but it is not a judicial institution, nor is it the apex of a herarchy of judicial decisions.[15]"

It is noted that the very purpose of the adoption of the notion of fairness was to avoid such categorization and to allow each case to be determined according to the circumstances and subject-matter under consideration.

B. MISCHIEF ON JUDICIAL REVIEW:

The power of the judiciary to review is based on the fact that there are legal (Statutory mainly) limits to the powers of the administration, and that the Courts as the Principal set of institutions concerned with legality, not only have authority, but indeed are under a duty, to enforce those limits. The validity of an administrative action can be challenged either on appeal if such a right exists or on review. Appears consider the merit of the decision whereas on review it is the legality of the decision that is in issue.

Judicial review ought to be viewed in the light of the needs of Society, especially pertaining to social and economic development, it must also take account of the circumstances that prevail at a given moment. Review is allowed on questions of jurisdiction (ultra vires, erros of Law apparent on the record etc) and on the violation of natural justice.

(a) Principle of Jurisdiction:

This is a confused area of administrative law. The Courts will review errors going to jurisdiction but not errors within jurisdiction. The chief problem is one of determining on which side a particular error falls or at times whether the tribunal has jurisdiction to determine the nature and extent of its own jurisdiction.

A tribunal that has jurisdiction, has not exceeded or abused its jurisdiction if it merely misconstrues a statute, admits illegal evidence or convicts without evidence. As is often quoted "if a tribunal has jurisdiction to go right it has jurisdiction to wrong[21]. Meaning if it has the power to decide, its decision is equally valid whether right or wrong. Such a decision by the doctrine of res judicata can only be impeached on appeal if such a right exists. This is assuming the body does not commit reviewable errors like breaking the rules of Natural Justice, taking into account extraneous matters or acting in bad faith.

on review, this he said in the case of R-v-Medical Appeal Tribunal ex.P. Gilmore[24]. This error of Law evolved so as to safeguard decision makers in that if they wanted to avoid review they could refuse to write any reasons. This was used during the war to avoid lengthy and laborious procedure in a time of war. It has been maintained as a ground of review almost to serve the same purpose and again few administrators give reasons.

(c) Breach of the Rules of Natural Justice:

This is the third ground on which review may be based. These rules were discussed extensively in Chapter one and also the mischief on these rules has been delt with in this Chapter.

(d) The Objective Cum Subjective Problem:

The decision makers decision may be 'objective' or 'subjective'. It is objective where the source of his power imposes defined or ascertainable pre-determined criteria, by which, and soley by which, he must make his choice. The decision makers discretion is 'subjective', however, when the source of his power confers upon him the freedom to determine his own criteria for choosing between the alternative courses of action open to him. Subjective discretions are conferred by such phrases as 'if in his opinion', 'if he thinks fit', 'if he deems', 'if he considers'. This subjective use of discretion is given to the person granted power to find his own creteria as indicated in the case of R-v-Governor of Brixton Prison ex.P.Soblen[25].

The distinction between subjective and objective test is a fundamental one, especially when we consider the application of the doctrine of subjectiv ultra vires, in reviewing discretionary powers, depends upon the existence in the empowering legistation of criteria against which the decision makers choice can be measured. In the absence of such criteria the doctrine of substantive ultra vires is important. The Courts have not expressly articulated this distinction nor have they explicitly used it as a tool for

One must assume that the only limits imposed by the 'four corners' of that particular power were that there had to be an act of requisitioning and that the subject of requisition had to be land. A similar interpretation was given by Lord Greene M.R. in Associated provincial picture Houses-v-Wednesbury Corporation[32].

Although the judgements in these decisions did not articulate the distinction drawn between objective and subjective discretions, it is clear that whether review is available under the 'four corners' doctrine depends upon the existence of objective limits upon the discretion. In the Caltona case the challenge was directed towards the subjectively defined power, whereas in the White and Collins Cases, the attack was concentrated upon the powers granted by statute. Thus in practice the Courts do recognise this distinction. This is not surprising since it is difficult to see how the decision maker can go beyond the scope of his power if he possesses the freedom to determine the extent of that power. As seen in Chapter two, the decision in Liversidge-v-Anderson delt extensively with determining whether the power granted was in objective or subjective forms. It was held it was in subjective terms. The end result of such is to whittle down the principal of ultra vires; for the decision-maker is the author of his own criteria, Consequntly everything that he does will be ultra vires. Such is a great mischief which requires remedy, for it is necessary for the individual to be protected from executive power. A power exercised capriciously without limit borders on the verge of anarchy and is the tunnel to state tyranny.

The 'irrelevant consideration' ground provides perhaps the most fertile field for the application of the distinction between objective and subjective discretions. If the empowering legislation either expressly

or implicityly imposes ascertainable criteria by which the decision maker must abide in making his choice, he will be acting ultra vires if he refuses to consider those criteria, or considers others, and thus irrelevant criteria. But if there is no such criteria the rule has no application. In numerous earlier cases, the courts refused to intervene because there were no criteria, no objective standards against which the decision could be measured. There are plenty of examples like the most controversial decision of Liversidge-v-Anderson (Supra), the Caltona Case, R-v-Metropolitan Police Commissioner ex. P Blackburn (No.3) 1973 1 All E.R. 324. are examples of the application of the principle. The Courts could ascertain no express or implied criteria to limit the discretionary power.

In cases where the statute is silent as to purposes and left it open to the decision-maker to determineffor himself why, in what circumstances, and for what purpose he should exercise his power, the courts could not interfere. In Short-v-poole[33]. Therefore, where the local authority had an unfettered power to dismiss teachers, it was held that the decision to dismiss teachers, and especially the plaintiff because she had married was within the authorities power. The reason for which the authority exercised its power could not be questioned. This was the situation in war times and it has been held to be the same even in peace times as evidenced in Minister of Agriculture - v- Price[34].

Roberts-v-Hopwood[35] must in the writers submission be regarded as the embarkation point from which the judiciary commenced their perilous voyage into the uncharted waters of subjective discretion. In that case, the aldermen and Councillors of the poplar borough Council, in the exercise of their power to pay such wages as they saw fit, had decided that they should be model employers and should set a fair and reasonable minimum living wage for both male and female employees. The wage which was set

namely £4 per week, was considerably higher than the current 'market rate' wages paid by private employees, particularly to women. The district auditor regarded this wage level as excessive and unlawful and surcharged the dependant oldermen and councillars for the difference between the current market rates and the level set by the council.

In the House of Lords the decision turned on a number of issues. First, it was held that the council was not entitled to the consideration which it had taken into account. They should, said Lord Atkinson, have taken into account external methods of fixing wages. Lord Atkinson did not consider the canon of construction "expression unus exalusion alterius' hence his reasoning is submitted was defective.

The courts have not however been deterred by the failure of the reasonableness test to provide a satisfactory ground for review of subjective powers. They have turned instead to statutory interpretation with vigour in recent years. The turning point was the House of Lords decision in Padfield-v-Minister of agriculture (35). The facts briefly were under the Agricultural Marketing Act 1958, a milk marketing scheme had been established. The scheme provided for variable rates to be paid to milk producers depending upon the distance from their farms to Centre of Consumption. The appellants were not entirely satisfied and made a complaint to the Minister, as they were entitled to do under the Act. By Section 19 of the Act, an investigation committee was set up and, charged with the duty, if in any case the Minister so directs, of considering and reporting to the Minister. The Minister refused to direct. An order of mandmus was sought, granted by Court of 1st instance, refused by court

of Appeal but granted by House of Lords. Lord Reid implied an objective test (36). Lord Morris gave the words their subjective meaning. The majority however, decided that the Minister had exercised his discretion wrongly, thus the court exercised the discretion for him, a power which Lord Halsbury expressly denied to any Court, in Westminister Corporation-v-London and N.W. Ry Co (37).

It is submitted therefore, that in both principle and logic the decision in Padfield is erroneous. Itis further submitted that this error was the result of the Courts failure to distinguish between objective and subjective discretion. This failure gives rise to the danger that the judiciary may exercise discretions which have been conferred upon administrators by virtue of their training, experience, knowledge and expertise and are more fitted than the judiciary to exercise the discretions.

The writer acknowledges his submission that the Courts do not have power to imply criteria limiting subjective discretionary powers runs against the flow of the tide. All the modern academic authorities acknowledg this power (38) but only because the recent decisions, discussed above, in respect of which a lot of analysis and criticism has never been detailed. There has been, a relatively uncritical acceptance of whatever the Courts have decided. A striking example of this uncritical approach can be found at page 258 of De Smith where he said:-

"Whether these decisions were good on their merits is less important than the fact that they were given".

Certiorari is an old prerogative remedy; it came to be settled view that in all cases where an inferior statutory tribunal exceeded its jurisdiction or drawn up a wrong conviction or order that was clearly bad on its face, certiorari would issue to quash that conviction or order. This view took account of all proceedings whether they were judicial or administrative. Hold C.J. in 1700 expressed this view when he said:

> "it is a consequence of all jurisdictions to have their proceedings returned here by certiorari to be examined here ..... where any court is erected by statute a certiorari lies to it[40]".

Later certiorari was extended to quash any decisions made by justices and other bodies exercising administrative functions under semi-judicial forms.

Mandamus emerged at the beginning of the 17th century. This was in 1615 in Baggs case[41]. In this case the writ was issued out of the kings bench and attested by Coke the C.J. at the time. Bagg, a capital burgess of Plymouth had been unjustly removed from office by the major and the Commonality. Coke issued the writ commanding them to restore Bagg to his office unless they showed good cause and a peremptory mandamus was issued to restore Baggs. As a result of this case such writs were afterwards issued to restore persons wrongly dismissed to offices and liberties.

By the 18th century, through the writ of mandamus the court of the Kings Bench could compel the carrying out of ministerial duties incumbent upon both administrative and judicial bodies. Thus, the writ was used to do away with laxity in the machinery of administration and to instil a sence of efficiency.

As seen in Chapter one, what is 'judiciality' is not yet settled but the word assumed a different meaning since Lord Atkins dictum. This dictum was applied in the cases after the first world war. It is clear that apart from anachronistic history of acting 'judically', the changed meaning of

judicially has narrowed the scope in which the remedies are applied. The development of 'judicially' and 'administrative' was to serve a particular time of crisis - war, but these upshifts have been erroneously carried forward to peace times. Thus rules that were designed to cope with a given mischief have been applied as though the mischief lasts and hence has wrought a greater mischief. So much so that certirari cannot be issued to quash purely ministerial acts.

As seen above, the orders of certorari and prohibition will only issue to curb the exercise of a power that is judicial or quasi-judicial or where it is shown that there is a duty to act fairly. "Judicial", 'quasi-judicial' and 'fairly' are never defined. Much has been said about them in the thesis. These words, some which emanated from the war, apart from being ill-defined are cunning device to give the Court a lot of lee-way in making a determination, a state of affairs that leaves the law vague. Acting 'fairly' to a recent phenomenon that according to thinkers substituted the distinction between administrative/judiciary or Natural justice. The result is the remedies particuh rly certiorari and prohibition are difficult to administer. This difficult of the remedies was recognised by Lord Denning Mr in Pyx Granite-v-Minister of Housing[42] when he said:

> "it is one of the defects of certiorari that it so often invoves an inquiry into the distinction between judicial acts and administrat acts which no one has been able to satisfactorily define".

The consequence is if a body is acting administratively it is exempt from any control by the Courts. The distinction had been repeatedly taken during the war and after. The Courts all reluctant to interfere with the discretion of the Minister - in fighting the war. Thus in Stevenage Case[43] the appeal of the local landowners were rejected so as to give effect to the policy of reconstruction. The decision was purely based on the dichtomy.

In a later case Lord Denning said that the duty to act fairly

"rests on them as on many other bodies although they are not 'judicial' nor 'quasi-judicial' but only administrative"[47].

These two cases did not consider the idea of acting judicially or not but adopted a single test of fairness, what was now required was to 'act-fairly' nor 'judicially'. The question to be asked is do the rules of Natural Justice apply or not, or that fairness is an additional rule to the hitherto existing rules of Natural Justice. What is 'fairness'? What are its ingredients? is it not another way of looking at Natural Justice? These questions are pertinent and have never been answered. I provide no answer but it is my contention that fairness and natural justice are the same. However, the truth is the rules of fairness, if there are any, have as one writer said "shown how easy it is for the Courts to narrow the meaning of acting with fairness to the point of extinction[48]".

It has also been submitted that a duty to act fairly means a duty to observe the rudiments of Natural Justice, yet maintain the distinction between Judicial and Administrative action[49]. It is the submission of the author that the maintanance of such dichotomy is nonsensical and its usefulness has been overtaken by events, patchwork manouvres to side-step the real issues and especially after the war has been the ungodly game of the Courts. It defeats reason if one issue brought before a judicial body and administrativ body, the determination will be different just because the one is acting judicially while the other administratively.

This distinction of acting fairly to acting judicially only added uncertainties prevailing in the principles of Natural Justice, as seen, the distinctions have been imported into Kenya.

The Law governing judicial Review in Kenya is largely judge-made. In following the English System only piecemeal rules have been developed through the medium of ultra vires doctrine and other various collection of

remedial procedures that typify the English System. Though more of these remedies have their peculiar history yet the Kenyan Legislature has adopted the major parts of these remedies[50]. The existence of wide discretion in the deciding officer may exclude Natural Justice[51].

The Kenya cases have followed the British trend of classfying decisions as "judicial" or'quasi-judicial' in order to attract the rules of Natural Justice. This is so as evidenced in Devshi-v-Transport Licencing Boards[52] where the applicant company had been refused the renewal of some of its transport licences and had the area of operation of the remainder reduced by the respondent on the ground that it was necessary to remove imbalances between Kenya citizens. On this grounds the applicant applied for a writ of certiorari in that he was treated in a discriminatory manner. It was held, inter alia, that the respondent performs a quasi-judicial function and Application for certiorari may be made. There are other cases that decide on the same point[53].

It has been argued that in Kenya the courts have adopted the Ridge-v-Baldwin principle. In Re Maina[54] Mwendwa C.J. and Chanana Singh J. held that: 'it appears to have brought the car of Natural Justice back on the old line' and that it was not necessary to establish that the collector of customs of the East African Community (now disbanded) was acting judicially in order to apply the rules of Natural Justice to his power to exact a fine from a member of the public if he was 'satisfied' of certain facts. This application by even Maina seems to come into, and indeed was, in line with English decisions.

The facts of Mainas Case are not complex nor unusual. He was employed by the Nairobi Airport as Deputy Director of Operations. An allegation was made against him that he had assaulted one Parker, merely committing an offence against the East African Customs and Transfer Tax Management Act. Maina sought to adjourn the case in the High Court for he had another case

in the High Court the same day, but the request for adjournment was not considered and he received a letter that he had been fined 150/=. He then applied for an order of certiorari to quash the above aorder arguing that the audi alteram partem rule of Natural Justice had been infringed in that judgement had been passed without his being heard.

In Mainas case the supreme Court had no difficult in finding that the order against the applicant was given in the exercuse of a judicial function. But this doubtful statement of the judge cast doubt to the truth he had expressed.

> "Even if we hold that the commissioners decision was an administrative one, we must hold that the applicant being charged with an offence stood to lose money and therefore had a right or interest in the matter".

What one can surmise from this dicta is that the judge does not demolish the distinction but bases the matter on locus standi. This is to say one benefits from the rules of Natural Justice so long as he can prove a locus standi in the matter. This is confusing for it amounts to saying that in judicial bodies locus standi is the determinant. Is this the Law?

In Sheikh Brother Ltd-v-Member of Control of Hotels Authority[55] the respondent had power to fix the percentage of accomodation available to monthly residents of the applicant Company's hotel as to the way in which the Hotel was managed. The respondents should have investigated and adjudicated on the complaint with the parties in attendance. Instead, at a meeting attended by two directors of the applicant company, the respondent passed an order, fixing the percentage of accommodation available for monthly resident, which had upto now been approximately 85% to 100%. The applicant company applied for certiorari to quash the order on the ground that the respondents did not observe the rules of Natural Justice because no notice

Lord Parker at page 630 were obiter as they did not assist the ultimate decision. It appears there is no case which has yet authoritatively held against the administrative/judicial distinction. What we have now are disapprovals.

It should be pointed out with all due respect that the dictum of Lord Parker in Re H.K. (an infant) of being required to act fairly as a substitute to the distinction is misleading. Which officials will be required to observe Natural Justice unless the case is suggested that all administrative officials and authorities must grant a hearing before a decision, a desirable but impractable stand.

As far as the remedies are concerned the position is in the British Legal system as it was before 1977. The distinction has brought much confusion and has led to much controversy in scholarly circles. A clear-cut criterion to distinguish the two types of acts has never been found. So much so that the citizen is not certain whether the government action which he is challenging 'will be held to be judicial so that the prerogative order will lie in administrative in which the orders will not lie.'

It is the submission of the author that a citizen is antitled to a system that is less complex and less uncertain, because it is wrong that so much can depend upon the choice of a particular remedy sought by a litigant, it is clear : "little if anything would be gained by us in the way of advancing the cause of administrative justice if our courts should continue to emulate the rather clumsy British grouping for a viable system of administrative law[58].

The frequrnt use of the overworked word "Judicial" as a test by which to determine jurisdiction to review is also to be regretted. It has been said that "no concept can safely be accepted as a guide to future actions unless (i) it has an accurate meaning and (ii) the theory upon which it is based, if ever it was valid, still retains its validity[(59)].

On this basis the test of 'judicial' as a criterion governing judicial review should have been scrapped years ago.

Dr. C.K. Allen has devoted an appendix in his Law and Orders to a heated defence of the Atkin dissent and an exposition of the quite convincing theory that "reasonable cause to believe" had always prior to the Liversidge judgement been taken in England to imply an objectively ascertainable standard[63]. However, he attributes fault to the wrong body. He should condemn the loose draftsmanship of the informal council or revision in November 1939, rather than berate the majority, Lords for taking the only avenue of escape in the impossible dilemma which confronted them

In Kenya it has been held that where a statute confers exclusive juridiction on a body to decide a particular matter, no other tribunal has jurisdiciton to decide that matter[64]. The total effect of this is a total bar in questioning the decision of any body of persons and more an administrative one as to the exercise of its discretion. The statutes in Kenya have not escapted the sins of the war. For instance, the Land Acquisiti Act[65] states at Sec.6(1) that "where the Minister is satisfied....., the same is repeated at Sec 24(1), and 27. In the immigration Act 1968 Sec.3(2) states "An immigration officer may in his discretion..... " The Official secrets act Cap 187 at Sec.6(1) states where it appears to the Minister....., Sec.19(1) of the same says where the A.G. is satisfied....." and many other statutes[66]. The use of such language is to make all that the Minister decides though objectively ultra vires, intra vires for the discretion is too wide. Such language whittles down the notion of substantive ultra vires as ground for judicial review to naught.

Though it may be argued that the range and magnitude of administrative control asserted over the individual citizen during the two great wars of this century have excited the fears of many that the process of constitutional democracy are giving way to an authoritarian state, yet it would appear, if the distinction between constitutionalism and

authoritarianism is to retain any real validity and meaning that we must grant that the integrity of the nationa as a constitutional democracy has not suffered lasting damage in the course of mobilising the energies of the nation to fight the war.

However, when the war is over and peace is reigning, it is foolhardly to insist or perpetrate the same Law that existed during the war. It could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preservation.

The major defects of the law as evidenced above require immediate changes so that the citizen is not overly prejudiced. However, I should not be understood to underestimate the role of the law in carrying out the success of any war or emergency. While we admit that the Courts of Law in normal times are peculiarly competent to weigh the competing claims of individuals and government, they are ill-equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency - particularly war emergency. Neither are they equipped once an emergency has been recognized, to measure the degree to which the pereservation of the life of the community may require governmental control of the activities of the individual. Jurists do not have the vital sources of information and advice which are acutable to the executive and the legislative, nor have they the burden of formulating and administering the continuing programme of the government, and the political responsibility to the people, which although intangibles, are of crucial importance in establishing the context within which such decisions must be made.

During peace times, it is the burden of the courts to safeguard the citizen from executive intrusion, the courts will fail in their endeavours of meting justice if they do not make an outcry loud enough to reach the

legislature. The legislature accordingly would fail if after hearing kept silent without making the necessary change. If justice is to appear to be manifestly done, the rules of natural justice must be restored to their status quo. Otherwise the mischief that has been outlined above will continue to threaten and bring into issue the validity of the judgements given by the courts.

FOOTNOTES TO CHAPTER THREE

1. de Smith; Judicial Review of Administrative Action 3rd ed.(1974) pg.142.
2. [1920] 3K.B.72.
3. [1948] A.C.87.
4. Supra note 16 Chapter One at pg 171.
5. [1951] AC 66, 69.
6. [1953]1 W.L.R. 1150, 1165.
7. Lord Denning Mr. The descipline of Law (1st ed.1979) pg 92.
8. [1964]A.C. 40
9. [1967] 2QB 617, 620
10. [1969] 2 ch 149, 159.
11. [1963] 2QB 243, 298-302.
12. Supta note 9.
13. [1976] 1 All.E.R. 12, 23.
14. 1 bid at pg 20.
15. 1 bid at pg 24.
16. [1936]K.B. at P129, Swift J.
17. Robson; Justice and Administrative Law 2nd ed. pg 401-3.
18. H.W.R. Wade, C.L.J. Vol. 10 pg 220.
19. See for example, Atkin L.J. in R-V-Electricity Commissioner 1924 , K.B. 171 at p.205.
20. Collins-v-Highway whiteway and company 1927 2KB 378.
21. R-V-Governor of Brixton Prison ex P Armach 1968 A.C. 192 (p.234).
22. [1955] 1 All.E.R. 691.
23. De Smith, Judicial Review of Administrative Action (2nd ed. 1968) pg 108-109 and 126.
24. [1957] 1 QB 243.
25. [1963] 2QB 243.

26. [1943] 2 All.E.R. 560

27. [1905] A.C. 426.

28. [1968] A.C. 998.

29. [1943] 2 All.E.R. 560, per Lord Greene at p.564.

30. See R.C. Austin: 'Judicial Review of subjective Discretion - At the Rubicon Whither now' C.L.P. Vol.28 (1975) pg 154.

31. [1943] 2 All.E.R. 560 Per Lord Greene at pg 564.

32. [1948] 1K.B. 223.

33. [1926] Ch.D 66

34. [1941] 2 KB 736.

35. [1925] A.C. 578.

36. Supra note 28.

37. [1905] A.C. 426 at pg 427.

38(i) S.A. de Smith: Judicial Review of Administrative Action (3rd ed.1974) Chapter six at pg 253-26.

(ii) Grifith and H. Street; 'Principles of Administrative Law (5th ed. 1973) pg 219.

39. Suptra note 19.

40. Greenvelt-v-Burnel (1700) 1 1d Raym 454.

41. (1615) 11 Co Rep 936.

42. [1958] 1 QB 554, 511.

43. [1948] A.C. 87.

44. [1958] EA 153, 155.

45. R-V-Inspector of Leman Street Police Station ex.P Venicoff 1920 3 K.B. 72 at pg.80.

46. [1967] 2 QB 617, 630.

47. Re Pergamon Press Ltd

48. Birtles:'Discretionary powers' M.L.R. Vol.33 pg 559, 561.

49. P.C. Kidula: 'The right to a nearing" Dissertation 1975.

50. The Law Reform Act (Cap 26, Laws of Kenya) D 8(2).

51. 1 bid, Section 38 (1).

52. [1971] E.A. 289.

53. Patel-v-Plateau Licensing Court [1954] 27 K.L.R. 147.

54. Unreported, High Court of Kenya at Nairobi, Miscellaneous causes case No. 7 of 1969.

55. [1949] 23 (2) K.L.R. 1 pg 4.

56. [1963] EA 478.

57. [1969] 2 W.L.R. 337.

58. Gyandoli, 'Discretionary powers in the second Republic (1971) 8 U.G.L.J. 1 at pg 22.

59. J. Wills; 'Three Approaches to Administrative law: The judicial, the Conceptual and the functional' Univ of Ttoronto L.J. (1935) pg 53 at pg 72.

60. [1942] 1 K.B. 87.

61. [1917] AC 260, 295-296.

62. [1942] A.C. 206, 244.

63. Allen: Law and Orders 333 et seq 1945.

64. Ali Mahdi-v-Abdullah Mohammed (1961) EA 456.

65. Chapter 295.

66. The Land Control Act (Cap 298, Laws of Kenya) Sec.8.

CHAPTER FOUR

RECOMMENDATIONS FOR REFORM AND CONCLUSION

From the foregoing thesis, it is evident that the impact of the wars on later decisions has been great; it has indeed derailed the law from the tenets as indicated in Coopers case where the courts had the jurisdiction to fill-in the gaps left by the legislature in the administration of justice. The thesis of my reform is to restore natural justice to its status quo ant especially before the two imperial wars. During the war as seen in the abo argument distinctions arose that bordered on the realms of fiction. Such distinctions as the ' administrative' and 'judicial' assumed a different connotation during and after the war. When the courts considered the impac of a decision, and stamped an action administrative, they formulated the 'voidable' and 'void' dichotomy. As though this was not enough the rules of natural justice were replaced by the principle of 'acting fairly'. Perh such distinctions could hold water during the war but not so during peace t The elesticity in the application of other concepts like discretion and reasonableness unguarded by the rules of natural justice should no longer be applied; as already submitted they could only be used for the purposes of ensuring success in the war and no more.

Therefore the observance of natural justice in administration will no doubt facilitate a sound decision because the administrator will be better acquainted with the facts in issue but it will also go along way to assuage the feelings of the people directly affected about injustice or any faul play and will repose confidence in the administration. It is not enough that justice is done it must manifestly be seen to have been done and no other rules ensure this better than the rules of natural justice.

However, the courts by themselves cannot achieve much; parliament do intervene and might decide to invalidate a court decision by an enactment.

The citizen therefore should not expect too much from the courts especially when the decision will have substantial impact on the political climate. They are at the mercy of parliament and unless they proceed with tact and discretion not only may their decisions be nullified, but they may find themselves stripped altogether their juridiction particularly in controlling Ministerial powers. Hence, the courts have been cowards in this respect. They evade conflict, but the price paid is inadequate judicial review. The courts fail to take jurisdication in Controversial Cases (1) and fail systematically to probe administrative action.

It has been suggested [2] that three main techniques may be used to fizzle out the efficacy of any decision made against the administration by the courts. First, delaying tactics may be used to postpone the evil day of a final court order. Secondly, following the order an identical decision may be taken. Thirdly, the government may resort to legislation as pointed out above, often retrospective to nullify the effects of the judgement. One should add, perhaps the possibility that government will simply disobey.

Where the rules of natural justice have not been followed the issue of whether a decision is void or voidable, as indicated above is not settled. But it is submitted that a decision arrived without recourse to natural justice is void. The Courts attitude to the annulment of administrative decisions has been guided by the length the action has stood unchallenged and the wider the ambit of the action, and the consequences of declaring the decision so. The courts are not blind to the above considerations, although they seldom discuss them openly. At this juncture one might ask, on what criteria is an action held valid until avoided? If there is a breach in the eyes of the law there is no way the court can turn around and say "look' it is not a serious one it can be avoided'. Such a situation is untenable. Thus the use of void or voidable to give a lee-way to a wrong decision to stand should be left aside

If there is a breach of natural justice a decision is void despite the consequences. Government Officers should not be jealously protected and get away with it when they act contrary to the law.

Again the courts might not do a sterling job due to their colonial attitu Technicalities in the administration of justice abound so subtle as to Mesmerize the layman and scare him off (3). But also apart from these inherent technicalities the colonial era saw the unholy alliance of the courts and the executive. Justice was meted on racial grounds. The Africans who were not the beneficiaries developed a cowardly attitude towards the courts, not to mention his financial incapacity to finance his case. This racial bias has been observed by two seasoned authors and vis:

> "Thus the High Court in the past performed its traditional roles for a very limited section of the population and the position has not changed appreciably since the advent of an Affrican Government(4)."

This Colonial stigma could appreciably be eradicated by the Africanizatio of the judiciary. Whereas other sectors of the economy have seen a substantial increase of indigenious brain, there has been a consistent and persistent dorminance of foreign brain at the bench. It is recommended that Africanisation will ensure the citizen that he will get his fair deal in the courts in the face of his fellow African unlike an expartriate who in his mind was the cause of the colonial misery.

The dichotomy between an 'administrative' and 'judicial' act should be left aside; it is unnecessary. An Indian case of Kraipak-v-Union of India (5) is a significant step forward. It has decided to ignore the distinction which has left the law vague. When the traditional argument of the distinction was raised and that one body was not required to accord the affected party natural justice, Justice Hedge pointed out that it made no difference whether the distinction existed because:-

> "the horizon of natural justice is expanding and the applicability of its principles to administrative' proceedings"

in discarding the doctrine of procedence he said "Public good is not advanced by rigid adherence to precedents. New problems call for new solutions."

discretionary powers to provide substantial evidence in support of the findings of fact which those bodies have given as their reasons or justificati for their decisions (8).

The Ministers should bring their evidence to the examination of the court and find whether it is weighty enough to support the claim as in the English case of Conway-v-Rimmer [9] where Lord Reid examined the documents and formed the opinion that they were not in any way prejudicial to the proper administration and general public interest. The Kenyan Evidence Act Sec 131 states the contrary in holding that such documents are privileged and there seems to be no change as evidenced in the recent case of Semo-v-Mudavadi [10]. It is my submission that the courts should be given a chance to peruse them. In the instance where the judge might not have the knowledge and forseability of the repercussions that might befall due to a disclosure of the documents it is advisable and if the minister is to be stopped from being a judge in his own casuse to refer the matter to an administrative tribunal or special body consisting say the Chief Justice who must be a Kenyan and African or administrator no longer in the civil service.

It is further submitted that the substantial evidence requirement can be extended beyond the control of preliminary jurisdictional facts and can be applied to the whole of the decision making process, even when the power is conferred in subjective terms, provided there is a duty to give reasons for a decision (11). Further more in Padfield, the court showed that it would not be deterred by a failure to give reasons. Logically, a failure to give any or adequate reasons would run foul of the substantive evidence rule. Furthermore in Givaudanx-Co. Ltd-v-Minister of Housing and Local Government (12), the court held a decision bad in law because the reasons required by and given under planning legislation were so vague and uncertain as to be unintelligible. Inevitably reasons, even if disguised by the name of the policy, must, in the individual case, be shown to be based on facts founded in evidence. The courts could and should test the substantiality of those evidentiary

foundations. Thus without questioning the merits of a decision-makers subjective judgement. The courts could nevertheless require that there be substantial evidence to support the factual findings or assumptions upon which that judgement is based.

The courts can insist that before acting, he shall at least find out the facts and find out in particular whether there is another side to the case. The wielding of power would be arbitrary if this were neglected; and the courts can provide a canon of good administration by holding that unless the other side is first considered the power is improperly exercised. The ru is a safeguard not against perversity but against well-meaning ignorance or carelessness - a much more likely danger.

As concerns the concept of a hearing, an oral hearing, if practicable will yield better results. Where facts are in issue or a sense of injustice prevails, paper is usually a second-best way to the truth and a solution. Like most vital principles as Lord MacDermott notes [13]:-

> "the audi alteram partem does not thrive in lip-service; but properly applied, its value in controlling the departmental use of power, in supporting the rule of law, and in strengthening the bond between the state and its members cannot be exaggerated."

Another safeguard that can be afforded to a citizen is a right to appeal from the ministerial decision. It should be either to the courts or to an established administrative tribunal. This will assure the citizen that injustice has not been done by giving him a chance to give his version of the story and be satisfied that there was no bias or rather there has been an effort to see things from his point of view. In this respect, a right of appeal provided upto the highest tribunal may be expensive and thus bar many aggrieved parties, but if a question of law fairly arises in the discharge of a statutory function committed to the executive, there seems no good reason why the cost of resolving it, whatever the result, should not be borne directly by the public purse.

It seems necessary as Lord McDermott suggests (14) to establish a body composed of a number of distinguished administrators and experienced lawyers so as to resolve disputes and ameliorate the apathetic attitude of the citizen towards the courts. This body must be completely independent in order to gain the necessary prestige and command the necessary respect.

In connection with the remedies especially Mandamus which does not apply to the Crown or its agents, an extension to the same is necessary. As the law stands, it is not a genuine protection for abitrary use of power by the executive. Professor Wade (15) has suggested that the courts might adapt Mandamus so as to make it available against those officials:-

> "who are not concerned with sovereign powers of the state, but with the powers which it has assumed to fulfil public needs in the social and economic sphere....."

All is well said but who will ensure that the executive as well as the courts do all they are supposed to do lawfully? In other words who will watch the watchers? Mr G.K. Rukwaro (16) having examined all the existing institutions created for the purposes of ensuring that there is a limit to excessive power, and critically assessing their efficicacy notes that:-

> "it is unwise to wait until a situation has reached crisis dimensions".

Hence, he suggests the establishment of an ambudsman. The services of an ombudsman will ease the tension between the executive and the citizen where the courts are wary to trend, provided the ombudsman is given his due position in his endeavours (18).

In Kenya an ombudsman, like that one in Tanzania will do a good job. The practice of the Tanzania permanent commission of Enquiry in this regard has been that once a matter is held to fall, prima facie, within the jurisdiction of the commission, the decision as whether an investigation will be carried out is up to the commission itself.

The whole of the tenets of operation read together reveal that the ombudsman is intended to be a supplement and not a substitute for the courts.

Moreover, the ombudsman like the courts are limited in power for they have to toll the line of the government, finally they may fall prey of the government.

However, the first Chairman, E.A.M. Mang'enya said the commission delt with, arbitrary decisions of arrests, omissions, improper use of discretionary powers, decisions made with bad or malicious motive or decisions that have been influenced by irrelevant considerations, misapplication and misinterpretation of laws. With such a wide scope the PCE has become a forum for hearing quite a number of grievances that went without redress. Indeed, it has become the "poor mans lawyer". The other good quality is that if overrides oaster clauses in a statute [19] and can have all documents except those disallowed by the president. However, this ambition may be hampered by the executive by unwilling to implement its decisions.

In Kenya [20] the ombudsman has been objected in this strong language:-

> "it is feared that the ombudsman might be misused by unscrupulous elements in society for witch-hunting and undue victimization".

Perhaps the Kenyan executive should learn from New Zealand's ombudsman who has publicly claimed that his decisions have encouraged departmental officers to take great care in the exercise of discretionary powers which before were final and not open to challenge [21]. However on the same score there are those who feel:-

> "The ombudsman has not made an ounce of difference. We never ask ourselves, what would the ombudsman think about this case?"

However, he is a necessary tool to bridge the gap left by the court, in my view he is the mediator between the executive and the citizen, he is closer to the executive than the courts and assuming he is of integrity and firmness he can do that which the courts have not been able to do. For a Kenyan ombudsman, its form, qualification of appointees and other related matters, a lot has been written [23]. However, it must be pointed out that an ombudsman appointed by the executive will in times of crisis allign itself with the executive. I would recommend that he be popularly elected so as to ensure a degree of autonomy.

It is my submission that, the relationship between the courts and the executive requires to be overhauled and reset so that the supremacy of the law may prevail in a manner better calculated to promote a more even administration of justice on the one hand and the act and practice of sound administration on the other.

Thus, having seen that the docrine of natural justice is being emasculated from within and honoured in name but dangerously devalued in substance, given only lip-service, such a state of affairs should be left aside and a return to first principles should be made. Natural justice is embedded in the concept of due process; as one of the earliest instances of its invocation in English law illustrates (24), notice and opportunity to be heard are its marrow. Establishment of the integral relationship between the two rules of natural justice requires no more than a restoration to the status quo ante. A more positive part must be played by the courts in working out in differing concrete situations the elements of a fair hearing; the narrowness of vision evident in Malloch-v-Aberdeen Corporation (25) will have to be replaced, if more than mere lip-service is to be paid to the notion of fair play, by a creative willingness to keep its practical expression abreast of current conceptions of justice. There must be no sliding scale of due process embodying the criteria of the appearance of quilt or innocence for such is the antithesis of fair play. The principle by Lord Wright in Spackman-v-General Medical Council (26) must be reaffirmed:-

> "if the principle of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision".

Therefore, if the concept of natural justice is to be salvaged from being a mere slogan, in view of its constant erosion and judicial metamorphosis - an endeavour to relegate it to the annals of history - and to avoid

multifarious offshoots surrounding it that only

> "cast a lengthening shadow, the shades of which serve only to conceal the decline of its substance"

it is paramount that it be restored to its status quo as evidenced by Cooper Case.

During the war the administrators should not be unnecessarily bound as to frustrate a successful execution of the war; nevertheless, due regard must be paid to the violation of the citizens rights. The doctrine of civil necessity must ve properly exercised and the courts should not feel bound to give the administrators as indicated in chapter two of this thesis a chance to properly prosecute the war.

In summation of this thesis, let me give a Caveat to the reader that the success of the recommendations so far outlined will depend more on the willingness of the government to keep to its ambit and not to interfere with those institutions established to safeguard the individual from abuse of power.

FOOTNOTES TO THE RECOMMENDATION AND CONCLUSION

1. Nakkuda Ali-v-Jayaratne [1951] A.C. 66.

2. Carol Harlow: 'Administrative reaction to Judicial Review', P.L. (1976) pg 116, 117.

3. For a full account see Rukwaro G.K., 'Reddress of grievances. The case for an Ombudsman in Kenya' E.A.L.J. Vol. 9 No. 1. (1973) pg 44

4. Ghai and McAuslan: Public law and polical change in Kenya. 1st ed. Oxford University Press, Niaorbi (1970) pg 106.

5. Writ Petition Nos: 173-175 of 1969 decided April 29th, 1969.

6. [1968] A.C. 997, 1030.

7. [1971] 1 W.L.R. 433.

8. Barlow-v-Collins, 392 U.S. 159 (1970).

9. [1968] A.C. 910.

10. Unreported, High Court of Kenya at Nairobi, Election petition Case No. 12 of 1979.

11. English law has gone far in this respect: See the Tribunals and Inquiries Act 1971 S.12 also the Supplementary Benefit Tribunal Rules of 1971 r.121.

12. [1967] 1 W.L.R. 250.

13. Lord McDermott: Protection from Power Under English Law.(The Hamlyn lectures, Ninth series, 1st ed. Steven & Sons London 1957) pg.75.

14. 1 bid at pg. 77.

15. Wade: 'The Courts and the Administrative Process'. LQR Vol.63 [1947] pg. 164.

16. Supra note 3 at pg. 52, 58.

17. Peter Oluyende; 'Rodress of Grievances in Tanzania' P.L. (1975) pg.8.

18. Permanent Commission of Enquiry Act (Act No. 25/1966) Tanzania.

19. Session paper No. 5 of 1974, para.107.

20. Public Lecture by Sir Guy Powles/Christchurch 27/4/64.

21. Walter Gellhorn; 'Ombudsman and Others' (1st Ed. 1967), pg.149.

22. Lewis G. Kamau; 'The Case for an Ombudsman in Kenya'. 4B. Dissertation University of Nairobi (1975).

23. Baggs Case (1615) 11 Co Rep 93 B.

24. [1971] 1 W.L.R. 1578.

25. [1943] A.C. 627, 644-645.

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