ADMINISTRATIVE FINALITY IN BRITAIN

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In 1929, the Lord Chief Justice of England descended from Olympus and launched his now-famous attack upon the "lawlessness" of English Government Departments.[1] Lord Hewart in *The New Despotism* was, in the main, criticizing a tendency which he noted in English law in the direction of administrative finality — towards the freeing of Executive action from judicial control. "A little enquiry", says he, "will serve to show that there is now, and for some years past has been, a persistent influence at work which, whatever the motives or the intentions that support it may be thought to be, undoubtedly has the effect of placing a large and increasing field of departmental authority and activity beyond the reach of the ordinary law".[2]

There are various kinds of statutory provisions in Britain which have the effect of placing adminstrative action there in a position of finality. Such provisions exist both with regard to the exercise by administrative agencies of powers which are legislative in character (*i.e.*, powers of delegated legislation) and of powers which are judicial in nature. In the former case, the provisions place the administrative sub-legislation in the same position as an Act of Parliament; in the latter, administrative decisions are declared to be "final" and "not subject to any appeal". In neither case is judicial review available.

Delegated Legislation

"During recent years a practice has grown up, and is rapidly being extended, whereby Parliament delegates to the public Departments more or less wide powers of legislation."[3] Examples of such delegations of legislative power to the Executive branch can be gathered from the earliest pages of English history. Henry VIII's Statute of Proclamations is the classic early example. The modern practice in this field is thus not a complete novelty. The changing rôle of the State, necessitated by the rise of industrialism in the last century, has, however, resulted in far greater powers of subordinate legislation being conferred than any since the seventeenth century. The growing need to cope with changes in the social and economic scene has led to the extension and intensification of the practice. The history of

[1] Willis, The Parliamentary Powers of English Government Departments (1933) 3.
[2] Hewart, The New Despotism (1929) 5.
[3] Hewart, The New Despotism, 61.

delegated legislation in Britain has been one of constant development and expansion, until, today, the undertaking of new forms of public service there would be unthinkable without the widest grants of legislative authority to the Executive.

We are not here concerned with what may be considered the *normal* types of delegated legislation — those rules and orders which on their face are subject to the control of the courts.[4] "Where delegated legislation is subject to judicial control, it is . . . not open to the most serious kind of objection."[5] Few will quarrel with the granting of such authority to the Executive, for the power to supplement legislation by administrative regulation is one which is necessary to modern administration. As the Committee on Ministers' Powers, which was appointed in 1929 to inquire into the growth of Executive power in Britain, concluded on this point: ". . . in truth whether good or bad the development of the practice [*i.e.*, of delegation] is inevitable. It is a natural reflection, in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries. . . . The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires."[6]

These observations on the need for delegated legislation do not, however, apply to cases where the action of the delegate is vested with finality, in that it is not subject to judicial control. In Britain, as Lord Hewart points out, "various forms of words have been used in connection with this sort of legislation in order to limit the controlling power of the Court, and in some instances, where private rights are seriously interfered with, the jurisdiction of the Courts has been entirely ousted and the officials in the exercise of their powers have been rendered wholly free from judicial control".[7] The most notable of such statutory provisions, which purport to place Executive action beyond judicial control, are those wherein Parliament has provided that the appropriate Minister may make an order under the Act, and that the order when made "shall have effect as if enacted in this Act".

[4] See Report of the Committee on Ministers' Powers (Cmd. 4060, 1932) 30.
[5] Hewart, The New Despotism, 64.
[6] Report, 5, 23.
[7] *Loc. cit. supra*, footnote 5.

The first important case dealing with the significance of such a provision — *Institute of Patent Agents* v. *Lockwood*[8] — was decided by the House of Lords in 1894. By the Patent, Designs and Trade Marks Act, 1888,[9] section 1(1), "a person shall not be entitled to describe himself as a patent agent . . . unless he is registered as a patent agent in pursuance of this Act". By sub-section 2, "the Board shall . . . make such general rules as are in the opinion of the Board required for giving effect to this section", and such rules were to "be of the same effect as if they were contained in this Act". The Board of Trade, in its rules made for giving effect to the statutory authorization, required registered patent agents to pay certain annual fees, on pain of erasure from the register. The defendant in the instant case refused to pay these fees, asserting that the rule was *ultra vires*, since the Act gave no express power to impose fees. The Institute of Patent Agents then brought an action for a declaration that the defendant was not authorized to practise as a patent agent and for an injunction to restrain him from so describing himself.

The House of Lords, on appeal from a judgment holding that the rule in question was *ultra vires*, affirmed the judgment below, but solely on the ground that the Institute had misconceived its remedy, the proper redress being by way of prosecution for violation of the Act. What followed with regard to the *vires* of the rule was, therefore, purely by way of *obiter*. "*Obiter dicta* in the House of Lords, however, have a 'persuasive' force almost equivalent to binding authority",[10] and the observations on the broader questions of *vires* have consequently been as important as though the case had actually turned upon that point.

In the first place, said Lord Herschell L.C., the rule in issue was clearly *intra vires*, for the prescription of fees was a necessary element in the execution of the statutory scheme. Parliament, having made no monetary grant for the purpose, must have intended the Board to have the power to raise the necessary funds. "I cannot but think that it was well within the scope of this enactment that the legislature should entrust the Board of Trade who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section."[11]

[8] [1894] A.C. 347.
[9] 51 and 52 Vict., c. 50.
[10] Allen, Law and Orders (1945) 139.
[11] [1894] A.C. at p. 356.

In this, all their Lordships agreed, but Lord Herschell went further and laid it down, gratuitously as it were, that it was not open to the courts to consider the *vires* of the rules. The provision that the rules were to have "effect as if they were contained in this Act" placed them beyond the judicial competence. "My Lords", said the Lord Chancellor in considering the effect of this clause, "I have asked in vain for any explanation of the meaning of these words or any suggestion as to the effect to be given them if, notwithstanding that provision, the rules are open to review and consideration by the Courts. . . . I own I feel very great difficulty in giving to this provision that they 'shall be of the same effect as if contained in this Act', any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act"[12] — or, as expressed by Lord Watson, "Such rules are to be as effectual as if they were part of the statute itself".[13]

Lockwood's case is referred to as "the high water mark of the inviolability of a confirmed order" in a later case,[14] and it is worthwhile to go somewhat into its background and effect. Sir William Graham-Harrison has shown that the type of clause considered in that case is at least as old as the Statute of the Staple of the fourteenth century, which provided that ordinances made under it were to have the virtue and force of a Parliamentary enactment. "Lord Herschell was indeed very wide of the mark when he said that these words are 'to be found in legislation only in comparatively recent years'."[15] Such clauses came to be used with increasing frequency, until, by the latter part of the nineteenth century, they were quite common in enactments. In the opinion of a leading British administrator, such provisions were included in a good many statutes as a matter of form.[16] The frequency of their use, however, made the language used in *Lockwood*'s case of great practical importance from the point of view of judicial control of Executive action.

Lord Herschell's doctrine in the *Lockwood* case has the vice of removing much of Executive action from the judicial competence. It is clear that, under the British constitutional system, Parliament can place delegated legislation beyond any judicial

[12] *Id.* at pp. 359–60.
[13] *Id.* at p. 365.
[14] *Minister of Health* v. *Rex; ex parte Yaffe*, [1931] A.C. 494, *per* Viscount Dunedin at p. 502.
[15] Committee on Ministers' Powers, Minutes of Evidence (1932) 33.
[16] Sir Maurice L. Gwyer, *id.* at p. 4.

control. But the policy of the common-law in favour of access to the courts is a very strong one, and only the clearest expression of the Parliamentary intent should have that effect. Provisions such as that in the *Lockwood* case, which can be interpreted either way, are surely not strong enough to bar the normal right of review.

What the *Lockwood* doctrine means in practice is well illustrated by the following extracts from the argument in a later case, dealing with a similar clause, in which the whole matter was reconsidered by the English courts:

"Will you tell me, if you can, how far you go?," asked Lord Justice Scrutton of the Attorney-General during the appeal. What if none of the preliminary requirements specified by the Act have been observed by the Minister. Would his order still be unassailable?

"*Attorney-General*: Yes, my Lord, in my submission. . . .

"*Lord Justice Scrutton:* Unassailable in the Courts no matter how *ultra vires*.

"*Attorney-General:* Quite.

"*Lord Justice Scrutton:* You go the whole domestic animal?

"*Attorney-General:* Yes, because if you are *ultra vires* at all, if you step one inch over the boundary, you might as well step a yard over, and in my submission the effect of this clause . . . is to deal with the very case in which the Minister does step over the boundary."[17]

Or, as graphically put during the argument in the Divisional Court:

"*Mr. Justice Talbot:* Suppose Parliament had intended to say what the Attorney General says they have said, how could they have expressed it better than they have done?

"*The Lord Chief Justice:* They might have said, 'After the passing of this Act, the Minister may do what he likes.'

"*Mr. Justice Swift:* That is what they *have* said!"[18]

The type of clause involved in the *Lockwood* case was considered again by the House of Lords in 1930. "An interval of thirty-six years had not dealt kindly with the attitude of mind that was responsible for *Lockwood*'s case."[19] By 1929, the English courts were in the forefront of attempts to reassert judicial controls over the Executive. The constitutional dangers in the

[17] Quoted in *id.* at p. 92.
[18] Quoted in Allen, Law and Orders, 271.
[19] Willis, *op. cit. supra*, footnote 1, at p. 76.

doctrine of administrative finality had by then become only too apparent.

Rex v. *Minister of Health; ex parte Yaffe*[20] arose out of the English Housing Act, 1925.[21] Under that Act, the Minister of Health was made the confirming authority for slum clearance schemes promulgated by local authorities and his order confirming such schemes, when made, was to "have effect as if enacted in this Act". In the *Yaffe* case, the slum clearance scheme, as submitted to the Minister, was clearly *ultra vires*, in that it failed to specify precisely what was to be done with each parcel of land proposed to be acquired compulsorily. The scheme had, however, been confirmed by the Minister with substantial modifications, so that, as confirmed by him, it was a valid scheme within the Act. The bare question before the courts was, therefore, whether the Minister of Health could by the modifications in his confirming order cure what had been an invalid scheme when it had been presented to him. The mere consideration of this point, however, necessitated a reconsideration of the *Lockwood* doctrine, for, under it, *all* judicial consideration of the validity of the Ministerial action was precluded.

The opinions in the House of Lords in the *Yaffe* case are not, it must be admitted, very satisfactory from the point of view of clarifying the law. Their Lordships were clearly of the opinion that the "have effect as if enacted in this Act" clause did not preclude judicial consideration of the *vires;* but there was the need to pay at least lip-service to *Lockwood*'s case. Then, too, the holding of the House on the question directly before it — that the Minister could validate a scheme through his modifications and that the scheme here as confirmed by the Minister was a valid scheme, despite its earlier defects[22] — made its observations on the effect of the *Lockwood* type of clause purely by way of *obiter*. The result is that there is still no authoritative direct holding on its effect. "Whereas previously there were dicta of the House of Lords in favour of the absoluteness of the clause, there are now countervailing dicta in favour of its limitation."[23]

Viscount Dunedin, who delivered the leading opinion, starts by asserting that there must be limits to the power conferred under this kind of clause. "It is evident that it is inconceivable

[20] [1931] A.C. 494.
[21] 15 and 16 Geo. V, c. 14.
[22] In this, their Lordships differed from the Court of Appeal. See [1930] 2 K.B. 98, at p. 137.
[23] Allen, Law and Orders, 140.

that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a per capita contribution of £5 to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect it could not be touched."[24] After touching upon the language of Lord Herschell in the *Lockwood* case, he goes on to say:

"What that comes to is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been 'Posteriora derogant prioribus.' But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari."[25] In other words: "The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the subsection in question".[26]

In the light of this language, it can be asserted that a provision in a British statute that a rule or order is to have effect as if enacted in the Act is merely declaratory in the sense that it no longer bars judicial inquiry into the *vires*. This at least was the opinion of the Committee on Ministers' Powers, which stated that criticisms of this type of clause have been "laid to rest" by the *Yaffe* decision, where the House of Lords laid it down that, while the provision made the order speak as if it were contained in the Act, the Act in which it was contained was the enabling Act and, if the order as made conflicted with that Act, it would have to give way to the Act. "It is, therefore, clear that the validity of any order made under a provision so worded remains legally open to question, and that it is only when what is done falls within the limits of the powers

[24] [1931] A.C. at p. 501.
[25] *Id.* at p. 503.
[26] *Id.* at p. 520, *per* Lord Tomlin.

conferred, and conforms to the conditions imposed, that the order acquires the force of law."[27]

"In my opinion", said Lord Thankerton in the *Yaffe* case, "the true principle of construction of such delegation by Parliament of its legislative function is that it confers a limited power on the Minister, and that unless Parliament expressly excludes the jurisdiction of the Court, the Court has the right and duty to decide whether the Minister has acted within the limits of his delegated power."[28] The *Lockwood-Yaffe* type of clause is clearly not enough to express the Parliamentary intent of exclusion of the judicial jurisdiction. "When the legislature seeks to produce a broader result other language is employed, as is well illustrated by the phraseology of clause 2 of the Third Schedule of the Act now under consideration."[29] The clause here referred to provides that confirmation by the Minister of a compulsory purchase order for the purposes of Part III of the Act (*i.e.*, the provision of houses for the working classes) "shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act."

This type of clause, in Lord Justice Scrutton's phrase, "apparently is intended to prevent any question of ultra vires being raised however flagrantly the Order in question may exceed the powers given by the Act".[30] Its legal effect was considered in *Ex parte Ringer*,[31] which held that it completely barred judicial inquiry into the *vires*. That case dealt with a compulsory purchase order made under section 39 of the Small Holding and Allotments Act, 1908,[32] which contained a "conclusive evidence" clause similar to that in the 1925 Housing Act, quoted previously. The language of the court, in concluding that it had no power to inquire into the validity of such an order, is very broad. Darling J. stated that "the section gave to an order made by a public department the absolute finality and effect of an Act of Parliament. The Court of King's Bench had no power to set aside an Act of Parliament, and it was provided by the section that it should have no more power to set aside an order made by the Board of Agriculture. Here there was a public department put in a position of absolute supremacy, and whatever the opinion of the farmers of Norfolk who came to the

[27] Report, 40.
[28] [1931] A.C. at p. 532.
[29] *Id.* at p. 520, *per* Lord Tomlin.
[30] *Rex* v. *Minister of Health; ex parte Yaffe*, [1930] 2 K.B. 98, at p. 144.
[31] (1909), 25 T.L.R. 718.
[32] 8 Ed. VII, c. 36.

Court asking for relief might be about the matter, they could only say that Parliament had enacted only last year that the Board of Agriculture in acting as they did should be no more impeachable than Parliament itself."[33]

These so-called "conclusive evidence" clauses are thus far stronger than the *Lockwood-Yaffe* type of clause, for they "have been designed with the express purpose of completely and finally excluding all control by the Courts".[34] Such clauses have been characterized as "one of the most imperious and unjustified methods of ousting judicial supervision".[35] They seek to place the exercise of delegated power beyond any controls and have proven as repugnant to many English observers as they would be on this side of the Atlantic. The Committee on Ministers' Powers took strong exception to the "conclusive evidence" clause: "the clause is objectionable, and we doubt whether it is ever justified. . . . Apart from emergency legislation, we hardly think there can be any case so exceptional in nature, as to make it both politic and just to prohibit the possibility of challenge altogether."[36] The strictures of the Committee here seem to have been effective, for the "conclusive evidence" clause has not found its way into any subsequent English legislation.

The Trend Under the Labour Government

One should not, however, think that with the abandonment of the most extreme statutory provision for Executive finality —the "conclusive evidence" clause — the English practice in the field of delegated legislation has undergone a fundamental change. Under the present British Government, at any rate, the trend is, if anything, in the opposite direction. The leaders of the Labour Government are firm believers in a strong Executive as the instrument for bringing about the programme of social and economic reforms to which they are committed. The views of one branch of the Labour Party on this were expressed by Sir Stafford Cripps, the present Chancellor of the Exchequer, some years ago. From the moment when a Socialist Government was to take control, he wrote, "rapid and effective action must be possible in every sphere of the national life. . . . The Government's first step will be to call Parliament together at the earliest possible moment and place before it an Emergency Powers Bill to be passed through all its stages on the first day.

[33] 25 T.L.R. at p. 719.
[34] Report of the Committee on Ministers' Powers, 40.
[35] Allen, Law and Orders, 141.
[36] Report, 41, 62.

This Bill will be wide enough in its terms to allow all that will be immediately necessary to be done by ministerial orders. These orders must be incapable of challenge in the Courts or in any way except in the House of Commons." Each year there is to be one main Planning and Finance Bill. "Once this Bill is passed little other legislation by Act of Parliament will be required, and such as is necessary will be of secondary importance only and will be so treated." The bulk of the legislative work would thus be done by the Executive, acting under powers of delegated legislation. As for judicial control, "this power must be taken from the Courts, and the sole right to challenge such orders must rest with Parliament".[37]

This programme is no doubt an extreme one, and one to which Sir Stafford Cripps himself probably would not adhere today. Yet the policy of the Labour Government does clearly seem to be in the direction of greatly increasing the power of the Executive and removing such power from judicial control. The trend in this direction can be gathered from the remarks of Mr. Herbert Morrison, then Home Secretary, in 1944. "I suggest", said he, "that we shall have to conceive our legislative measures on lines of broad principle and of finance, so that Parliament can express its will on fundamentals. . . . Then Parliament must be prepared to leave to the executive the task of working out the details, within the policy Parliament has approved, and implementing them by means of departmental regulations and orders."[38]

Delegations of power such as Mr. Morrison is advocating in this passage lead to what has come to be denoted as "skeleton legislation". The enabling Act contains a set of broad principles, with power in the Executive to give substantive content to the Act through departmental regulations — *i.e.*, Parliament, in Sir Leslie Scott's phrase, gives, as it were, a skeleton to be clothed by the appropriate Ministry.[39] Legislation of this character tends, in a very practical sense, to free Executive action from judicial control. It must be remembered that the English courts have no constitutional grounds upon which to base their supervision of the Executive. They are limited to review based upon the doctrine of *ultra vires*, which "is, indeed, the keystone of the whole system of judicial control by the Courts"[40] in England. Where Parliament prescribes only the bare outline of the rele-

[37] Quoted in Allen, Law and Orders, 293.
[38] The Times, March 6th, 1944, p. 2, col. 3.
[39] Committee on Ministers' Powers, Minutes of Evidence, 130.
[40] Allen, Law and Orders, 134.

vant statutory scheme, leaving by far the greater part to be filled in at the discretion of the Executive, the doctrine of *ultra vires* is all but excluded. It was this which led the Committee on Ministers' Powers to urge that the "precise limits of the law-making power which Parliament intends to confer on a Minister should always be expressly defined in clear language by the statute which confers it: when discretion is conferred, its limits should be defined with equal clearness".[41]

The legislation being enacted by the present British Government in support of the socialist programme to which it is committed is in the main of the "skeleton" type, in that the "warp and woof", as it were, of the relevant statutory schemes are left to be determined by delegated legislation. The rôle of the courts is all but excluded by broad extensions of Ministerial discretion. With the fulfilment of socialist doctrine, this will mean that the English courts will be excluded from a large part of the social and economic scene.

The trend towards extension of Executive power under the Labour Government is well shown by the Coal Industry Nationalization Act, 1946,[42] which has served as the model for nationalizations in Britain. The instrument in which is vested the responsibility for operating the newly nationalized industry is the National Coal Board, which can be compared in a very general way to the government corporation in the United States. The Coal Board is charged with the duties of working and getting the coal in Great Britain, securing the efficient development of the coal-mining industry, and making supplies of coal available as may seem to them best calculated to further the public interest. Their functions are to include the carrying on of all such activities as may appear to them requisite, advantageous, or convenient in connection with the discharge of their duties. The Board is given the power to do anything and to enter into any transaction that in their opinion is calculated to facilitate the proper discharge of their duties or is incidental or conducive thereto. It may thus be seen that the government operator is given the widest authority to enable it to perform its functions — at least as broad as that possessed by the prior private owners.

It would, however, not be wholly consonant with English constitutional principles to set up an independent governmental organ, free of any immediate responsibility to the legislature. The appropriate Minister — the Minister of Fuel and Power — is,

[41] Report, 65.
[42] 9 and 10 Geo. V, c. 59.

therefore, given wide, though not clearly defined, powers over the workings of the Coal Board. In the first place, the members of the Board are appointed by the Minister, who is also given the power to make regulations with respect to their proceedings and determinations. With regard to the actual activities of the Board, the Minister is given a general supervisory power. The Board is to act upon directions of a general character given by the Minister as to the exercise and performance by them of their functions in relation to matters appearing to the Minister to affect the national interest. The relation here is to be compared with that of the President of the United States to a government corporation in that country. The similarity is highly suggestive. The sort of power conferred and the degree of independence are strikingly similar. A possible explanation lies in the affinity to be noted in the kind of work performed by this type of instrument in both countries. The comparatively few operating activities that the Federal Government does perform have tended to be vested in government corporations analogous to the English type — *e.g.*, the Tennessee Valley Authority, Reconstruction Finance Corporation, etc.

This is not to say, of course, that the powers conferred upon such organs in the United States reach anything like the degree of intensity as those given, for example, to the British Coal Board. However inadequately expressed may be the statutory provisions as to the relative spheres of the Board and the Minister, it is clear that, together, they possess complete discretionary authority with regard to the operation of the industry. The provisions mentioned, which are, in substance, all that the Act contains on the actual operation, are in the most general terms. There is no articulated standard — other than that vague guide, "public interest" — and, aside from the very broad area of activity (*i.e.*, the Board's activity is limited to the coal-mining industry), there seems to be nothing in the Act upon which judicial review can be granted.

Administrative Exercise of Judicial Power

"In our opinion", said the Committee on Ministers' Powers in 1932, "the maintenance of the rule of law demands that a party aggrieved by the judicial decision of a Minister or Ministerial Tribunal should have a right of appeal from that decision to the High Court",[43] at least on points of law. Despite this assertion, however, the tendency we noted in the direction of

[43] Report, 108.

Executive finality with regard to English delegated legislation has its counterpart in the field of administrative justice. "It is not, but it ought to be, common knowledge", claims Lord Hewart, "that there is in England a considerable number of statutes, most of them passed during the last twenty years, which have vested in public officials, to the exclusion of the jurisdiction of the Courts of Law, the power of deciding questions of a judicial nature. Usually the power is given nominally to the Minister or other head of a Government Department, sometimes to the Department itself, and it is commonly provided that his or its decision shall be final and conclusive."[44]

The possession of power which is judicial in nature has been as significant a feature of the English administrative process as the sub-legislative power. It seems clear that the grant of such authority to administrative agencies is not, of itself, a detrimental practice. But, as with delegations of legislative power, the trend in this direction must be carefully watched to guarantee that it does not go too far. For many of the safeguards we have come to associate with judicial justice are absent in the Executive determination of disputes. Much of this is inherent in Executive justice. The advantages of Executive justice — directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively declared policy[45] — can only be bought at the cost of many of the traditional checks which obtain upon our courts. Certainty and predictability, the technique of decision according to authoritative principles and the bridling of the individual will of the magistrate by formalized rules of procedure — these must inevitably be lessened as freer play is given to Executive discretion.

It is largely for this reason that the rule of law demands some degree of judicial control over administrative determinations. The principle of Executive finality, so common in Continental systems, is basically repugnant to common-law notions on governmental power. In England, of course, there are no constitutional limitations upon the legislature, and a statutory provision for the finality of an Executive decision must be respected by the courts. Thus, Parliament may "provide that the decision of the Minister shall be final and conclusive. When this is the case, the Courts are powerless to intervene, however unjust and absurd a decision may appear to be, and even though

[44] Hewart, The New Despotism, 43.
[45] See Pound, Justice According to Law (1914), 14 Col. L. Rev. 1, 24.

it is obviously based on an erroneous view of the law."[46] The type of provision referred to can be illustrated by the following:

> Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within 21 days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made *shall be binding and conclusive on all parties.*[47]

It might be well to go into this provision further, for, although it has since been repealed,[48] it is a good example of the extreme type of judicial power conferred upon the Executive in Britain, and will serve to focus our inquiry on the problems arising out of such delegations. The English Public Health Act, 1875, "was the first really determined effort to bring into existence an elaborate system of sanitation, regardless, in many ways, of private prejudices and private rights".[49] To carry out this purpose, great powers of a coercive nature were conferred upon the various local authorities who were largely responsible for its administration. In general, they were given the authority, upon default of the owner, to execute any necessary sanitary construction and to recover any expenses incurred by them in the process in a summary manner. Thus, the local authority could, by written notice, require the owner or occupier of a house to make a covered drain connecting his house with a sewer. If such notice were not complied with, the local authority could itself do the work required and recover the expenses from the defaulting owner.[50] A similar method of procedure was provided with regard to "the recovery of expenditure incurred by the enforcement of provisions for securing lavatory accommodation, the examination of drains alleged to be out of order, the purification of an unwholesome house on the certificate of the medical officer, the abatement of various kinds of nuisances, the provision of a proper water supply for dwelling-houses, the closing of polluted wells, the cleansing and disinfection of premises against infectious disease, and the levelling, paving, metalling and other treatment of private streets".[51]

[46] Hewart, The New Despotism, 48.
[47] Public Health Act, 1875, 38 and 39 Vict., c. 55, s. 268 (emphasis added).
[48] Public Health Act, 1936, 26 Geo. V and 1 Ed. VIII, c. 49, Sched. III.
[49] Robson, Justice and Administrative Law (2d ed., 1947) 108.
[50] Public Health Act, 1875, section 23.
[51] Robson, *loc. cit. supra*, footnote 49, citing ss. 23, 36, 41, 46, 47, 62, 70, 120 and 150.

Section 268, just quoted, granted a right of appeal to the relevant central Government Department, the Local Government Board, to those aggrieved by the decision of the local authority in such cases as to the necessity for such works. The Board, in its disposition of the case, was not tied down by any legal standards, for it could "make such order in the matter as to the Board may seem equitable".[52] The striking thing about this statutory provision, however, is not so much the wide range which it gives to Executive discretion as the conclusiveness which it vests in the Executive determination. The order of the Board "shall be binding and conclusive on all parties". These are strong words, and seem to have the effect of placing the Executive decision beyond any judicial control.

The relevant language in section 14(3) of the Roads Act, 1920,[53] went even further and may be taken as the extreme instance of the conferring of judicial power upon an administrative authority in Britain.[54] After providing for a right of appeal to the Minister of Transport from the decision of a vehicle licensing authority refusing to grant a licence or granting it subject to conditions, and authorizing the Minister upon such appeal to "make such order thereon as he thinks fit", it went on to state that "an order made by the Minister under this subsection shall be final and not subject to appeal to any court, and shall, on the application of the Minister, be enforceable by writ of mandamus".

Here, too, as in the field of delegated legislation, the trend under the Labour Government has seen an intensification in the reliance upon Executive justice, to the exclusion of the ordinary courts. Thus, to take some of the recent English insurance legislation, under the National Insurance Act, 1946,[55] claims for benefit are submitted in the first instance to an insurance officer appointed by the Minister of Health. Appeals are taken from his decision to a local tribunal and then to the National Insurance Commissioner or deputy Commissioner or to a tribunal presided over by the Commissioner or deputy Commissioner. We have here an elaborate hierarchy of administrative tribunals — original, intermediate appellate and, in some cases, ultimate appellate — to decide claims arising under the Act. Their functions are analogous to those performed by the ordinary courts

[52] See *Reg.* v. *Local Government Board* (1882), 10 Q.B.D. 309, at p. 325.
[53] 10 & 11 Geo. V, c. 72.
[54] So characterized in Port, Administrative Law (1929) 201.
[55] 9 & 10 Geo. VI, c. 67, s. 43.

and they are, to all intents and purposes, the final arbiters, for their decisions are not subject to any judicial control.

The National Health Service Act, 1946,[56] sets up a comprehensive system of socialized health insurance, and the disqualification of medical practitioners from participating in the system deprives them of all but a very small area of possible employment. The authority to disqualify a practitioner from such participation is vested in a Tribunal set up under the Act, who are given very wide discretion in the matter, for they may direct the removal of a name from the list of qualified practitioners "if they are of opinion that the continued inclusion of the said person in any list . . . would be prejudicial to the efficiency of the said services". There is a right of appeal to the Minister of Health from any direction of the Tribunal; and the Minister's decision is made the final one, although the British Medical Association had strongly urged that, in these cases, there should be a right to appeal to the courts.

The type of administrative tribunal we can expect in Britain under the Labour Government is exemplified by those established under the Furnished Houses (Rent Control) Act, 1946.[57] That Act, which applied to all "houses or parts thereof let at a rent which includes payment for the use of furniture or for services", creates a new legally enforceable concept which is to be a restriction upon the traditional right of freedom of contract — namely, that of a "fair rent". Any party to a contract for furnished letting, whether entered into before or after the passing of the Act, may refer such contract to the Rent Tribunal for the district. The tribunal is to consider the reference and, after making such inquiry as they think fit and giving to each party an opportunity of being heard, "shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable". The tribunal may also, in its discretion, increase the rent to cover increases in the cost of services since 1939. Rents in excess of those approved by the tribunal are declared to be illegal and persons requiring or receiving such additional rents are guilty of a criminal offence, punishable by up to £100 fine or six months imprisonment, or both.

Here, indeed, is an extraordinary power to confer upon a non-judicial tribunal. It is true that rent control, as far as unfurnished houses are concerned, has been a feature of the

[56] 9 & 10 Geo. VI, c. 81, s. 42.
[57] 9 and 10 Geo. VI, c. 34.

landlord-tenant relationship in England since the First World War.[58] But the enforcement of such controls has been vested not in an administrative tribunal, but in the ordinary courts, with the normal right of appeal to the Court of Appeal preserved. Nor is the discretion of the English courts in these cases an unfettered one. In general, the validity of rents is to be judged according to a "standard rent", which, under the present Act, is the rent at which the premises were let on September 1st, 1939, although certain substantial increases are permitted under the terms of the Act.

The vast majority of the decisions rendered by these English Rent Tribunals have been in the direction of drastically reducing rents, and their work has consequently been very popular, for the landlords affected constitute but a small minority. In both their procedure and the general approbation that has greeted their work, they thus approach the position of "people's courts". Not being bound by rigid rules, they can dispense justice that accords with the ethical sentiment of the community. This, indeed, is one of the prime advantages of such reversions to "justice without law". In times of rapid transition, such as the present, law, which is after all but the crystallization of past experience, may often lag behind what society has come to expect due to changing ideas as to the end to be served by the State. Hence the frequent resort during such periods to justice unfettered by strict law, under which the magistrate may decide in keeping with the moral sense of the community, unhampered by strict rules.

There is, however, a great danger in extending justice of this sort, uncontrolled by law. Formal rule is, in Ihering's phrase, the sworn enemy of caprice, the twin sister of liberty. Rules are "needed to guide the weak judge and to save us from his lack of will and lack of judgment.[59] The great virtue of the judicial process is that there are checks upon it which reduce the risk of arbitrariness, because of the weakness of the individual judge, to a minimum. The trained technique of decision through the application of authoritative precepts practically eliminates the individual factor, at least in so far as it is possible to do so where human judgment is involved.

The growth of administrative justice of the Rent Tribunal type must not, therefore, be an uncontrolled one, if the tradi-

[58] The present Act is the Rent and Mortgage Interest Restrictions Act, 1939, 2 and 3 Geo. VI, c. 71.

[59] See Pound, Justice According to Law (1913), 13 Col. L. Rev. 696, at p. 702.

tional framework of the common-law polity is to be maintained. The decisions of the Rent Tribunals are, to all intents and purposes, final, for, as recently stated by Lord Goddard C.J., "Parliament has chosen to make them the absolute masters of the situation and to leave the decision of these cases to them without appeal".[60] However justified may be the initial conferring of judicial power of this nature upon agencies other than the ordinary courts, the grant to them of immunity from any judicial control is surely inconsistent with the rule of law.

FOR A SOUND BODY OF LAW

An all-round development of a body of law must be the work of legislators, judges, and jurists or law writers who from Roman times have been also chiefly law teachers. It calls for wise and matured legislation, thoroughly considered and well reported judicial decisions, and competent doctrinal writing. Legislators have been most in the public eye, but in the long run everywhere have done the least part. Moreover, there has been in the country as a whole manifest deterioration in the quality of state legislatures in comparison with those in the formative era in the nineteenth century. Even more significant, legislatures are less inclined to take up comprehensively details of the civil side of the law. Ilbert tells us that the British Parliament is not interested in "lawyers' law", that is, in the authoritative grounds of decision and guides to decision by which courts adjust private relations. An omnicompetent legislative body is too much taken up with political questions, with regulating administration, and with foreign affairs to trouble itself about the administration of justice in civil cases. To a less extent the same indifference to the task of lawmaking for civil controversies may be seen everywhere. This has been throwing a heavier burden of creative lawmaking upon the judges in all jurisdictions. Moreover, it is a burden not easy for them to bear since in the expressive phrase of Mr. Justice Holmes, judicial lawmaking can be interstitial only. (Roscoe Pound in the New York University Law Quarterly Review for July 1948 at pp. 449–450)

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[60] *Rex* v. *Furnished Houses Rent Tribunal*, [1947] 1 All E.R. 448, at p. 450.