

The Writ of Certiorari in the Setting of an Asian Legal System: A Comparative Survey*

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One of the primary objectives of the writ of certiorari is to confine the activities of administrative tribunals within the limits of their jurisdiction. Modern government is so complex a process that the conferment of far reaching powers on administrative bodies created for a variety of purposes is a commonplace phenomenon. In an age of rapidly expanding governmental activity, manifested in Sri Lanka by the striking proliferation of State Corporations and other institutions entrusted with a significant measure of responsibility for the reshaping and development of the national economy, the protection of the individual requires continual vigilance in the adoption of safeguards against action taken in excess of legitimate administrative authority and against other forms of abuse of administrative power.

Judicial surveillance of administrative tribunals in this context finds its doctrinal justification in the concept of jurisdiction. The policy of the law is founded on a distinction between jurisdictional or collateral and other questions.³⁴⁰ A preliminary or collateral question is understood as one that is collateral to "the merits"³⁴¹ or to "the very essence of the inquiry",³⁴² and is contrasted with "the main question which the tribunal has to decide."³⁴³ The basic principle is that no court or tribunal of "stinted, limited jurisdiction"³⁴⁴ can arrogate to itself jurisdiction by a wrong decision on a point collateral to the merits of the case, on which the limit to its jurisdiction depends.³⁴⁵ A fact is treated as jurisdictional if it involves the limits of the power conferred on the tribunal.³⁴⁶

340. *Terry v. Huntington* (1668) Hardr. 480; *R. v. Plowright* (1686) 3 Mod. 94.

341. *Bunbury v. Fuller* (1853) 9 Ex. 111 at p. 140; *R. v. Lincolnshire JJ., ex parte Brett* (1926) 2 K.B. 192 at p. 202; *R. (Limerick C.C.) v. L.G.B.* (1922) 2 I.R. 76 at p. 93.

342. *Ex parte Vaughan* (1866) L.R. 2 Q.B. 114 at p. 116.

343. *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* (1951) 2 K.B. 1 at p. 6.

344. *Terry v. Huntington, supra.*

345. *Bunbury v. Fuller, supra.*

346. *R. v. Bradford* (1908) 1 K.B. 365; *R. v. Queens's Country JJ.* (1908) 2 I.R. 285; *Re Butler* (1939) 1 K.B. 570; *White & Collins v. Minister of Health* (1939) 2 K.B. 838; *R. v. Sandbach JJ., ex parte Smith* (1951) 1 K.B. 62; *Quiltotex Co. Ltd. v. Minister of Housing and Local Government* (1966) 1 Q.B. 704; *Lake v. Bennett* (1970) 1 Q.B. 663; *R. v. Metropolitan Police Commissioner, ex parte Ruxton* (1972) 1 W.L.R. 232; *R. v. Home Secretary, ex parte Mehta* (1975) 1 W.L.R. 1087.

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The dichotomy³⁴⁷ between errors “going to jurisdiction” and errors within jurisdiction is embedded in the Sri Lankan case law. Where an Elections Officer was required to decide the question whether a claimant was qualified to be a voter, the Supreme Court of Sri Lanka pointed out that, if a question arose as to the substance of the law which governed the qualification of voters in general, such a question was antecedent to the exercise of jurisdiction.³⁴⁸ When he proceeded to decide the case before him on the footing of the erroneous decision on the preliminary question as to the content of the law, he acted outside his jurisdiction³⁴⁹. Where the Commissioner of Labour purported to act under a statutory provision³⁵⁰ which empowered him to make a certain class of orders against employers who had terminated the employment of their workmen, the Court of Appeal of Sri Lanka declared: “His jurisdiction to make the orders is conditional on the existence of certain facts which may be referred to as the collateral facts. If it can be shown that he has made a wrong decision on the collateral issues which clothed him with jurisdiction, his orders are liable to be quashed by certiorari.”³⁵¹

With regard to the power to determine jurisdictional questions, two categories of case warrant distinct treatment. The first category encompasses cases where the effect of statutory provision is that “if a certain set of facts exists and is shown to the tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise”.³⁵² There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, it will be held that they have acted without jurisdiction.³⁵³ The second category envisages cases where the legislature has entrusted a tribunal or body with a “jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as

347. *State v. Durean (Judge)* (1964) I.R. 279 at p. 283; *R v. Governor of Brixton Prison, ex parte Armah* (1968) A.C. 192 at p. 257.

348. *Mudanayake v. Sivagnanasunderam* (1951) 53 N.L.R. 25.

349. *ibid.*

350. Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, Section 6.

351. *Colombo Paints Ltd. v. de Mel* (1973) 76 N.L.R. 409 at pages 411-412, per T. S. Fernando, P.

352. *R v. Special Commissioners of Income Tax* (1888) 21 Q.B.D. 313 at p. 319, per Lindley, L.J.

353. *ibid.*; cf. *R v. Pugh* (1951) 2 K.B. 623; *Re Purkiss' Application* (1962) 1 W.L.R. 902 at p. 914

well as the jurisdiction, on finding that it does exist, to proceed further.”³⁵⁴ In the latter context an error by the tribunal as to the existence of the preliminary or collateral facts has no bearing on jurisdiction.³⁵⁵

Although the two categories are distinguishable in theory, it is often difficult, as a matter of construction, to decide on which side of the line a particular case should fall. An example of statutory demarcation of the subject matter falling within the purview of the administrative tribunal or officer is provided by subordinate legislation³⁵⁶ in Sri Lanka, in terms of which the Commissioner of Labour had power to make an order in relation to a “trade dispute”. The fact that jurisdiction was conferred on the Commissioner in ostensibly subjective terms, in that he was required to be “satisfied” that the petition submitted to him pertained to a “trade dispute” was construed in one case³⁵⁷ as an indication that *de novo* review by the courts was inappropriate.³⁵⁸ However other judicial pronouncements, typifying a preferable legal policy, have shown less reluctance to acquiesce in denial of supervisory jurisdiction on this ground. Thus, the comment has been made in this context by a Sri Lankan court that “When the respondent took the objection that the matter referred for investigation did not relate to a trade dispute, it became the duty of the District Judge to consider the question whether there was a trade dispute and to give his decision thereon, for his power to proceed further depended on his finding that there was a trade dispute and not upon the declaration of the Commissioner that he was satisfied that there is a trade dispute.”³⁵⁹

The distinction between “extra-jurisdictional” and “intra-jurisdictional” error has been assailed by the “pure” theory of jurisdiction,³⁶⁰ the gist of which is that a tribunal’s findings ought to be equally conclusive on every matter which it must investigate in order to discharge its task.³⁶¹ The salient merit of this theory is its logical symmetry and consistency, but it does not accord with the policy objectives of judicial review. An indispensable postulate of supervisory jurisdiction is that some conditions precedent circumscribe the *vires* of

354. *R. v. Special Commissioners of Income Tax* (1888) 21 Q.B.D. 313 at p. 319, *per* Lindley, L.J.

355. *Brittain v. Kinnaird* (1819) 1 Br. & B. 432; *Allen v. Sharp* (1848) 2 Ex. 352; *R. v. Bradley* (1894) 70 L.T. 379; *R. v. Lincolnshire JJ., ex parte Brett* (1926) 2 K. B. 192.

356. Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, Rule 6.

357. *Brown & Co., Ltd. v. Roberts* (1946) 47 N.L.R. 529.

358. *cf. Ashbridge Investments Ltd. v. Minister of Housing and Local Government* (1965) 1 W.L.R. 1320; *McEldowney v. Forde* (1971) A.C. 632 at pages 660-661.

359. *Liptons, Ltd. v. Gunasekera* (1947) 48 N.L.R. 105 at p. 109, *pre* Soertsz, S.P.J.

360. See D. M. Gordon, “The Relation of Facts to Jurisdiction” (1929) 45 L.Q.R. 459; “Observance of Law as a Condition of Jurisdiction” (1931) 47 L.Q.R. 386, 557; *cf.*

S. A. de Smith, *op. cit.*, p. 100

361. H. W. R. Wade, *op. cit.*, p. 252.

an inferior tribunal and that decisions of the tribunal on these matters are reviewable by the courts. The substance of the doctrine of *ultra vires* is that the courts "will not permit the inferior tribunal either to usurp a jurisdiction which it does not possess or to refuse to exercise a jurisdiction which it has."³⁶²

Corollaries to the "pure" theory of jurisdiction, never countenanced unequivocally by the courts of England or Sri Lanka, have influenced the approach that "The question of jurisdiction is determinable on the commencement, not at the conclusion, of the inquiry"³⁶³ During the last decade, however, the ambit of judicial review has been expanded significantly by erosion of the distinction between preliminary or collateral questions and questions involving the merits. The premise that the jurisdiction of an inferior tribunal is ascertainable only at the outset of the investigation is incompatible with the principle, currently established, that a tribunal having jurisdiction over a matter in the first instance may exceed its jurisdiction by contravening the rules of natural justice, applying the wrong legal test, answering the wrong questions, failing to take relevant considerations into account or basing its decision on legally irrelevant considerations.³⁶⁴ Reflecting this extension of the concept of jurisdictional error, the courts of Sri Lanka have acknowledged that an inferior tribunal having general jurisdiction in the first instance can lose its jurisdiction if a matter arises during the course of its inquiry on which it has no authority to give a ruling³⁶⁵ and that, if a tribunal determines a question without addressing itself to an essential issue, it acts without jurisdiction.³⁶⁶ The Privy Council has concluded in an appeal from Sri Lanka that a Minister acts in excess of his jurisdiction if he fails to consider the right questions and to make the decisions which are the requisite foundations for the exercise of statutory power.³⁶⁷ Moreover, failure to consider relevant evidence has been characterized in Sri Lankan judgments as involving jurisdictional error. It has been observed that "Where a tribunal is empowered to make findings of fact that are excluded from review, a court will have jurisdiction to intervene where there has been a failure to consider material and relevant evidence."³⁶⁸

362. *R. v. Shoreditch Assessment Committee, ex parte Morgan* (1910) 2 K. B. 859 at p. 880, per Farewell, L.J.

363. *R. v. Bolton* (1841) 1 Q.B. 66 at p. 74, per Lord Denman, C.J.

364. *Anisminie Ltd. v. Foreign Compensation Commission* (1969) 2 A.C. 147.

365. *Zackeriya v. Croos Raj Chandra* (1947) 48 N.L.R. 394.

366. *Hayleys Ltd. v. Crossette-Thambiah* (1961) 63 N.L.R. 248.

367. *Board of Trustees of the Maradana Mosque v. Minister of Education* (1966) 68 N.L.R. 217 at p. 225, per Lord Pearce.

368. *United Industrial Local Government and General Workers' Union v. Independent News Papers, Ltd.* (1972) 75 N.L.R. 529, at p. 532, per Siva Supramaniam, J.

Notwithstanding that the concept of jurisdictional error embraces error of law as well as error of fact, the principles regulating judicial review are predicated on appropriate gradations, in that the former is generally availed of more readily than the latter as a basis of invocation of the court's supervisory jurisdiction. This difference, which has received explicit articulation in English³⁶⁹, Australian³⁷⁰ and Canadian³⁷¹ judgments, derives from a pragmatic rationale in so far as procedural concomitants—in particular, virtually exclusive reliance on affidavits, with minimal scope for cross-examination, discovery of documents and interrogatories—inhibit adjudication of disputed questions of fact in certiorari proceedings.³⁷² It has been persuasively argued in England that the distinction between errors of law which “go to jurisdiction” and those which do not, is anomalous,³⁷³ in that all questions of law, by definition, are preliminary or collateral.³⁷⁴ But there is no indication in the Sri Lankan decisions that the traditional distinction between jurisdictional and non-jurisdictional questions, as applied without discrimination to matters of law and of fact, has ceased to be useful as an instrument of judicial policy.

In regard to delineation of the limits of *vires*, the following points may be noted :

- (a) In the case of administrative tribunals which derive their powers from the provisions of principal or subordinate legislation, the confines of the powers are embedded in the terms of the applicable provisions. A necessary qualification, however, is that “Whatever may fairly be regarded as incidental to, or consequent upon, those things which the legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*”.³⁷⁵ Within the framework of legislation³⁷⁶ controlling the licensing of buses, the Sri Lankan courts have considered it reasonable to construe the relevant provision so as to enable the

369. *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* (1951) 2 K.B. 1; cf. *Elston v. Rose* (1868) L.R. 4 Q.B. 4 at p. 7; *Joseph v. Henry* (1850) 19 L.J.Q.B. 369.

370. *Caledonian Collieries Ltd. v. Australasian Coal & Shale Employees' Federation* No. 1 (1930) 42 C.L.R. 527 at pages 547-548.

371. *Segal v. City of Montreal* (1931) S.C.R. 460 at p. 473.

372. *Brown v. Cocking* (1868) L.R. 3 Q.B. 672; *R. v. Hackney Rent Tribunal, ex parte Keats* (1951) 2 K.B. 15.

373. Lord Diplock, “Administrative Law: Judicial Review Reviewed” (1974) 33 C.L.J. 233 at p. 243.

374. cf. H. W. R. Wade, *op cit.*, p. 257.

375. *Attorney-General v. Great Eastern Railway* (1880) 5 A.C. 473 at p. 478.

376. Omnibus Service Licensing Ordinance, No. 47 of 1942, section 14(1) (b).

administrative authority to require that, while a road along which the prescribed route was to run was closed to traffic, the route should run along another road or roads, for "such temporary diversion of routes is clearly for the convenience of the public and must at times be necessary".³⁷⁷

- (b) Unlike administrative bodies whose powers are conferred entirely by statutory provisions or by laws, the inherent powers of established courts have been recognized uniformly in Sri Lanka.³⁷⁸ It has been considered desirable "in order to prevent injustice not to confine within too strict limits what is known as the inherent jurisdiction of the court."³⁷⁹
- (c) Practical convenience is often seen to lie at the root of judicial predilections. Thus, a Sri Lankan court has had no compunction in stating, as a ground of its decision, that "The object of expediency, a necessary object in road transport licensing, is better achieved by the tribunal's having itself to make the final order upon an appeal, without reference back to the Commissioner."³⁸⁰
- (d) In determining the validity of a decision made or a power exercised by an administrative tribunal in contravention of a statutory prohibition, the distinction between mandatory and directory prohibitions is of fundamental importance, in that the scope of the tribunal's authority is restricted by the former class of prohibitions but not by the latter. It has been held in Sri Lanka that, where a returning officer at an election of municipal councillors upheld an objection to a nomination which was not made within the time prescribed by the law, he acted without jurisdiction.³⁸¹ The premise of the decision was that the prohibition against entertaining objections not lodged in time, curtailed the ambit of the returning officer's lawful authority.³⁸²

377. *Ebert Silva Bus Co., Ltd. v. High Level Road Bus Co. Ltd.*, (1949) 51 N.L.R. 162 at p. 166, per Windham, J.

378. *Abeyaratne v. Perera* (1912) 15 N.L.R. 347; *Mohamed Alia v. Meera Saibo* (1918) 5 C.W.R. 299; v. *Wijesuriya v. Kaluappu* (1919) 6 C.W.R. 198; *Edirisinghe v. District Judge, Matara* (1949) 51 N.L.R. 549.

379. *Re a Solicitor* (1944) 2 All E.R. 432 at p. 434, per Humphreys, J.

380. *Abdul Fareed v. Tribunal of Appeal, Motor Transport* (1950) 51 N.L.R. 211 at p. 213, per Windham, J.

381. *Perera v. Kannangara* (1943) 45 N.L.R. 29.

382. At p. 32, per Hearne, J.

- (e) The general rule is that no estoppel or promissory estoppel can be relied on to augment the *vires* of an administrative tribunal.³⁸³ The effect of the Omnibus Service Licensing Ordinance³⁸⁴ of Sri Lanka was that the authority of a licensee to operate an omnibus service terminated on the date of expiry of the licence, subject to the concession of continuing to operate on the prescribed route for a limited period, provided that an application for renewal had been made before expiration of the licence.³⁸⁵ Where no application for renewal of licences which had already expired, was made within the period specified by statute, but the buses continued without legal sanction to operate along the routes, official condonation of this irregularity was construed as being incapable of conferring on the bus company any additional rights.³⁸⁶

The concept relating to the limits of jurisdiction is integral to the theoretical foundation of judicial review, exercised by means of the writ of certiorari. Referring to an irregularity by a tribunal amounting to an excess of its jurisdiction, a Sri Lankan judge has commented : "It is sound law that, in respect of such an irregularity, the remedy by way of certiorari would lie, whereas for an irregularity not amounting to an excess of jurisdiction, it would not".³⁸⁷ In another case³⁸⁸ the Sri Lankan court, granting the writ, declared : "There has been a clear usurpation of jurisdiction."³⁸⁹

Decisions of administrative officials and tribunals have been declared void by the courts of Sri Lanka, by having recourse to the doctrine of *ultra vires* in a variety of contexts :

- (i) Types of orders which the tribunal has no power under the enabling statutory provision to make, have been quashed. Where the tribunal of Appeal set up under the Omnibus Service Licensing Ordinance³⁹⁰ was empowered to confirm the decision of the Commissioner of Motor Transport refusing the

383. M. A. Fazal (1972) Public Law 43; S. A. de Smith, *op. cit.*, p. 90

384. No. 47 of 1942.

385. Section 10.

386. *W. H. Bus Co., Ltd. v. Commissioner of Motor Transport* (1949) 51 N.L.R. 118 at p. 120, *per* Gratiaen, J.

387. *Ebert Silva Bus Co., Ltd. v. High Level Road Bus Co., Ltd.* (1949) 51 N.L.R. 162 at p. 163 163, *per* Windham, J.

388. *de Pinto v. Rent Assessment Board Dehiwala-Mt. Lavinia* (1945) 46 N.L.R. 396.

389. At p. 398 *per* Wijeyewardene, J.

390. No. 47 of 1942.

petitioner a licence or to order that a licence be issued to the petitioner, the tribunal lacks power to remit the matter to the Commissioner for a decision.³⁹¹ Where an Industrial Court was given authority under the Industrial Disputes Act³⁹² to make an award regarding "the payment by any employer of compensation to any workman as an alternative to his reinstatement, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid",³⁹³ it has been held that in an industrial dispute arising from the non-employment of a workman by his employer, an order of the Industrial Court for payment of compensation to the workman is *ultra vires* unless there is also a decision as to his reinstatement.³⁹⁴

In circumstances where an industrial dispute between a company and a trade union was referred under the Industrial Disputes Act³⁹⁵ for settlement by arbitration, and one of the terms of reference to which the parties agreed was that, if the arbitrator was of opinion that certain letters of warning which had been sent by the company to some of their workmen were justified, the letters should stand, the arbitrator decided that the letters of warning were justified, but that a material paragraph in them should have no effect. The part of the award embodying the latter finding was quashed by certiorari as being in excess of the jurisdiction conferred on the arbitrator.³⁹⁶

(ii) The order of an administrative tribunal is devoid of legal force if it purports to deal with subject matter outside the category demarcated by statute. Where a Rent Assessment Board was invested with jurisdiction to determine the appropriate quantum of rent only in cases in which, owing to enhancement of the annual value of the property, the rents and rates had been raised, an order by the Board fixing the rent in other circumstances has been impugned as a nullity.³⁹⁷

(iii) A tribunal exceeds its jurisdiction by utilizing, for the purpose of its determination, unauthorized material. Adverting to the revisionary powers of a District Judge to examine the record maintained in Rural Court

391. *Abdul Fareed v. Tribunal of Appeal, Motor Transport* (1950) 51 N.L.R. 211.

392. No. 43 of 1950.

393. Section 23 (d).

394. *Taos Ltd. v. Fernando* (1963) 65 N.L.R. 259 at p. 261, *per* Basnayake, C.J.

395. Section 3 (1) (d).

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

397. *de Pinto v. Rent Assessment Board, Dehiwela-Mount Lavinia* (1945) 46 N.L.R. 396.

proceedings, the Supreme Court of Sri Lanka has observed that "By not confining himself to the material in the record, the District Judge has exercised a power not granted to him and thereby exceeded his jurisdiction."³⁹⁸

(iv) An order which a tribunal purports to make in relation to a category of person it is not competent to deal with, has no validity. Where a bylaw provided that any dispute concerning the business of a co-operative society between members or past members of the society or persons claiming through them, or between a member or past member or person so claiming and the society or any officer should be referred for settlement to the Registrar of Co-operative Societies,³⁹⁹ the fact that at any material time a person came within the specified class is "an essential condition precedent qualifying the ambit of the power".⁴⁰⁰

(v) A tribunal has no jurisdiction to entertain proceedings not instituted in the manner prescribed, or not commenced by the person designated, by the governing statute. In the context of a provision in the rent laws⁴⁰¹ barring proceedings for ejection of a tenant unless the Rent Assessment Board, "on the application of the landlord",⁴⁰² had in writing authorized them, the requirement pertaining to the initiative of the landlord constitutes an imperative limiting condition.⁴⁰³

(vi) If the tribunal transgresses the bounds of the situation within which it is required to make the determination, its order is liable to be quashed. An arbitrator on whom power is conferred by the Industrial Disputes Act⁴⁰⁴ to inquire into disputes connected with "employment or non-employment, or the terms of employment, or the conditions of labour"⁴⁰⁵ has no jurisdiction in respect of cases of cessation of employment.⁴⁰⁶

398. *Dissanayake v. Kulatilleke* (1956) 59 N.L.R. 310 at p. 312, *per* Basnayake, C.J.

399. Rule 29 framed under the Co-operative Societies Ordinance, No. 34 of 1921, section 37.

400. *Soysa v. de Silva* (1949) 52 N.L.R. 309 at p. 310, *per* Gunasekera, J.; *cf.* *Mohideen v. Lanka Matha Co-operative Stores Society, Ltd.* (1947) 48 N.L.R. 177; *Illangakoon v. Bogollagama* (1948) 49 N.L.R. 403.

401. Rent Restriction Ordinance, No. 60 of 1942.

402. Section 8.

403. *Zackeriya v. Croos Raj Chandra* (1947) 48 N.L.R. 394

404. No. 43 of 1950.

405. Section 4 (1)

406. *Colombo Apothecaries Co. Ltd. v. Wijesooriya* (1968) 70 N.L.R. 481; *State Bank of India v. Sundaralingam* (1970) 73 N.L.R. 514.

(vii) Failure to comply with an antecedent procedural requirement may deprive a tribunal of its jurisdiction. The view had been expressed in Sri Lanka that, in court martial proceedings under the Navy Act,⁴⁰⁷ the mission of the Judge-Advocate to perform the statutory duty, explicitly imposed,⁴⁰⁸ of summing up on the evidence before the court deliberates on its finding is a fatal illegality.⁴⁰⁹

(viii) Improper delegation of its functions by the tribunal to an extraneous body or officer is tantamount to excess of jurisdiction. The act of "entertaining" an application for settlement under the Debt Conciliation (Amendment) Act⁴¹⁰ must be performed by the Debt Conciliation Board itself and cannot be delegated by the Board to its Secretary. Accordingly, if the Secretary purports to issue to the creditor a notice of the application made by the debtor, before the application is entertained by the Board, the prohibition on alienation or other disposition imposed by the statute⁴¹¹ is inoperative.⁴¹²

(ix) Where a tribunal, in consequence of misconceiving its powers, assumes that it has jurisdiction only in some of the situations in which it is statutorily empowered to make orders or determinations, certiorari is available against the tribunal. The erroneous limitation of its authority as the result of a jurisdictional error is equivalent to declining jurisdiction and is exposed to review.⁴¹³ Analogous principles apply to refusal and to excess of jurisdiction,⁴¹⁴ as opposed to the making of an incorrect decision on the merits of a case.⁴¹⁵

(x) The validity of a decision made by a tribunal is vitiated if the determination is made in disregard of a provision as to time which controls the ambit of the tribunal's authority.⁴¹⁶

(xi) The jurisdiction of a tribunal may be affected by a deficiency or taint in respect of its appointment. This principle is illustrated by a series of cases decided under the provisions of the Ceylon (Constitution) Order-in-Council,

407. No. 34 of 1950.

408. Section 39 (d).

409. *Jayanetti v. Martinus* (1968) 71 N.L.R. 39 at p. 51, per H. N. G. Fernando, C.J.

410. No. 5 of 1959.

411. Section 19 B (1).

412. *Simon Silva v. Debt Conciliation Board* (1963) 65 N.L.R. 138, at p. 140, per T. S. Fernando, J.

413. *de Pinto v. Rent Assessment Board, Dehiwela-Mount Lavinia* (1945) 46 N.L.R. 396.

414. *Ex parte Moss, re Board of Fire Commissioners of N.S.W.* (1961) 61 S.R. (N.S.W.) 597.

415. *Ex parte Tebbitt Bros.* (1917) 116 L.T. 85; *R. v. War Pensions Entitlement Appeal Tribunal ex parte Bott* (1933) 50 C.L.R. 228 at p. 242.

416. *Perera v. Kannangara* (1943) 45 N.L.R. 29.

1946, the effect of which was that, in order to vest judicial power in any tribunal, the members of such tribunal had to be appointed by the Judicial Service Commission.⁴¹⁷ In keeping with this provision a Bribery Tribunal has been held to lack power to conduct proceedings⁴¹⁸ or to impose punishment⁴¹⁹ unless its members were appointed in the prescribed manner. Similarly, an arbitrator appointed by the Registrar of Co-operative Societies⁴²⁰ had no jurisdiction to resolve a dispute between a co-operative society and an officer of the society in respect of a liability arising from contract or delict, since "the dispute concerning the existence of this liability and the duty to perform it was an ordinary civil dispute within the traditional jurisdiction of the courts".⁴²¹ The provisions of the Licensing of Traders Act⁴²² were ineffectual in so far as they purported to empower a licensing authority to determine whether a trader had contravened the Control of Prices Act⁴²³ and to impose a penalty. "This penalty has the same effect, whether punitive or deterrent, as would a fine inflicted by a court for an offence."⁴²⁴ However, the exercise by Courts Martial, duly convened under the Army Act,⁴²⁵ of the powers of trial and punishment conferred by that Act did not conflict with the Constitution of 1946 because "the exercise of such powers by Court Martial did not constitute usurpation or infringement of the powers of the Judicature as contemplated in the Constitution."⁴²⁶ Moreover, the Constitution of 1946 did not have the effect of invalidating the provisions of any pre-existing statute under which judicial power was conferred on a person not holding judicial office.⁴²⁷ The imposition, by executive officers, of penalties under revenue statutes did not involve the exercise of judicial power if the penalties contained "the remedial character of sanctions".⁴²⁸ Where the resolution of disputes by an executive officer could be properly regarded as being part of the execution of some wider administrative function

417. Section 55.

418. *Piyadasa v. Bribery Commissioner* (1962) 64 N.L.R. 385; *Ranasinghe v. Bribery Commissioner* (1962) 64 N.L.R. 449 (S.C.), (1964) 66 N.L.R. 73 (P.C.).

419. *Senadhira v. Bribery Commissioner* (1961) 63 N.L.R. 313.

420. Act No. 21 of 1949, section 53.

421. *Karunatileke v. Abeywira* (1966) 68 N.L.R. 503 at p. 505, per H.N. G. Fernando S.P.J.

422. No. 62 of 1961.

423. No. 29 of 1950.

424. *Ibrahim v. Government Agent, Vavuniya* (1966) 69 N.L.R. 217 at p. 220, per H. N. G. Fernando S.P.J.

425. No. 17 of 1949.

426. *Gunaseela v. Udugama* (1966) 69 N.L.R. 193 at p. 196, per H. N. G. Fernando, S.P.J.

427. *Panagoda v. Budenis Singho* (1966) 68 N.L.R. 490.

428. *Xavier v. Wijeykoon* (1966) 69 N.L.R. 197.

entrusted to him, he should be looked upon as acting in an administrative capacity and not as discharging a judicial function.⁴²⁹ The Privy Council was of opinion that the Board of Review constituted under the Income Tax Ordinance⁴³⁰ did not exercise judicial power and that "its work is administrative though judicial qualities are called for in its performance."⁴³¹ After a sustained conflict of judicial opinion⁴³² the view prevailed⁴³³ that the President of a Labour Tribunal, an arbitrator or a member of an Industrial Court did not hold paid judicial office within the framework of the Constitution of 1946.

Some recent English decisions underline the resilience of the concept of natural justice by predicating, as one of its postulates, that a tribunal's decision should be based on some evidence of probative value.⁴³⁴ Other decisions, however, emphatically deny that lack of evidence, *per se*, raises any question of jurisdiction, substantive or procedural.⁴³⁵ The approach which seems to accord best with current judicial trends in Sri Lanka is that decisions of administrative tribunals, wholly unsubstantiated by evidence, attract the doctrine of *ultra vires*.⁴³⁶

The problems discussed in this section are catered for by ramifications of the doctrine of substantive *ultra vires*. Adoption by the tribunal of a procedure irreconcilable with the rudiments of natural justice entails conflict with the principle of formal or procedural *ultra vires*.⁴³⁷ These are aspects of a single principle, and no legitimate distinction may be made as to the degree of invalidity of determinations reached in the two contexts, in that the effect of a decision arrived at in breach of the rules of natural justice may properly be equated with that of a decision made outside the limits of the substantive power conferred. In principle, the decision should be void in both situations.⁴³⁸

429. *Ranaweera v. Wickremasinghe* (1969) 72 N.L.R. 553 at p. 558, per Lord Donovan.

430. No. 2 of 1932.

431. *Ranaweera v. Ramachandran* (1969) 72 N.L.R. 562 at p. 568 per Lord Donovan.

432. *Walker Sons & Co. Ltd. v. Fry* (1965) 69 C.L.W. 65; *Moosajees Ltd. v. Fernando* (1966) 68 N.L.R. 414.

433. *United Engineering Workers' Union v. Devanayagam* (1967) 69 N.L.R. 289; cf. *Jafferjee v. Ceylon Mercantile Union* (1968) 71 N.L.R. 112.

434. *R. v. Deputy Industrial Injuries Commissioner, ex parte Moore* (1965) 1 Q.B. 456; *Burwoods (Caterers) Ltd. v. Secretary of State for the Environment* (1972) Est Gaz. Dig. 1007.

435. *R. v. Governor of Brixton Prison ex parte Armah* (1968) A.C. 192 at p. 234; *R. v. Governor of Pentonville Prison, ex parte Sotiriadis* (1975) A.C. 1 at p. 30.

436. cf. *Bailey's case* (1854) 3 E & B. 607.

437. cf. *Thabrew v. Yatawara* (1952) 54 N.L.R. 117.

438. H. W. R. Wade, *op. cit.*, p. 448.

The foundations of judicial review in Sri Lanka, where the doctrine relating to the sovereignty of Parliament is incorporated in the paramount law, necessitate exposition of the rationale underlying superintendence of administrative authorities in terms interlinked with implied legislative intent. This dimension of the basis of supervisory jurisdiction is underscored in the remark by a Sri Lankan court, in a case involving infraction of an imperative procedural requirement, that "The legislature could not have contemplated that a Judge Advocate, the very title of whose office denotes its quasi-judicial character, might through caprice or inadvertence deny to an accused person his right to a summing up on the evidence and on the law."⁴³⁹

(b) Error within Jurisdiction

It would seem axiomatic that an erroneous decision made by a tribunal within the limits of its jurisdiction should be immune from *de novo* review. However, there is an important qualification subject to which this principle has been adopted by English administrative law. Of the supervisory jurisdiction of the Court of King's Bench over all inferior tribunals, it has been observed : "This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law"⁴⁴⁰.

The doctrine relating to error on the face of the record detracts from the structural symmetry of the law, in that it constitutes an isolated rubric of review which is not referable to a jurisdictional principle. In the evolution of the remedy of certiorari, error *ex facie* the record was the earliest ground of review recognized by the Court of King's Bench.⁴⁴¹ It is only after Parliament, incensed by judicial intervention on trivial pretext, embarked on a vigorous policy of diminishing the effectiveness of review on this ground⁴⁴² that the courts were prompted to develop the jurisdictional doctrine as the bulwark of review. For almost a century the English courts, in their preoccupation with mechanisms of review rooted in jurisdictional concepts, relegated to a condition of obsolescence the doctrine of error on the face of the record until it was reactivated in 1951.⁴⁴³ The acknowledgement of this principle as part of the applicable body of administrative law has admitted of no doubt in Sri Lanka where the Supreme Court has commented : "It must be taken as well settled that error

439. *Jayanetti v. Martinus* (1968) 71 N.L.R. 49 at p. 51, per H. N. G. Fernando C.J.

440. *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* (1951) 1 K.B. 711 at p. 719.

441. W. Holdsworth, *History of English Law*, vi, 56, 112, 263.

442. See the Summary Jurisdiction Act of 1848.

443. *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw, supra*.

appearing on the face of the record of a decision of a statutory tribunal renders that decision liable to be quashed. It is hardly necessary to emphasize that our law on this point follows that of England".⁴⁴⁴

One interpretation of a crucial ruling by the House of Lords⁴⁴⁵ is that "it renders obsolete the technical distinction between errors of law which go to jurisdiction and errors of law which do not."⁴⁴⁶ If all error of law is treated as intrinsically jurisdictional, the notion of manifest intra-jurisdictional error of law which may be reached by certiorari, becomes redundant. However, since this interpretation is not only controversial but is at variance with recent Commonwealth authority,⁴⁴⁷ it is probable that patent error of law within jurisdiction will continue to be of value as a pivot of judicial review by means of certiorari in the future.

The inherent limitations of this head of review are indicated by the case law :

(a) Emphasizing the contrast between appellate and supervisory jurisdiction, a Sri Lankan judge has insisted that the latter jurisdiction "does not extend to the correction of a wrong decision of fact by an inferior tribunal. But it is settled law that a decision of an inferior tribunal, which is based on an error of law apparent on the face of the record of the tribunal's proceedings, is one of the grounds for the issue of a writ of certiorari quashing the decision."⁴⁴⁸ Even if error of fact is rigidly excluded from the ambit of this doctrine, it is indisputable that error of law, in this context, has an extensive connotation. This is illustrated by the treatment of decisions based on demonstrably erroneous inferences of fact as involving errors of law.⁴⁴⁹ The Court of Appeal of Sri Lanka has asserted that "A tribunal which draws an inference wholly unsupported by the primary facts errs in point of law."⁴⁵⁰

The inflexible exclusion of errors of fact from the scope of review on this ground, although supported by judicial authority in England⁴⁵¹ and the Commonwealth,⁴⁵² has not found favour uniformly. It has been suggested that,

444. *South Ceylon Democratic Workers' Union v. Selvadurai* (1962) 71 N.L.R. 244 at p. 247, per T. S. Fernando, J.

445. *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 A.C. 147.

446. Lord Diplock in (1974) 33 C.L.J. 233 at p. 243.

447. *New Zealand Engineering Union v. Court of Arbitration* (1976) 2 N.Z.L.R. 283.

448. *Hayleys Ltd. v. de Silva* (1962) 64 N.L.R. 130 at p. 137 per Weerasooriya, S.P.J.

449. *Coleen Properties Ltd. v. Minister of Housing and Local Government* (1971) 1 W.L.R. 433.

450. *Wijerama v. Paul* (1973) 76 N.L.R. 241 at p. 258, per T. S. Fernando, P.

451. *R. v. Criminal Injuries Compensation Board, ex parte Staten* (1972) 1 W.L.R. 569.

452. *Gould v. Wily* (1960) N.Z.L.R. 960.

in exceptional contexts, error of fact should be susceptible to review because "it contradicts itself on some finding of fact or because it finds some fact contrary to common knowledge of which judicial notice can be taken."⁴⁵³ In any event, however, it is evident, for pragmatic reasons, that the courts will show greater inhibition in controlling errors of fact than is appropriate to scrutiny of errors of law. This arises from the expertise of administrative tribunals in relation to matters committed specifically by the legislature to their charge.⁴⁵⁴ The innovative grounds of review founded on "misunderstanding or ignorance of an established and relevant fact"⁴⁵⁵ and "acting upon an incorrect basis of fact",⁴⁵⁶ which emerge from recent English judgments, are not foreshadowed by the tenor of the Sri Lanka decisions.

(b) The concept of error on the face of the record does not entail gradations as to the gravity of the error. A Sri Lankan court, repudiating the contention that gross or fundamental error is a prerequisite, stated: "What is contemplated by 'manifest error' in this context is no more than error which must be plain on the face of the admissible record, not error which can be discovered only after assiduous search beyond its face."⁴⁵⁷

The dichotomy between patent and latent error within jurisdiction is integral to the dimensions of review, which may be resorted to only if "there was upon the face of the order anything which showed that that order was erroneous".⁴⁵⁸ The criterion is that the error should appear in the record. A narrow definition of "the record" is that it is confined to "the order or decision as recorded".⁴⁵⁹ But the established view is that the record consists of "all those documents which are kept by the tribunal for a permanent memorial and testimony of the proceedings".⁴⁶⁰ The record⁴⁶¹ includes not only the docu-

453. H. W. R. Wade, *op. cit.*, p. 271.

454. For examples of judicial restraint even in regard to errors of law, see *R v. Preston Supplementary Benefits Appeal Tribunal, ex parte Moore* (1975) 1 W.L.R. 624; *R v. Barnsley Supplementary Benefits Appeal Tribunal, ex parte Atkinson* (1976) 1 W.L.R. 1047.

455. *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1976) 3 W.L.R. 641 at p. 656, *per Scarman, L.J.*

456. At p. 665, *per Lord Wilberforce*; cf. *Laker Airways, Ltd. v. Department of Trade* (1977) 2 W.L.R. 234 at p. 250, *per Lord Denning, M.R.*

457. *South Ceylon Democratic Workers' Union v. Selvadurai* (1962) 71 N.L.R. 244 at p. 248, *per T. S. Fernando, J.*

458. *Overseers of the Poor of Walsall v. London and North Eastern Railway Co.* (1878) 4 A.C. 35 at p. 39, *per Earl Cairns, L.C.*

459. *Baldwin & Francis, Ltd. v. Patents Appeal Tribunal* (1969) A.C. 663 at p. 687, *per Lord Tucker.*

460. See the *Northumberland case* (1952) 1 K.B. 338 at p. 344.

461. See also *R v. Nat Bell Liquors, Ltd.* (1922) 2 A.C. 128.

ment which initiates the proceedings⁴⁶² but any document referred to in the primary documents⁴⁶³ except in arbitration proceedings,⁴⁶⁴ as well as the pleadings,⁴⁶⁵ the adjudication⁴⁶⁶ and even patent specifications,⁴⁶⁷ where relevant. The better view appears to be that a court has inherent power to order a tribunal to complete its record.⁴⁶⁸ An unsatisfactory feature of the law is that the difference between patent and latent error within jurisdiction may depend on coincidental factors, in that evidence is not part of the record unless the tribunal elects to incorporate it in the record.⁴⁶⁹ In suitable contexts the courts of Sri Lanka have been prepared to treat evidence as forming part of the record.⁴⁷⁰

An order liable to be quashed for error on the face of the record must necessarily be a "speaking order". The essence of a "speaking order" is that the reason underlying the making of the order is evident on its face and needs no further explanation. Consistently with this definition, a Sri Lankan judge has remarked : "Upon a fair construction of the document, it seems to me that it is best described as a speaking order, with the ground in support of it appearing thereon."⁴⁷¹ Here, again, the element of coincidence is significant, since an order unaccompanied by reasons is not amenable to *de novo* review if made within jurisdiction,⁴⁷² although the statement of reasons would have brought the order within the purview of certiorari. This anomaly has been rectified in England by statutory conferment of an enforceable right to reasoned decisions,⁴⁷³ but the distinction, unfortunately, retains its arbitrary quality in the setting of the Sri Lankan legal system.

462. See the *Northumberland* case (1952) 1 K.B. 338 at p. 344.

463. *R. v. Medical Appeal Tribunal, ex parte Gilmore* (1957) 1 Q.B. 574.

464. *Gincome Costa Fu Andrea v. British Italian Trading Co., Ltd.* (1963) 1 Q.B. 201.

465. The *Northumberland* case (1952) 1 K.B. 338 at p. 344.

466. *ibid.*

467. *R. v. Patent Appeals Tribunal, ex parte Swift & Co.* (1962) 2 Q.B. 647. The position in England now seems to be that there is no need any longer for the doctrine of error on the face of the record or for a distinction between patent and latent error, since any error of law by a tribunal is a jurisdictional error : *Pearlman v. Keepers and Governors of Harrow School* (1979) Q.B. 56; *Re Racal Communications, Ltd.* (1980) 3 W.L.R. 181; see, however, *South East Asia Fire Bricks Sdn Bhd v. Non-Metallic Mineral Products Manufacturing Employees Union* (1980) 2 All E.R. 689.

468. *Re Battaglia and Workmen's Compensation Board* (1960) 22 D.L.R. (2d) 446.

469. *Re Allen & Matthews' Arbitration* (1971) 2 Q.B. 518.

470. *Virakesari Ltd. v. Fernando* (1963) 66 N.L.R. 145.

471. *Manickam v. Permanent Secretary, Ministry of Defence and External Affairs* (1960) 62 N.L.R. 204 at p. 208, per T. S. Fernando, J.

472. *R. v. Oulton (Inhabitants)* (1735) Cas. Hard. 169; *R. v. Perston-on-the-Hill (Inhabitants)* (1736) Burr. Set. Cas. 77.

473. Tribunals and Inquiries Act, 1971, section 12.

It is of interest to note that the principles applicable to speaking orders have been interpreted liberally by the Sri Lankan courts in two respects. Firstly certiorari has been granted to quash an order which, although not technically a speaking order, is based on the contents of a document which is part of the record.⁴⁷⁴ Secondly, it has been accepted that, where the reasons spelt out in the speaking order are not supportable in law, "one cannot import into the order other reasons which are not set out by the tribunal."⁴⁷⁵ Both principles are consistent with expansion of the scope of judicial review.

(c) The courts of Sri Lanka have placed emphasis on the causal nexus between the error and the conclusion reached by the tribunal. The Supreme Court has stated, as a ground for quashing the order of an Industrial Court, that "There can be little doubt that the error of law was on a point deemed material by the Industrial Court itself."⁴⁷⁶

The following are instances of error on the face of the record quashed by certiorari in Sri Lanka :

- (i) Where the reason stated for the tribunal's decision is indefensible in law, certiorari will issue. Commenting on a letter addressed by the prescribed officer under the Citizenship Act⁴⁷⁷ to an applicant for citizenship by registration, the Supreme Court has observed : "The ground specified in it is bad in law and is not one which can legitimately form a justification for the refusal to send the application to the Minister."⁴⁷⁸
- (ii) A similar view has been taken in regard to misapprehension by the tribunal of the constituent elements of the charge. In investigating a charge that the petitioner did advertize, commending his professional skill or knowledge, it was clear from the record of the proceedings maintained by the Medical Council that the Council acted under the impression that the mere fact of a surgeon dissociating himself from participation in a reported surgical misadventure which had occurred in circumstances reflecting no credit on the surgeon who performed the operation, could reasonably

474. *Colombo Paints Ltd. v. de Mel* (1973) 76 N.L.R. 409 at p. 411 per T.S. Fernando, P.

475. *Hayleys, Ltd. v. Crossette-Thambiah* (1961) 63 N.L.R. 248 at p. 261. per Tambiah, J.

476. *Shell Co. of Ceylon, Ltd. v. Perera* (1967) 70 N.L.R. 108 at p. 112.

477. No. 18 of 1948

478. *Manickam v. Permanent Secretary, Ministry of Defence and External Affairs* (1960) 62 N.L.R. 204 at p. 208, per T. S. Fernando, J.

- ly be said to constitute a commending of his own professional skill. The finding of the Council was quashed on the ground that 'The mere fact of dissociation, without more, must fall short of commendation of his professional skill or promotion of his own professional advantage.'⁴⁷⁹
- (iii) Misconstruction of a statute, plainly, involves error of law. Where an elections officer, in deciding whether a person claiming registration as a voter had the requisite qualifications under the law, made an error in travelling outside the language of the Parliamentary Elections Order-in-Council, 1946, to ascertain the meaning of the relevant provision,⁴⁸⁰ error of law was held in the circumstance to be evident on the face of the record.⁴⁸¹
- (iv) The proposition is supportable that certiorari will issue against an inferior tribunal which has proposed an irrelevant or extraneous question of law as the sole question involved in its determination and which has entirely misdirected itself on the point and made that the basis of its decision, provided that the error was apparent.⁴⁸²
- (v) A ruling founded on an incorrect legal premise may be vitiated on the ground of manifest error. Where an industrial dispute arose between a company and a trade union in consequence of the company's dismissal of workmen who had engaged in a "stay-in strike" and an Industrial Court made an award in favour of the trade union on the footing that a "stay-in strike" was not unlawful in Sri Lanka, but the latter assumption was not borne out by the statutory provisions applicable,⁴⁸³ the company's application for certiorari was successful.⁴⁸⁴
- (vi) The view has prevailed that failure on the part of an inferior tribunal to consider and decide a question to which the governing statute requires the tribunal to address its mind is an error of law and that, if such error is apparent on the face of the record, certiorari is available.⁴⁸⁵

479. *Wijerama v. Paul* (1973) 76 N.L.R. 242 at p. 258, *per* T. S. Fernando J.

480. Section 9.

481. *Mudanayake v. Sivagnanasunderam* (1951) 53 N.L.R. 25 at p. 45.

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

483. Stay-in Strikes (Repeal) Act, No. 23 of 1958.

484. *Hayleys, Ltd. v. Crossette-Thambiah* (1961) 63 N.L.R. 248 at p. 261, *per* Tambiah, J.

485. *Hayleys, Ltd. v. de Silva* (1962) 64 N.L.R. 130 at p. 137, *per* Weerasooriya, S.P.J.

- (vii) An erroneous assumption, reflected in the decision, as to the applicability of a statutory provision may furnish evidence of manifest error.⁴⁸⁶
- (viii) Where the inferior tribunal treated as indistinguishable two cases which were clearly disparate, having regard to their statutory and circumstantial contexts, the Supreme Court concluded that "A misdirection such as this would be an error of law on the face of the award which renders such part of the award as is affected by the error liable to be quashed."⁴⁸⁷
- (ix) Unreasonableness of the order has been relied upon as evidence of manifest error. Quashing an order made by an arbitrator under the Industrial Disputes Act completely contrary to the weight of evidence, the Supreme Court stated: "The arbitrator has not dealt with the evidence at all. No reasonable man could have reached his conclusion on the evidence placed before him."⁴⁸⁸

(c) An Evaluation of Review on Jurisdictional Grounds

The distinction between error going to jurisdiction and error within jurisdiction has been obscured to a great extent by contemporary developments which have crucially expanded the scope of judicial review. These trends, representing a conspicuous feature of modern administrative law, have influenced profoundly the prevailing attitudes to judicial control of the executive in Sri Lanka.

The courts are reluctant to recognize an inferior tribunal invested with limited jurisdiction as the final arbiter of the confines of its *vires*. This has generally been considered "a point of law and construction which (the inferior tribunal) is not required or empowered to determine."⁴⁸⁹ Although abuse of discretionary powers has often been conceived of as not involving jurisdictional defects,⁴⁹⁰ inroads into this principle curtailing the ambit of *de novo* review by the courts have been made in Sri Lanka in a variety of contexts. Thus, failure to consider material and relevant evidence⁴⁹¹ exposes a determination to direct

486. *Shell Co. of Ceylon Ltd. v. Perera* (1967) 70 N.L.R. 108.

487. *New Dimbula Co. Ltd. v. Brohier* (1962) 64 N.L.R. 380 at p. 383, *per* Weerasooriya, S.P.J.

488. *Heath & Co. (Ceylon) Ltd. v. Kariyawasam* (1968) 71 N.L.R. 382 at p. 384, *per* Sirimana J.

489. *Zackeriya v. Croos Raj Chandra* (1947) 48 N.L.R. 394 at p. 395, *per* Windham J.

490. *R v. Paddington & St. Marylebone Rent Tribunal* (1947) 1 All E.R. 448 at pages 449-450.

491. *United Industrial Local Government and General Workers Union v. Independent Newspapers, Ltd.* (1972) 75 N.L.R. 529 at pages 531-532, *per* Siva Supramaniam, J.

attack on the ground that it has been made *ultra vires*, while a decision which is manifestly unreasonable is similarly vulnerable.⁴⁹² A decision which is ordinarily within the *vires* of an administrative functionary is vitiated by acting under dictation, which may be equated with excess of jurisdiction or declining jurisdiction. The Sri Lankan courts have consistently upheld the principle that "Private instructions given to a specially designated officer or tribunal as to how quasi-judicial functions should be performed, are bad. The object of establishing an independent tribunal is to remove the power of decision from the executive, and this is clearly defeated if the tribunal acts to order."⁴⁹³

The Supreme Court of Sri Lanka, guided by English⁴⁹⁴ and by Australian⁴⁹⁵ authority, has unequivocally accepted that improper motive or purpose may affect the legality of the exercise of discretionary powers conferred on the executive. Where "certain public bodies were given powers to acquire land for certain specific purposes, but the acquisition turned out in fact to be for other purposes not intended by the statute, and motivated by some ulterior object",⁴⁹⁶ the decision to acquire would be *ultra vires*. In the exercise of their supervisory jurisdiction generally, the Sri Lankan courts have regarded action resorted to *mala fide* as taken outside the limits of *vires*. This principle has been applied in circumstances where it has been shown that "an official who makes a particular executive order had an antecedent motive against the person affected by the order, or had an antecedent bias in favour of a person benefited by the order."⁴⁹⁷

The cumulative effect of these trends has imported into the principles of jurisdictional control a measure of resilience which has served the courts well in forging effective instruments for the superintendance of executive power in situations of increasing complexity.

492. *Heath and Co. (Ceylon) Ltd. v. Kariyawasam* (1968) 71 N.L.R. 382 at p. 384, per Sirimane J

493. *Lademuttu Pillai v. Attorney-General* (1957) 59 N.L.R. 313, at p. 331, per Basnayake, C.J.

494. *Webb v. Minister of Housing and Local Government* (1965) 2 All E.R. 193.

495. *Municipal Council of Sydney v. Campbell* (1925) A.C. 338.

496. *Hewawasam Gamage v. Minister of Agriculture and Lands* (1973) 76 N.L.R. 25 at p. 30, per Pathirana, J.

497. *Hirdaramani v. Rainavale* (1971) 75 N.L.R. 67 at p. 79, per H. N. G. Fernando, C.J. (an application for habeas corpus); cf. *R. v. Governor of Brixton Prison, ex parte Sarno* (1916) 115 L.T. 608; *R. v. Superintendent, Chiswick Police Station, ex parte Sacksteder* (1918) 118 L.T. 165; see for Indian law, *Desphande v. Emporer* (1945) A.I.R. Nagpur 8.

IV Problems Surrounding *Locus Standi*

It is settled principle in Sri Lanka that only a "person aggrieved" has *locus standi* to ask for the prerogative writs.

The fundamental character of certiorari as a public law remedy, the central purpose of which is to control the exercise of powers devolving on public authorities, is conducive to liberal interpretation of the rules governing *locus standi*. The accepted principle in England is that, where certiorari is sought by a person who has a particular grievance of his own, whether as a party or otherwise, the remedy lies *ex debito justitiae*, but that if the application is made by a stranger, the remedy is purely discretionary.⁴⁹⁸

The circumstances in which an applicant for certiorari may be classified as a "stranger" in the relevant sense, are stringently restricted because of the elasticity attendant on construction of a "grievance", for the purpose of award of the remedy.

It is clear from the Sri Lankan decisions that a personal interest is not an essential requirement of *locus standi*. This point was considered specifically in the context of an application by the Tea Controller for certiorari to have the legality of an order made by the Board of Review constituted under the Tea Control Ordinance,⁴⁹⁹ inquired into. One of the arguments addressed to the Supreme Court was that the Tea Controller had no status to make an application for certiorari, since he was no more aggrieved or prejudiced than a judge of an inferior court whose decision was reversed in appeal. It was held, however, that the Tea Controller was a person sufficiently interested to apply for certiorari on the basis that he was interested on behalf of the national tea industry and that he was in a position comparable for practical purposes with that of a trustee.⁵⁰⁰

The class of "persons aggrieved" is not confined to persons who have been deprived of their offices,⁵⁰¹ proprietary rights⁵⁰² and occupational licences⁵⁰³ but encompasses business rivals whose pecuniary interests are adversely affected

498. *R. v. Thames Magistrates' Court, ex parte Greenbaum* (1957) 55 L.G.R. 129.

499. No. 11 of 1933.

500. *Wijesinghe v. Tea Export Controller* (1937) 39 N.L.R. 437.

501. *Abeyaguneseckera v. Local Government Service Commission* (1949) 51 N.L.R. 8.

502. *Singho Mahatmaya v. Land Commissioner* (1964) 66 N.L.R. 94.

503. *Abdul Thassim v. Edmund Rodrigo* (1947) 48 N.L.R. 121.

by the order impugned.⁵⁰⁴ In a well-known Sri Lankan case⁵⁰⁵ the petitioner and the respondents were holders of road service licences issued by the Commissioner of Motor Transport under the Omnibus Service Licensing Ordinance.⁵⁰⁶ In consequence of complaints made by the petitioner, the Commissioner ordered that the conditions attached to the licences of the respondents should be varied so as to debar them from picking up and setting down passengers within the municipal limits of Kandy. The petitioner had no legal right to be heard by the Tribunal of Appeal which reversed the decision of the Commissioner; he was merely one of a number of persons who had made representations to the Commissioner and supported variation of the conditions incorporated in the licences. Nevertheless, the Supreme Court, holding that the petitioner had *locus standi*, declared: "The petitioner is the person who is most affected by the order of the Tribunal, for he is directly prejudiced by the removal of the condition from the respondent's licences, a condition which was inserted at the petitioner's instance and for his benefit."⁵⁰⁷

This approach presents a striking contrast with the narrow formulation of the rules pertinent to standing in relation to declaratory actions. Where for instance, a planning authority, not complying with a mandatory procedure prescribed by statute, grants permission for the building of a hospital or a school, a neighbour lacks competence to secure a declaration that the permission is invalid.⁵⁰⁸ This is attributable to the attitude of the law, in the context of declaratory actions, that "planning permission is a matter between the applicant and the planning authority, and is not legally the business of a mere neighbour."⁵⁰⁹ The different origins and complexion of the remedy of certiorari account for the appreciably wider dimension of the principles regulating *locus standi* in this area. Under the rule of court introduced in England in 1977 an applicant for review should have "sufficient interest in the matter".

Assimilation of the divergent doctrines applicable to standing has been advocated in Canada.⁵¹⁰ Implementation of this proposal will contribute significantly to rationalisation of the law. However, until reform of the law is effected on these lines in Sri Lanka, there is cogent reason to preserve the

504. For English law, see *R v. Groom, ex parte Cobbold* (1901) 2 K.B. 157; *R v. Richmond Confirming Authority, ex parte Howitt* (1921) 1 K.B. 248.

505. *Kandy Omnibus Co., Ltd. v. Roberts* (1954) 56 N.L.R. 293.

506. No. 47 of 1942.

507. (1954) 56 N.L.R. 293 at p. 297, *per Sansoni, J.*

508. *Gregory v. Camden London Borough Council* (1966) 1 W.L.R. 899.

509. H. W. R. Wade, *op. cit.*, p. 506.

510. *Thorson v. Attorney-General of Canada (No. 2)* (1974) 43 D.L.R. (3d) 1 at p. 19 *per Laskin, J.*

amorphous quality of the rules relevant to standing in respect of applications for certiorari. This is especially so because the Sri Lankan legal system furnishes no remedy analogous to the relator action of English law, enabling the Attorney-General to supply, by his intervention, the deficiency of standing on the part of an applicant who complains of infringement of his legal rights.⁵¹¹

Viewed in this perspective, the conclusion reached by the Privy Council in a leading Sri Lankan case⁵¹² that, although a Minister had wrongfully dissolved a municipal council because he had failed to comply with an implied duty to observe the rules of natural justice, the mayor of the dissolved council acting in his personal capacity had no competence to impeach the validity of the Minister's act, may be assailed convincingly from the standpoint of policy. The Privy Council observed: "The appellant was no doubt mayor at the time of its dissolution, but that does not give him any right to complain independently of the council. He must show that he is representing the council or suing on its behalf or that by reason of certain circumstances such for example as that the council could not use its seal or for other reasons it has been impracticable for the members of the council to meet to pass the necessary resolutions, the council cannot be the plaintiff."⁵¹³

This reasoning is plainly contrary to the tests emerging from entrenched strands of judicial opinion in Sri Lanka and in England. The Sri Lankan courts have deemed it sufficient, to render the petitioner "a person aggrieved", that he had a "substantial interest"⁵¹⁴ in the decision in respect of which certiorari is sought. This pragmatic criterion, which is predicated on an acceptable compromise between competing objectives of the law—discouraging the officious intermeddler without impeding the potential of certiorari as a beneficial remedy for the exposure and redress of administrative injustice and malpractice in the public interest—is closely akin to the ideas of "a peculiar grievance beyond that which affects the public at large"⁵¹⁵ and "a real practical grievance"⁵¹⁶ which find expression in the English authorities. The approach of the Privy Council, it is deferentially submitted is self-stultifying and signifies a deviation from the continuity of development characteristic of the pre-existing law.

511. See, for example, *London County Council v. Attorney-General* (1902) A.C. 165 at p. 169, per Lord Halsbury, L.C.

512. (1966) 69 N.L.R. 265.

513. At p. 274 per Lord Upjohn.

514. *Kandy Omnibus Co., Ltd. v. Roberts* (1954) 56 N.L.R. 293.

515. *R. v. Surrey JJ.* (1870) 39 L.J.M.C. 145.

V. Discretionary Bars to Provision of Relief

(a) Waiver and Acquiescence

With regard to the applicability of this discretionary bar, the decided cases support a distinction between total and contingent want of jurisdiction on the part of the tribunal, the order or determination of which is challenged by certiorari. The former connotes complete lack of jurisdiction because of the nature of the subject matter or the status of the parties.⁵¹⁷ The latter concept is appropriate to tribunals which, although invested with jurisdiction, are required to exercise that jurisdiction subject to conditions or in accordance with a specified procedure.⁵¹⁸ The petitioner may be deprived of the remedy of certiorari on the ground of waiver or acquiescence in the latter situation, but not in the former.

It has been held in Sri Lanka that, if a statutory Tribunal of Appeal labours under a total want of jurisdiction to hear an appeal, the acquiescence of the petitioner has no bearing on invalidity of the order of the Tribunal on the ground of absence of jurisdiction, but that if the want of jurisdiction is only contingent, acquiescence on the part of the person aggrieved by the ultimate decision may render him disentitled to impugn the decision in certiorari proceedings.⁵¹⁹ The courts of India, following English authority,⁵²⁰ have declared : "It is not open to a person to confer jurisdiction by consent, and no amount of acquiescence would confer jurisdiction upon a tribunal or court where such jurisdiction did not exist."⁵²¹ This proposition admits of no controversy in Sri Lanka.⁵²² The rationale sustaining this approach is that "Any attempt to create or enlarge jurisdiction constitutes a manifest usurpation of the royal prerogative."⁵²³

The position regarding contingent want of jurisdiction is different, for "no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing boundaries."⁵²⁴ The Supreme

516. *R v. Richmond Confirming Authority, ex parte Howitt* (1921) 1 K.B. 248; cf. *R v. Nicholson* (1899) 68 L.J.Q.B. 1034.

517. *Jones v. Owen* (1848) 5 D & L. 669; *Knowles v. Holden* (1855) 24 L. J. Ex. 223.

518. *Jones v. James* (1850) 19 L.J.Q.B. 257; *Moore v. Gamgee* (1890) 25 Q.B.D. 244.

519. *Kandy Omnibus Co., Ltd. v. Roberts* (1954) 56 N.L.R. 293.

520. *Mayor of London v. Cox* (1867) 36 L.J. Ex. 225 ; *Farquharson v. Morgan* (1894) 63 L.J.K.B. 474; *Simson and Latton v. Crowle* (1921) 90 L.J.K.B. 878.

521. *Laxaman Chettiar v. Commissioner of the Corporation of Madras* (1948) 50 Madras 130; cf. *Madhara Rao v. Surya Rao* (1954) A.I.R. Madras 103.

522. *Ebert v. Additional Public Trustee* (1976) 78 N.L.R. 264.

523. *Spencer Bower, Estoppel by Representation* (1923) p. 187.

524. *ibid.*

Court of Sri Lanka, dealing with this type of case, has observed : "The petitioner having participated in prolonged proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid order. The jurisdictional defect, if any, has been cured by the petitioner's consent and acquiescence."⁵²⁵ The principle is entrenched in Sri Lanka that "Where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party who has invited or allowed the court to exercise it in a wrong way cannot afterwards turn round to challenge the legality of proceedings due to his own invitation or negligence."⁵²⁶

The distinction is sometimes expressed in terms of patent and latent want of jurisdiction⁵²⁷ or *defectus jurisdictionis* and *defectus triationis*.⁵²⁸ In the former situation an objection founded on lack of jurisdiction may be taken at any time, and a writ of certiorari sought. But in the latter situation where want of jurisdiction is not apparent *ex facie* the plaint, it is settled law that the objection to jurisdiction cannot be raised for the first time at the stage of appeal or even at a late stage of the trial. This principle may be illustrated by reference to a series of cases⁵²⁹ involving the powers of Conciliation Boards established in Sri Lanka under the Conciliation Boards Act.⁵³⁰ The object of this statute was to reduce the volume of litigation by encouraging the amicable settlement of disputes in cases where the offences alleged were capable of being compounded. The Act provided for a compulsory attempt to compound specified offences of a relatively trivial nature before the Conciliation Board.⁵³¹ In several cases the objection was taken that the Magistrate's Court had no jurisdiction to entertain the complaint, since the matter had not been referred to the Conciliation Board.

The Sri Lankan courts have adopted the principle that an objection relating to jurisdiction may be waived if the want of jurisdiction is not apparent but depends on proof of certain facts—for example, where one party does not know that there is a Conciliation Board constituted in the area but becomes

525. *Nagalingam v. Lakshman de Mel* (1975) 78 N.L.R. 231 at p. 237, *per* Sharvananda, J.

526. *Alagappa Chitty v. Arumugam Chitty* (1921) 2 C.L. Rep. 202

527. *Farquharson v. Morgan*, *supra*.

528. *Spencer Bower*, *op. cit.*, p. 187.

529. *Samarasinghe v. Samarasinghe* (1967) 70 N.L.R. 276; *Wickremaratchi v. Inspector of Police, Nittambuwa* (1968) 71 N.L.R. 121; *Nonahamy v. Halgrat Silva* (1971) 73 N.L.R. 217.

530. No. 10 of 1958.

531. Section 14 (1) (b).

aware, after the commencement of the trial, of the existence of a Conciliation Board and thereafter objects to jurisdiction.⁵³² On the other hand, "where the want of jurisdiction is patent, objection to jurisdiction may be taken at any time. In such a case it is the duty of the court itself *ex mero motu* to raise the point even if the parties fail to do so."⁵³³ But if lack of jurisdiction is not evident on the face of the record, it is for the party who asserts the want of jurisdiction to make the necessary averment and to support it by adduction of evidence.⁵³⁴ In these circumstances an objection to jurisdiction cannot be lodged at an advanced stage of the trial⁵³⁵ or after interlocutory decree has been entered.⁵³⁶

It is submitted that, in one respect, the approach of the Sri Lankan courts to this problem is open to criticism. The principle has been explicitly formulated in Sri Lanka that, in cases of total want of jurisdiction, implied waiver of an objection to the tribunal's jurisdiction by participation in the proceedings could not deprive the petitioner of his right, despite acquiescence, to contend subsequently that the order made by the tribunal is void.⁵³⁷

The underlying assumption is that, if complete lack of jurisdiction is established objectively, the conduct of the petitioner cannot militate against his right to assail the proceedings as a nullity. This, however, is a *non sequitur*, for it is consonant with both principle and authority⁵³⁸ that, notwithstanding total want of jurisdiction in the tribunal, "the conduct of the party applying (for certiorari) may be such as to preclude him from being entitled to it."⁵³⁹ The attitude of the Sri Lankan courts has whittled down unjustifiably the legitimate scope for exercise of discretion in regard to the grant of certiorari.

(b) *Laches*

Where discretion is available to the court in regard to the issue or refusal of certiorari, the writ will generally not be granted if there has been inexcusable delay on the petitioner's part in seeking relief. The observation has been made in Sri Lanka that "Where the extraordinary process of the Supreme Court is

532. *Fernando v. Fernando* (1971) 74 N.L.R. 57.

533. *Peeris Inspector of Police (Crimes), Kalutara* (1971) 74 N.L.R. 479.

534. *Fernando v. Fernando, supra.*

535. *Gunasekera v. Kosgama Police* (1972) 75 N.L.R. 497.

536. *Fernando v. Rosalin* (1971) 74 N.L.R. 563.

537. *Kandy Omnibus Co., Ltd. v. Roberts* (1954) 56 N.L.R. 293.

538. *R. v. South Holland Drainage Committee* (1838) 8 A. & E. 429 ; *R. v. JJ of Surrey* (1870) L.J.M.C. 145; *R. v. Williams* (1914) 83 L.J.K.B. 538.

539. *R. v. Manchester & Leeds Railway Co.* (1838) 8 A. & E. 413.

sought after a long lapse of time, it is essential that the reasons for the delay in seeking relief should be set out in the papers filed in court.”⁵⁴⁰ This involves *uberrima fides*, and relief will be withheld if there has been no complete and candid disclosure of the relevant circumstances by the petitioner.⁵⁴¹

In England, if an application for certiorari was delayed for more than six months, leave of the court to extend the time for making application was necessary until the new Order 53 of the Rules of the Supreme Court came into force in 1977.⁵⁴² A more flexible principle operates in Sri Lanka where the reasonableness or otherwise of the delay is viewed as a question of fact, to be determined in the light of all the attendant circumstances. A delay of a year will generally be regarded as inexcusable.⁵⁴³ An unexplained delay of seven months in applying for certiorari and mandamus to enhance compensation awarded in respect of immovable property acquired by the State, has been thought to warrant the exercise of discretion against the petitioner.⁵⁴⁴ On the other hand, in a case calling for the examination of several intricate points of law, an interval of two months has been considered reasonable.⁵⁴⁵ Although relief has to be sought promptly, delay is a relative term, and it is undesirable to fetter the court’s discretion by specification of a definite period within which the petition for certiorari should be presented.

(c) *The Availability of Alternative Remedies*

The extraordinary character of the remedy of certiorari is reflected in the rule that the writ will not ordinarily be granted if the petitioner’s rights are protected sufficiently by other remedies.⁵⁴⁶ However, a condition precedent for invocation of this rule is that the alternative remedy, according to the phraseology adopted in Sri Lankan judgments, must be “adequate”⁵⁴⁷ or “equally convenient and effective”.⁵⁴⁸ In a case of wrongful dismissal, for instance, monetary damages may not be a substantial remedy, so that certiorari may be

540. *Dissanayake v. Fernando* (1968) 71 N.L.R. 356 at p. 360 per Weramantry, J.

541. *R. v. Kensington I.T.C.* (1917) 1 K. B. 486.

542. See Rules of the Supreme Court, Ord. 53, rule 2 (2).

543. *President of Malagodapitiya Co-operative Society v. Arbitrator of Co-operative Societies Galle*, (1949) 51 N.L.R. 167.

544. *Gunasekera v. Weerakoon* (1970) 73 N.L.R. 262.

545. *Kandy Omnibus Co., Ltd. v. Roberts* (1954) 56 N.L.R. 293.

546. *Gunasekera v. Weerakoon*, *supra*.

547. *Linus Silva v. University Council of the Vidyodaya University* (1961) N.L.R. 104 at p. 115, per T. S. Fernando, J.

548. *Gunasekera v. Weerakoon* (1970) 73 N.L.R. 262 at p. 263 per Sirimane, J.

sought by the petitioner to have the termination of his services declared a nullity. The need for caution and discrimination in having recourse to the rule as to alternative remedies has been stressed by the Sri Lankan courts.⁵⁴⁹

Conversely, a petitioner is not necessarily debarred from seeking other remedies because he is entitled to certiorari. Commenting on the scope of declaratory actions in the modern law of Sri Lanka, the Supreme Court has stated : "With the growth of legislation which affects the rights of the subject and his freedom of action, suits in which the subject seeks redress against illegal acts on the part of statutory functionaries are bound to increase. The courts should not be slow to grant relief when their jurisdiction is properly invoked, and the existence of other remedies is not a sound reason for refusing to adjudicate on a matter rightly brought before them."⁵⁵⁰

This approach is of value in revitalizing the law by discouraging technicality and by preserving intact, side by side, a variety of remedies, each containing invigorating elements which are not necessarily part of the others.

(d) Futility of Judicial Intervention

Sri Lankan judges have been mindful that "The prerogative writs are not issued as a matter of course, and it is in the discretion of the court to refuse to grant them if the facts and circumstances are such as to warrant a refusal."⁵⁵¹ Thus, a premature application for certiorari will generally not be successful.⁵⁵² The maxim *fiat justitia ruat caelum* is not capable of universal application. Naturally, the courts of Sri Lanka have declined to issue the writ of certiorari in circumstances where the result of its grant would have been to bring the government of the country to a virtual standstill.⁵⁵³

VI. Procedural Aspects

The procedure for obtaining the writs is spelt out in Rules made by the Supreme Court⁵⁵⁴ in pursuance of the rule-making power conferred on the Court by the Constitution of Sri Lanka⁵⁵⁵.

549. See, for example, *Sirisena v. Kotawera-Udugama Co-operative Stores, Ltd.* (1949) 51 N.L.R. 262 at p. 263, *per* Gratiaen, J.

550. *Ladamuttu Pillai v. Attorney-General* (1957) 59 N.L.R. 313 at p. 333, *per* Basnayake, C.J.

551. *P. S. Bus Co. Ltd. v. Members and Secretary of the Ceylon Transport Board* (1958) 61 N.L.R. 491 at p. 496, *per* Sinnetamby, J.

552. *Ceylon Mineral Waters, Ltd. v. District Judge, Anuradhapura* (1966) 70 N.L.R. 312.

553. *P. S. Bus Co., Ltd. v. Members and Secretary of the Ceylon Transport Board*, *supra*.

554. Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka No. 9110, Part II, issued on Wednesday 8th November, 1978.

555. Constitution of the Democratic Socialist Republic of Sri Lanka, Article 136.

All applications made to the Court of Appeal for writs are by way of petition and affidavit.⁵⁵⁶ The petitioner is required to support his application in open court and, if necessary, the Court orders the issue of notice on the respondent.⁵⁵⁷ It is the duty of the petitioner within two weeks of the date of the order of the Court, unless the Court otherwise directs, to tender the requisite notices with such number of copies of his application as there are respondents.⁵⁵⁸ Where a petitioner moves to amend any of the papers he has filed or to tender any additional papers, he must do so within two weeks of the order made by the Court on such motion unless the Court otherwise directs.⁵⁵⁹ Where notice is served on the respondent, he must ordinarily file his objections, if any, within two weeks of the service of such notice.⁵⁶⁰ A copy of the objections must also be served on the petitioner and on each of the other respondents, unless any of the respondents waives this right.⁵⁶¹ On an application being registered the respondent is entitled to take notice of it and to file objections at any time before the date fixed by the Court for filing objections.⁵⁶² Objections are required to be supported by an affidavit in support of the averments set out in them.⁵⁶³

The primary defect of this procedure, which is modelled on that applicable in England,⁵⁶⁴ is that it provides inadequate opportunity for the adjudication of controverted questions of fact. The consequence is that "where the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere."⁵⁶⁵ It is submitted that the inclusion of provision for interrogatories, discovery of documents and cross-examination—which may be resorted to at present only exceptionally in England⁵⁶⁶ and not at all in Sri Lanka—would constitute a salutary innovation.

556. Rule 46.

557. Rule 49.

558. *ibid.*

559. Rule 50.

560. Rule 52.

561. *ibid.*

562. Rule 53.

563. *ibid.*

564. See Rules of the Supreme Court, 1965, Order 53.

565. *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* (1951) 2 K.B. 1 at p. 11.

566. *Barnard v. National Dock Labour Board* (1953) 2 Q.B. 18 at p. 43. *R. v. Stokesley, Yorkshire Justices, ex parte Bartrem* (1956) 1 W.L.R. 254.

The courts of Sri Lanka, while insisting that the party against whom relief is sought should be identified clearly⁵⁶⁷ and that the person who purported to make the impugned award is a necessary party to an application for certiorari,⁵⁶⁸ have consistently precluded persons other than those who are parties to the application from intervening in certiorari proceedings.⁵⁶⁹ As a matter of legal policy, however, intervention by third parties in these proceedings in appropriate circumstances, and subject to the controlling discretion of the court, is altogether supportable.

The rationalization of English administrative procedure has been greatly furthered by the application for judicial review introduced by rule of court in 1977. "An applicant for relief will no longer be defeated merely because he has chosen to apply for the wrong remedy. Not only has the court a complete discretion to select and grant the appropriate remedy: but it now may grant remedies which were not previously available."^{569(a)} This is exemplified by Rule (12) which enables the court to grant a declaration or injunction instead of, or in addition to, a prerogative order, where to do so would be just and convenient.

VII. Suggestions for Reform

In 1957 the Franks Committee on Administrative Tribunals and Enquiries was not convinced that the procedure involved in seeking the prerogative writs was unduly complex.⁵⁷⁰ However, in 1971, the British Law Commission thought it unrealistic to take so sanguine a view of the existing law.⁵⁷¹ An Australian writer has urged reform of "the antiquated and costly apparatus of administrative law inherited from England".⁵⁷²

As a sequel to detailed reports of the McRuer Commission legislation was enacted in Ontario, providing for a single remedy which dispensed with the refinements and aberrations arising from the bifurcation of ordinary and prerogative remedies.⁵⁷³ Ordinary remedies like the injunction, the declaration

567. *Jamila Umma v. Mohamed* (1948) 50 N.L.R. 15.

568. *Soyza v. de Silva* (1951) 52 N.L.R. 309; *Dissanayake v. Siyane Adikari Co-operative Stores Union* (1958) 60 N.L.R. 140.

569. *Chandrasena v. de Silva* (1961) 63 N.L.R. 143.

569a. *Inland Revenue Commissioners v. National Federation of Self Employed and Small Business Ltd.* (1981) 2 W.L.R. 722 at p. 743 per Lord Scarman.

570. 1957 Cmnd, 218, paragraphs 114 and 117.

571. Working Paper No. 40, paragraph 69.

572. H. Whitmore, "Administrative Law in the Commonwealth: Some Proposals for Reform" (1972) 5 F.L. Rev. 7.

573. Judicial Review Procedure Act, 1971, Section 2 (1).

and the action for damages are governed by rules as to *locus standi* and procedural steps which bear no comparison with the corresponding principles applicable to the prerogative remedies. These anomalies render the law needlessly bewildering and entail the risk of injustice by compelling an aggrieved party to make an election between two distinct groups of remedies.

The Ontario statute which is entitled "an Act to Provide a Single Procedure for the Judicial Review of the Exercise or the Failure to Exercise a Statutory Power", provides that "On an application by way of originating notice which may be styled 'Notice of Application for Judicial Review', the court may, notwithstanding any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following : (i) proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari; (ii) proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise of proposed or purported exercise of a statutory power".⁵⁷⁴ Similar legislative provision for a composite remedy described as "an application for review" has been effected in New Zealand.⁵⁷⁵ Moreover, it has found favour with the British Law Commission⁵⁷⁶ and is at present the subject of study by the Law Commission of Sri Lanka.

Several aspects of the law relating to certiorari are in need of reform,

(a) The question whether an investigating body, the recommendations of which are not binding on an independent tribunal which makes the ultimate decision, is amenable to certiorari, admits of no unambiguous answer in the light of the Sri Lankan authorities. Legislative provision recently made in Australia, that the making of report or recommendation prior to the actual decision falls within the ambit of judicial review,⁵⁷⁷ embodies a salutary principle.

(b) The law of Sri Lanka like that of most common law jurisdictions, has been bedevilled by the dichotomy of "quasi-judicial" and "administrative" functions, entrenched in the case law. It is unfortunate that recent Canadian legislation has sanctified this artificial bifurcation by restricting judicial review to "administrative decisions required by law to be made on a judicial or quasi-judicial basis".⁵⁷⁸ The removal of this technicality which is explicable solely by reference to historical factors, will contribute significantly to the rationalization of the law.

574. *ibid.*

575. Judicature Amendment Act, 1972.

576. Working Paper No. 40, paragraph 75.

577. Administrative Decisions (Judicial Review) Act, 1977, section 3(3).

578. Federal Court Act, 1970, section 28.

(c) Despite the conclusion of the Ellicott Committee in Australia that "Decisions should be subject to judicial review even though the exercise of the Minister's discretion may involve considerations of policy or be an implementation of policy,"⁵⁷⁹ the contrary view preferred by the Kerr Committee that "It may not be desirable in all cases to allow relief in relation to the exercise of a discretion by a Minister because of the questions of policy involved"⁵⁸⁰ finds oblique expression in Australian federal legislation⁵⁸¹ which enables decisions to be exempted by regulation from the provisions of the Act⁵⁸² governing review. A comparable approach typifies judicial trends in Sri Lanka although, in principle, compliance with the rules of natural justice is not incompatible with a substantial policy content in administrative decisions.

(d) Whether *locus standi* in relation to certiorari should be interpreted narrowly, to confine the remedy to persons who complain of deprivation of rights or advantages to which they are legally entitled or of subjection to penalties which are legally enforceable, or whether the remedy of certiorari should be open to anyone "who has a genuine grievance because an order has been made which prejudicially affects his interests",⁵⁸³ is enveloped in doubt because of conflicting judicial attitudes. It is submitted that the broader approach is in keeping with contemporary circumstances and values and should infuse the remedy of certiorari, as it is conceived of in modern administrative law. A restrictive definition of "rights", too, is inopportune. A "person aggrieved" for purposes of the modern law relating to certiorari, may be defined appropriately as one "adversely affected as to his rights, property, privileges or liberties"⁵⁸⁴ or one who is denied "some right, property, privilege or liberty which he is claiming".⁵⁸⁵

(e) In Commonwealth jurisdictions the scope of certiorari should be expanded to encompass not only decisions made in the exercise of statutory powers but orders and determinations which purport to be founded on prerogative and analogous powers. In this respect, the present condition of Australian law is defective.⁵⁸⁶

579. Report of the Committee of Review of Prerogative Writ Procedures, Parliamentary Paper No. 56 of 1973, paragraph 26.

580. Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971 paragraph 265.

581. Administrative Decisions (Judicial Review) Act, 1977.

582. Section 19.

583. *Attorney-General of the Gambia v. N'Jie* (1961) A.C. 617 at p. 634.

584. Report of the Commonwealth Administrative Review Committee, Parliamentary Paper No. 144 of 1971, paragraph 306.

585. *ibid.*

586. The Administrative Decisions (Judicial Review) Act, 1977 section 3(1), applies only to decisions made pursuant to an "enactment".

Notwithstanding the recommendation of the Law Reform Commission of Canada that "The grounds of review and the forms of relief should be expressly articulated in legislation, but in an open-ended way so as to permit future evolution"⁵⁸⁷ it is submitted that, in the Sri Lankan context, codification of grounds of review is a retrogressive step in so far as it would in some degree fetter the scope for judicial initiative and creativity in developing the law to meet new situations. It is a welcome development that pedantic application of the distinction between extra-jurisdictional and intra-jurisdictional error has been obviated by perceptive use of the doctrines of improper motive and purpose and of extraneous considerations influencing the exercise of discretionary powers. There is good reason for legislative abrogation of the palpably unsatisfactory distinction between patent and latent error of law as a ground of certiorari. The Australian provision admitting as a ground of judicial review that "the decision involved an error of law, whether or not the error appears on the record of the decision",⁵⁸⁸ is based on sound policy. However, it is important to guard against too amorphous an interpretation of the bases of *de novo* review, which would involve the consequence of blurring the difference between the nature of appellate and supervisory jurisdiction. Thus, despite indications of the adoption of a more flexible test in some Commonwealth authorities,⁵⁸⁹ the doctrine of "unreasonableness" as an instrument for controlling discretionary powers is capable of legitimate invocation only in circumstances where it could be asserted with confidence that no tribunal or functionary could properly have made the impugned order or decision. Similarly, there are cogent reasons for resisting expansion of the "no evidence" ground, an emerging rubric of judicial review, in such a manner as to approximate in dimension to the "substantial evidence" concept which is a feature of current American law.⁵⁹⁰ A striking provision incorporated in Australian federal legislation is that permitting *de novo* review in the case of "an exercise of a power in such a way that the result of the exercise of the power is uncertain."⁵⁹¹ It is probable, however, that modern refinements worked out by the courts within the framework of the *ultra vires* doctrine subsume this ground of review.

587. Working Paper 25, 1980, Chapter 7, recommendation 7.5.

588. Administrative Decisions (Judicial Review) Act, 1977, section 5(1) (f).

589. *Warringah Brick and Pipe Works Pty. Ltd. v. Blacktown Municipal Council* (1971) 1 N.S. W.L.R. 21; *Protean Holdings, Ltd. v. Environment Protection Authority* (1977) V. R. 51.

590. L. Jaffe, *Judicial Control of Administrative Action* (1965), pages 595-623.

591. Administrative Decisions (Judicial Review) Act, 1977, section 5 (2) (h).