Safeguards in the Exercise of Functions by Administrative Bodies*

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As Lord Justice Denning has recently pointed out, ". . . the social revolution of our time has resulted in the creation of a great number of new duties of a kind unknown before — positive duties of the individual towards the State and of the State towards the individual. . . . In the old days the legislature nearly always entrusted to the ordinary courts of law the task of ascertaining and vindicating the rights and duties which it created. And in the early days of this social revolution it did the same. But the enforcement of the great majority of the new duties is now entrusted to Government Departments or to tribunals whose members are appointed by the Government Departments."[1]

The main Departments involved in the United Kingdom are the Ministry of Agriculture and Fisheries; Ministry of Civil Aviation; Customs and Excise; Ministry of Education; Ministry of Fuel and Power; Ministry of Health; General Post Office; Home Office; Board of Inland Revenue; Ministry of Labour; Lord Chancellor's Department; Ministry of National Insurance; Ministry of Supply; Ministry of Town and Country Planning; Board of Trade; Ministry of Transport; and the Treasury.[2]

As Lord Greene[3] said, ". . . certain types of question are not so suitable for decision by courts of law as by a different type of tribunal. A court of law must necessarily be guided by precedent. Its functions are first to ascertain the facts and then to apply the law to the facts as ascertained. In applying the law it must be guided by previous decisions. If it does not do this the law be-

*A companion article to the present writer's Safeguards in Delegated Legislation (1949), 27 Can. Bar Rev. 550.

[1] Denning, Freedom under the Law, pp. 75-6.

[2] For a list of administrative tribunals existing on December 31st, 1948, see the Appendix to (1950) Administrative Tribunals at Work (a symposium edited by R. S. W. Pollard).

[3] Formerly the Master of the Rolls, and now one of the Lords of Appeal in Ordinary.

comes chaotic. The whole tradition and practice of legal administration makes it extremely difficult for the judges to administer a law by which the tribunal is to grant or withhold rights according as they think it just or reasonable to do so."[4] "Without desiring to lay down any definite rule I would venture to state as a general proposition that questions which involve the conferring of rights or the taking away of rights on the basis of what a tribunal thinks is reasonable on the facts of the individual case are not in general suitable for decision by a court of law. It is particularly in the sphere of social legislation that this distinction appears to me to be important."[5]

It is important to bear in mind that the functions entrusted to administrative bodies may, so far as this article is concerned, be judicial, quasi-judicial, or administrative. This fact is important because the principles of natural justice only apply to judicial and quasi-judicial functions, and the prerogative orders of certiorari and prohibition, too, lie only in respect of those functions.

Judicial and Quasi-Judicial Functions

As regards judicial and quasi-judicial functions, it will be profitable to remind ourselves of the views expressed by the Committee on Ministers' Powers (which from now on will be referred to as the "C.M.P."): "We are of opinion that in considering the assignment of judicial functions to Ministers Parliament should keep clearly in view the maxim that no man is to be judge in a cause in which he has an interest. We think that in any case in which the Minister's Department would naturally approach the issue to be determined with a desire that the decision should go one way rather than another, the Minister should be regarded as having an interest in the cause. Parliament would do well in such a case to provide that the Minister himself should not be the judge, but that the case should be decided by an independent tribunal."[6] For seventy years or so now, Parliament when passing legislation dealing with such matters as transport, public health, education, pensions, local government, and social services such as health insurance and unemployment benefits, has created judicial functions exercisable not by the ordinary courts of law but by Government Departments, or tribunals the personnel of

[4] Law and Progress, p. 20, being the Thirteenth Haldane Memorial Lecture, delivered at Birkbeck College, University of London, on October 19th, 1944.

[5] *Ibid.*, p. 21.

[6] Report of the Committee on Ministers' Powers, Cmd. 4060 (1932), p. 78 (King's Printer, London).

which are appointed by Ministers. Should anyone ask why Parliament has acted in this way, the answer, I suggest, has been given by Lord Justice Denning, who has stated: "The reason is — we must face it squarely — that the ordinary courts are not suited to the task — or, if you will, the disputes are not suitable for decision by the courts. Some of the disputes are so numerous that the courts would not have sufficient judges to cope with the amount of work involved. Other disputes involve so much specialized knowledge that they need specialist judges to deal with them. And, more often than not, expedition and economy are essential factors which, it is thought, the courts do not provide. Perhaps the most decisive consideration, however, is the feeling that the new rights and duties are better dealt with as part of an administrative system. So Parliament has set up administrative tribunals to deal with them."[7]

The C.M.P. was of the opinion that it is only on special grounds that judicial functions should be assigned by Parliament to Ministers or Ministerial Tribunals, adding that in modern social legislation it may often be wise for Parliament to take this course.[8] It was further of the opinion that no general principle or formula can be enunciated in advance and applied in all cases as to when judicial functions should be entrusted to Ministers and Ministerial Tribunals, and that the decision of Parliament should normally depend on what is the dominant aspect of the problem or class of problem to be solved.[9] It is obvious that legislative provisions relating to, for example, transport, pensions, and health and unemployment insurance, are bound to give rise to disputes between administrative authorities, on the one hand, and transport contractors, persons claiming pensions, or persons claiming health or unemployment insurance benefits, as the case may be, on the other hand. The C.M.P. recommended that "It is in the ordinary Courts, higher or inferior, that justiciable issues, whether between subject and subject or between Crown and subject, ought as a rule to be determined",[10] but it admitted that Ministerial Tribunals have much to recommend them in the way of being cheaper to the parties; more readily accessible; freer from technicality; more expeditious; and perhaps better able at least than the inferior courts of law to establish uniformity of practice.[11] It reported that, where either judicial or quasi-judicial functions are

[7] Freedom under the Law, pp. 76-7.
[8] Cmd. 4060, p. 93.
[9] *Ibid.*, p. 96.
[10] *Ibid.*, p. 97.
[11] *Ibid.*, p. 97.

exercised by Ministers, or judicial functions by Ministerial Tribunals, the rule of law requires the following safeguards, namely (1) the maintenance of the jurisdiction of the High Court to review and, if necessary, to quash the proceedings on the ground that the Minister or the Ministerial Tribunal has exceeded the statutory powers and has therefore acted without jurisdiction, and the existence of a simple procedure for the purpose; (2) the vigilant observance by the Minister or the Ministerial Tribunal of the three principles of natural justice that (a) a man may not be a judge in his own cause, (b) no party ought to be condemned unheard, and he must know in good time the case which he has to meet, and (c) a party is entitled to know the reason for the decision, be it judicial or quasi-judicial; (3) in every case in which a statutory public inquiry is held, the report made by the person holding the inquiry should be published, subject only to the reservation that there may be exceptional cases where on special grounds the Minister may hold that publication would be against the public interest; and (4) the right of any party aggrieved by a judicial decision to appeal to the High Court on any question of law within a short stated time, and the existence of a simple procedure for the exercise of such right.[12]

The C.M.P. made it quite clear that, provided the Minister or Ministerial Tribunal observes the principles of natural justice, there is no need to follow the procedure of an ordinary court of law, and also that it is not necessary for a party to be given the opportunity of stating his case orally.[13] The appeal, it recommended, should be to a single judge of the High Court, and the question of appropriating particular judges for such cases should be considered. It thought that the decision of the High Court on an appeal should be final, but that where the legal question involved in the dispute is of unusual importance the High Court and the Court of Appeal should have power to give leave to appeal further.[14] It was satisfied that there should as a rule be no appeal to any court of law on issues of fact. It recognized that very exceptionally it may be desirable that the statute conferring the powers of adjudication on the Minister or Ministerial Tribunal should provide for an appeal on issues of fact to a specially constituted Appeal Tribunal consisting, it suggested, of three persons, of whom one should be a barrister or solicitor of not less than seven years standing, who would be the chairman of the Tribunal.

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[12] *Ibid.*, p. 98.
[13] *Ibid.*, p. 99.
[14] *Ibid.*, p. 108.

The Lord Chancellor should appoint or concur in the appointment of its members, and also be empowered to make regulations with respect to the procedure of such an Appeal Tribunal and especially to provide by his regulations for the speedy determination of appeals.[15]

Some of these recommendations of the C.M.P. have borne fruit. Under the National Insurance Act, 1946, claims may be made for unemployment and sickness benefit, maternity benefit, widow's benefit, guardian's allowance, retirement pensions, and death grants. This Act has created Local Appeal Tribunals, appeals from which lie to the National Insurance Commissioner under the Act with the leave of the tribunal. A very recent decision of the National Insurance Commissioner has been published. In January a member of the Electrical Trades Union lost his job. He had served long enough to qualify for ten days holiday with pay and he was paid that money. He was refused unemployment benefit for the first ten days of his unemployment period because it was held that his holiday money covered this. The Union appealed on his behalf, and it has now been told that the Commissioner has allowed the appeal on the ground that it was reasonable to assume that a man ceasing work in January would not take a holiday for at least another three months.[16] Likewise, under the National Insurance (Industrial Injuries) Act, 1946, which provides an insurance covering personal injuries caused by accident arising out of and in the course of the injured person's employment, and also covering prescribed diseases and injuries due to the nature of the employment, there are Local Appeal Tribunals, and an appeal lies to the Commissioner with leave of the Tribunal or of the Commissioner. The Commissioners under these National Insurance Acts have an independence and security equal to that of the judges, and, therefore, the appeal to the Commissioner is as much a safeguard as would be an appeal to the High Court. So it would appear that, in effect, in the field of national insurance the recommendations of the C.M.P. have been adopted. When one notices the numerous kinds of benefit obtainable under these National Insurance Acts, and when one remembers that for certain benefits every person in the United Kingdom is covered by the Acts, one can easily appreciate the importance of the Local Appeal Tribunals and National Insurance Commissioners, and of the fact that there is no appeal to the ordinary courts from their decisions on either law or fact. The

[15] *Ibid.*, pp. 108-9.
[16] London *Evening News*, April 10th, 1950.

ordinary courts only come into the picture as regards appeals from decisions of the Minister on questions of law.

The importance of the recommendation of the C.M.P. that there should always be a right of appeal on any question of law to the High Court is illustrated by the appeals in connection with war pensions. Pensions Appeal Tribunals have been set up,[17] which, despite the name, are tribunals of first instance to which is entrusted the final decision of questions of fact. There is an appeal by leave from a decision of a Pensions Appeal Tribunal on a point of law, but none from its decision on a question of fact. In pension appeals the recommendation of the C.M.P. has been fully adopted, since the appeal is to a single judge of the High Court, he being the particular judge nominated to hear all such appeals. That is, the same judge considers and determines all such appeals. Each Tribunal is composed of three members, each of whom has special qualifications, and it is their duty to give the claimant the benefit of any reasonable doubt. The 1943 Act contains no express provision as to whether, in order to reject a claim, the members of the Tribunal must be unanimous or whether a majority vote will suffice. One of the Tribunals, by a majority, decided against a claimant, who appealed to the High Court. The judge came to the conclusion that a claim to a pension is not to be rejected unless the Tribunal is unanimous in rejecting it, and that in the case of disagreement the claim must go before another Tribunal. In the instant case, the judge remitted the case for a fresh hearing before another Tribunal, and decreed that the claimant was at liberty to call fresh evidence if he desired so to do.[18] The importance of this decision to claimants for war pensions cannot be over-estimated, and the case is clear evidence of how valuable a safeguard the right of appeal can be.

But the position is not so satisfactory in the field of public assistance. The National Assistance Act, 1948, assigns to the National Assistance Board the duty "to assist persons in Great Britain who are without resources to meet their requirements, or whose resources (including benefits receivable under the National Insurance Acts, 1946) must be supplemented in order to meet their requirements".[19] Officers of the National Assistance Board decide whether an applicant is in need, and, if so, grant assistance. Appeal Tribunals are set up under the Act, each Tribunal having jurisdiction over the district assigned to it by the Board, and

[17] Pensions Appeal Tribunals Act, 1943.
[18] *Brain* v. *Minister of Pensions*, [1947] 1 All E.R. 892.
[19] National Assistance Act, 1948, s. 4.

having power to adjudicate *inter alia* on a refusal by the National Assistance Board to give assistance, or on the amount of an assistance grant. The chairman of a Tribunal is appointed by the Minister of National Insurance, who also appoints another member, these two members holding office in accordance with the terms of the Minister's letter of appointment. The third member of the Tribunal is the work-people's representative, appointed by the National Assistance Board from a panel nominated by the Minister. The tribunals normally hold their sittings at area offices of the Board, and in many of these offices the only suitable accommodation is the Area Officer's own room. "This arrangement makes for informal contact between the chairman, members of the tribunals and the area officer, and nothing would be more natural on such occasions than for a chairman or member to ask about some aspect of the Regulations or Act on which they are not clear, or on which they would like to know the Board's policy. In this way the tribunals are open to an influence which can in no way be offset by any activity on the part of the appellant."[20] "Much of the damage has already been done, but the new National Assistance Board still has some freedom of action. It can cease to use the Board's offices as the place of sitting; it can cease to thrust its instructions upon the tribunals, and it can stop the practice of giving newly appointed members facilities for consultation with officers of the Board; it can cease the issue of memoranda. All these changes would certainly make the members of tribunals self-reliant and the tribunals themselves would thus become more independent".[21] ". . . the tribunals are unlikely to have the confidence of parties before them or to be recognized as independent courts free of all influence by the Board. Moreover, there are general defects, such as the need for a higher tribunal . . .".[22] A proposal to establish a superior tribunal under the 1948 Act was rejected by the Minister of National Insurance, who thought it would make the machinery too rigid. As Mr. Lach points out, "The creation of a superior tribunal would make it necessary for chairmen of tribunals to formulate and record the grounds of their decisions",[23] and one agrees with his view that "where the point at issue is of general concern to a group of applicants then there is clear advantage in giving the grounds for a decision".[24] The unsatisfactory position as regards public assistance clearly demonstrates the wisdom of the views of the C.M.P.,

[20] Lach, Appeal Tribunals under the National Assistance Act, 1948 (in the symposium, Administrative Tribunals at Work), at pp. 61-2.
[21] *Ibid.*, p. 63.
[22] *Ibid.*, p. 57.
[23] *Ibid.*, p. 66.
[24] *Ibid.*

particularly the view that where the Minister should be regarded as having an interest in the cause (as the Minister of National Insurance obviously has) Parliament would do well to provide that the Minister himself should not be the judge, but that the case should be decided by an independent tribunal. Parliament, unfortunately in my opinion, accepted the argument of the Minister that the tribunals would become too formal if too many safeguards were introduced.

The difference between quasi-judicial decisions and true judicial decisions was indicated by the C.M.P., which stated that a true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisities, namely:

(1) the presentation (not necessarily orally) of their case by the parties to the dispute;

(2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties; and

(4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.[25]

A quasi-judicial decision, however, said the C.M.P., involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is "in fact taken by administrative action, the character of which is determined by the Minister's free choice".[26] Suppose, said the C.M.P., that a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not he will take action. The ultimate decision of the Minister is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy. This option would not be open to him if he were exercising a purely judicial function.[27] In the recent case of *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*[28] the Judicial Committee of the Privy Council stated that " . . . it is a truism that the conception of

[25] Cmd. 4060, p. 73.
[26] *Ibid.*, p. 74.
[27] *Ibid.*
[28] [1949] A.C. 134; [1948] 4 D.L.R. 673.

the judicial function is inseparably bound up with the idea of a suit between parties whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings".[29] Professor Robson suggests "that the primary characteristics of 'pure' judicial functions, by whomsoever exercised, are:— (1) The power to hear and determine a controversy. (2) The power to make a binding decision (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute".[30] In the case of a quasi-judicial decision, "the Minister at some stage in his mental operations before his action takes final shape passes from the judge into the administrator",[31] and the C.M.P. thought that the Minister should not be called upon to perform the incongruous task of dealing with the judicial part of the quasi-judicial decision as an impartial judge, when *ex hypothesi* he and his department want the decision to be one way rather than another, and it recommended that in such a case the judicial functions which must be performed before the ultimate decision is given and on which that decision must be based should be entrusted by Parliament to an independent tribunal whose decision on any judicial issues should be binding on the Minister when in his discretion he completes the quasi-judicial decision by administrative action.[32]

The distinction drawn by the C.M.P. between judicial and quasi-judicial decisions is not approved by many persons, including Professor Robson, who asks *inter alia*, "Can we be told just when and how the Chancery jurisdiction, for centuries a purely discretionary intervention based on moral and social grounds, became 'truly judicial'?"[33] As he so rightly points out, it is true of all courts, whether civil or criminal, that in some classes of action they are tightly bound within narrow limits by their own precedents or by legislation, while in other cases they have almost complete latitude to do whatever they wish, subject only to the need for maintaining the corpus of the law coherent and consistent. The same is true, he says, also of administrative tribunals, and "The notion that a government department or any other form of administrative tribunal is free to follow any whim

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[29] [1948] 4 D.L.R. 673, at p. 679.
[30] Justice and Administrative Law (2nd edition, 1947), p. 13.
[31] Cmd. 4060, p. 75.
[32] *Ibid.*, p. 79.
[33] Justice and Administrative Law (2nd edition, 1947), p. 351.

of the moment under the guise of calling it 'policy' is too ridiculous an assumption to call for serious consideration".[34]

Notwithstanding the widely varying views which have been put forward on innumerable occasions for so many years now by so many persons, at heart they all want to achieve the same thing. The school of thought which supports the view that the ordinary courts of law are the proper forum for all justiciable issues uphold that view because they think there is a greater probability of obtaining justice in such courts. Likewise, those who support the view that justiciable issues arising out of social legislation ought to be determined by courts or tribunals other than the ordinary courts, do so because they feel that justice in such matters is more likely to be obtained if their view prevails. Both sides should agree to compromise. The ordinary courts should be prepared to admit that modern statutes deal for the greater part with matters of social welfare, and that the application to them of the rules of interpretation devised by the ordinary courts would be unsuitable, as such rules of interpretation are of an analytical, and not a functional, character. Further, that the professional training of the ordinary lawyer is inadequate, having regard to the subject-matter of modern legislation, for the ordinary courts to be entrusted with the interpretation of such statutes. On the other hand, Ministers should readily concede that they ought at all costs to avoid giving even the impression that they are judges in their own cause, and that consequently there should always be a right of appeal to a person or body completely independent of the Minister. The more interested a Minister is in the work of his Department the more convinced he is that the departmental view is right, so that the higher the standard of efficiency, and the greater the enthusiasm of the Minister the greater the danger of bias. The frailties of human nature must never be overlooked, especially when Ministers are involved. Ministers, if only to create the impression that they are efficient, should agree that if the ordinary courts are not to have powers of adjudication in such cases then full powers of adjudication should be given to tribunals completely independent of Ministers. This would ensure that the decisions of the tribunals would not be suspect on the ground of having been arrived at as a result of pressure from Government Departments. Lord Justice Denning has made the excellent suggestions that if a majority decision of the tribunal is permissible, "there should be an appeal to a Superior Court on a question of fact as well as of law, just as there is from the deci-

[34] *Ibid.*, p. 352.

sions of justices of the peace, unless the matter at stake is so small that there should be no appeal at all",[35] and that "The Superior Court should be either a High Court Judge, as in the War Pensions Appeals, or a Commissioner, as in Insurance Appeals: and this court should be able to give leave to appeal in any case where there is a principle of importance involved or there are other special circumstances to justify it. The decision of the Superior Courts should be published and form a body of administrative law. The Superior Courts should not be treated as a separate set of courts similar to the administrative courts in France. They should be welded into the Supreme Court of Judicature."[36] The only respect in which one might wish to differ from Lord Justice Denning is that it might be better, in some cases, for these Superior Courts to be welded into a Supreme Court of Administration.

Administrative Functions

We now enter the field of real controversy. As we have already seen, the view of the C.M.P. was that the exercise of a judicial or quasi-judicial function presupposes the existence of a dispute and parties to the dispute, and "it is this feature which separates the judicial and quasi-judicial function on the one hand from the administrative on the other".[37] When exercising an administrative function "there is no legal obligation upon the person charged with the duty of reaching the decision to consider and weigh submissions and arguments, or to collate any evidence, or to solve any issue. The grounds upon which he acts, and the means which he takes to inform himself before acting, are left entirely to his discretion."[38] But even a large number of administrative decisions may and do involve, in greater or less degree, at some stage in the procedure which eventuates in executive action, certain of the attributes of a judicial decision. Indeed, generally speaking a quasi-judicial decision is only an administrative decision, some stage or some element of which possesses judicial characteristics.[39] Prof. Robson describes administrative functions as consisting "of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public service".[40] But, as Mr. Batt points out, Professor Robson's description "is too wide to be a statement of what the courts

[35] Freedom under the Law, p. 88.
[36] *Ibid.*, p. 96.
[37] Cmd. 4060, p. 75.
[38] *Ibid.*, p. 81.
[39] *Ibid.*
[40] Justice and Administrative Law (2nd edition, 1947), p. 13.

mean by 'administrative' functions".[41] Mr. Batt reminds us, too, that "Not only is there no satisfactory judicial definition of an administrative function, but the courts do not appear to have used the term 'administrative' consistently",[42] and in his view ". . . the recent cases show a tendency to apply the term 'administrative' to functions which carry an absolute discretion, the characterization of a function as 'administrative' frequently being used to mean that the court will not review the exercise of that function".[43]

The C.M.P. was "definitely opposed to any right of appeal from an administrative decision whether it contains a judicial element or not",[44] a view from which the present writer strongly dissents. The C.M.P. was of the opinion that on questions of policy a Minister is "subject to control by Parliament and to the influence of public opinion with which he is in daily contact and to which he is highly sensitive".[45] This is delightful constitutional theory, which, it is submitted, did not square with the factual position in 1932. But whether the C.M.P. accurately described the position in 1932 or not, the events of the last few years have been such that no thinking person could possibly agree that the statement accurately reflects the position at the present time. We have moved a great distance from the time when Dicey wrote that ministerial responsibility "means in ordinary parlance the responsibility of Ministers to Parliament, or, the liability of Ministers to lose their offices if they cannot retain the confidence of the House of Commons".[46] In Dicey's day the sphere of ministerial activities was very much more restricted than it is in the middle of the twentieth century, and it was reasonable at that time for a Minister to lose his office if he found the House of Commons against him. But in these days, when there seems to be no limit to the sphere of ministerial activity, the operation of the doctrine of ministerial responsibility must be restricted. After all, the doc-

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[41] Batt, Judicial Control of Administrative Acts and Decisions in Canada, p. 50, being the dissertation submitted by Mr. H. G. Batt in 1949 for the degree of Master of Laws of the University of London.

[42] *Ibid.*, pp. 50-51.

[43] *Ibid.*, p. 52. Mr. Batt cites in support of his view *The King* v. *Noxzema Chemical Company of Canada Ltd.*, [1942] 2 D.L.R. 51 (S.C. Can.); *Re Ashby*, [1934] 3 D.L.R. 565; *Re Silverberg*, [1937] 3 D.L.R. 509; *Re Brown and Brock and the Rentals Administrator*, [1945] 3 D.L.R. 324; and *Re Ness and Incorporated Canadian Racing Associations*, [1946] 2 D.L.R. 188, [1946] 3 D.L.R. 91; and refers to Wade and Phillips, Constitutional Law (3rd edition) p. 252, and Mr. D. M. Gordon's article, 'Administrative' Tribunals and the Courts (1933), 49 L.Q.R. 94, 419.

[44] Cmd. 4060, p. 109.

[45] *Ibid.*, p. 110.

[46] Dicey, Law of the Constitution (9th edition) p. 325.

trine rests on constitutional convention, and it is of the essence of a constitutional convention that it should be flexible and so be able to reflect the prevailing political outlook. In the light of recent events it would appear that the prevailing view is that the doctrine should operate only in those cases where there has been a very grave dereliction of duty on the part of the Minister. The more senior the rank of the Minister the less effective is the doctrine. The doctrine is wearing thin, and it is submitted that it can no longer be regarded as an adequate safeguard. It is the Cabinet that controls the House of Commons. That is the real position, and to hold that it is the other way round is to show a preference for constitutional theory over hard reality. The doctrine of ministerial responsibility is now a façade, and the present writer entirely agrees with the observation of the late Rt. Hon. Ellen Wilkinson that "Nothing is so dangerous in a democracy as a safeguard which appears to be adequate but is really a façade".[47]

As ministerial activities are no longer limited to great affairs of State, but directly control the everyday life of every person, it is more important than ever before that there should be adequate safeguards. The absence of such safeguards has resulted in our living in a world of conceited and unchecked executives, and the time surely has come to devise new and proper checks and balances to replace those which were adequate, say, sixty years ago, but which have now become hopelessly inadequate. As one writer has stated ". . . few will choose to regard the present state of affairs with complacency . . . though it is generally true to say that the administrator may have to answer politically for his acts, in modern political conditions it is exceptional for individual cases of injustice to receive adequate attention. It may be that the swift and efficient execution of social policy is more important than the interests of individual owners of property; but it does not follow that it is in the public interest for the administrator's conduct to be governed by little more than the dictates of his own conscience."[48] "The Minister, acting in his administrative capacity, is governed by considerations of expediency only. . . . No principle of natural justice as between any individual and the Minister of the Crown has any place in that kind of administration."[49] Another writer has pointed out that the post-War reported

[47] Cmd. 4060, Annex VI, p. 138.
[48] de Smith, The Limits of Judicial Review (1948), 11 Mod. L. Rev. at pp. 324-5.
[49] Henn Collins J. in *Miller* v. *Minister of Health*, [1946] 1 K.B. 626, at p. 628.

decisions show the ordinary courts "as extremely chary of substituting their own view of policy for that of the executive, and in this respect, at least, have evinced a very nice regard for the doctrine of the separation of powers".[50]

It cannot be right or just that Ministers should have unfettered discretions merely because the ordinary courts have no jurisdiction on one ground or another. Of course, certain powers falling within the royal prerogative[51] must remain outside the jurisdiction of all courts and tribunals. No one suggests, for example, that the prorogation or dissolution of Parliament; the right to make war and peace; and the disposition of the armed forces; should be controllable by any court or tribunal. These prerogative powers are very similar in character to the French *actes de gouvernement.* Both English law and French law "acknowledge the necessity for the exercise of discretionary powers in the field of high politics. Modern development, it is true, has much reduced the sphere of acts of government, but it has not abolished it altogether. Such acts relate now either to domestic affairs, comprising the relations between Government and Parliament, certain security measures . . . or to international affairs, comprising either diplomatic relations and the interpretation of diplomatic acts, or acts relating to external security, external war, and colonial affairs."[52] As regards acts done in the exercise of prerogative powers, the situation is the same in Canada as in England, "that is, the courts will only determine the extent of the prerogative concerned and will not review any act done under it. . . . the division of prerogative powers in Canada for the purpose of whether they are to be exercised on the advice of Dominion or Provincial Ministers follows the lines of division of legislative power between the Dominion and the Provinces."[53] But why should a person who has been wrongfully convicted and imprisoned be at the mercy of a Minister when it comes to receiving compensation? Should not such a person have the right, in the event of the amount of compensation offered by the Minister being inadequate, to appeal to an independent tribunal or court?

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[50] Lloyd, Ministers' Powers and the Courts (1948), 1 Current Legal Problems, p. 102.

[51] Legally, of course, royal prerogative powers are vested in the Sovereign but that is form. They have become ministerial functions.

[52] Sieghart, Government by Decree (1950), p. 213, citing Hauriou, Précis de droit administratif (12e éd.) p. 419ff; Waline, Manuel élémentaire de droit administratif (4e éd.), p. 96ff.

[53] Batt, Judicial Control of Administrative Acts and Decisions in Canada, p. 12, citing *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566, at p. 587; *A-G for Canada* v. *A-G for Ontario* (1892), 19 O.A.R. 31, at p.38; *R.* v. *St. Catherines Milling Co.* (1886), 13 O.A.R. 148, at p. 171.

Now that naturalization is a matter of great importance, should it remain a matter within the absolute discretion of a single Minister? Would it not be better from the point of view of the community for an applicant for naturalization to have to satisfy an independent tribunal or court that he should be allowed to become a British subject?[54] Although the conclusion or otherwise of a treaty of peace should remain a prerogative power, should the absence of a treaty of peace have the same legal consequences for all nationals of the country with which the United Kingdom is still technically at war? Should not an independent tribunal or court have power to go into the merits of any particular case and to decide whether, for example, the alien enemy should be given his freedom or not, such decision to be binding on the Minister?[55]

By the Transport Act, 1947, the British Transport Commission may apply to the Transport Tribunal for alteration of a charges scheme which is in force. The Commission apparently anticipates a loss of £30,000,000 a year, and it has applied for a new charges scheme in the London area which would raise another £3,500,000 from the travelling public. The Transport Tribunal must do nothing to prevent the Commission from discharging its duty to secure that their revenue is not less than sufficient for making provision for the meeting of charges properly chargeable to revenue, taking one year with another,[56] so it would appear that if the Commission prove that they must raise fares to balance their accounts the Tribunal is helpless to intervene to protect the travelling public of London. The Minister of Transport is entitled to give general directions to the Commission on matters affecting the national interest. Having regard to the yearly loss, two alternatives appear to be available to the Minister. He can either tell the Commission to operate at a loss, giving the Commission a direct subsidy from the taxpayer, and thus obviate an increase in fares, or allow the Commission to proceed with its proposal for higher fares. It is clear that governmental policy is involved, but ought not the Minister to be under an obligation to put all the facts before an independent tribunal or court, other than the ordinary courts, so that the community can have a proper chance of seeing exactly what the policy of the Government in the field of transport really involves? Should the Min-

[54] The acquisition of Australian citizenship by an alien has been made a solemn matter, the alien having to take the oath of allegiance before a High Court judge. See the present writer's Twilight of Dominion Status? (1949), 2 Current Legal Problems, p. 220.

[55] See, e.g., *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 1 All E.R. 635, [1946] 2 All E.R. 434 (C.A.).

[56] Transport Act, 1947, s. 85.

ister have a completely free hand merely because "policy" is involved? It may be said that the Minister is under a duty to inform Parliament, and that it is only in Parliament that effective action can be taken. That is the final step. What is suggested is that the Minister should have to present his case fully to an independent tribunal or court, whose decision should be binding on the Minister, so that if he did not like the decision he would have to ask Parliament to assist him. All the facts and figures put before the tribunal or court by the Minister would be available to Parliament, who would be saved a great deal of time.

The Minister of Civil Aviation has wide powers in respect of civil aviation. In August 1947 a Committee (known as the "Newton Committee") was appointed by the National Civil Aviation Consultative Council to inquire into the procedure governing investigation into accidents to civil aircraft in the United Kingdom and to British civil aircraft abroad and to make recommendations. It reported to the Minister in February 1948 and its Report[57] contains valuable recommendations. The Newton Committee pointed out that the gradual and progressive intervention by the State in the field of civil aviation has inevitably forced the Minister into a position in which he is a directly interested party in the result of most accident investigations.[58] The Committee reported that it did not think it right that the Minister should be required to exercise any discretion in connection with accident investigation procedure,[59] and it recommended that there should be set up a Civil Air Accidents Board, responsible to the Minister for accident investigation and incidental matters.[60] This recommendation the Government was unable to accept for various reasons.[61] The Minister found himself in great trouble with Parliament in November 1949 as a result of the attitude he adopted over the report of the tribunal he appointed to inquire into the accident at Prestwick Airport in October 1948. He repudiated, without giving any reason, a finding of fact by the tribunal, thus creating the impression that decisions reached by an impartial tribunal which has seen and heard the witnesses may be reversed on appeal to one of the interested parties on the same evidence. The Minister, of course, has responsibility for any executive

[57] Report of the Committee of the National Civil Aviation Consultative Council on Accident Investigation Procedure, and Memorandum by the Minister of Civil Aviation, Cmd. 7564 (1948), King's Printer, London.

[58] Cmd. 7564, para 42.

[59] *Ibid.*, para. 46.

[60] *Ibid.*, para. 60.

[61] The reasons are given in para. 4 of the Memorandum by the Minister of Civil Aviation.

action that the findings of the tribunal may entail, but this does not entitle him to disregard everybody, including Parliament. The Minister saw the error of his ways and apologized, but it is submitted that the incident shows how desirable it is that there should be adequate checks on the exercise of discretionary powers of Ministers.

Just before the House of Commons rose for the 1950 Easter vacation questions were asked in the House concerning the number of officials who may enter homes and premises without a warrant. The information given in reply disclosed that there are 15,000 of such officials, but, said the Financial Secretary to the Treasury, the powers are very rarely used in practice. Some of these officials are employed in the Ministry of Civil Aviation, and have been given this extraordinary power for the purpose of extinguishing or screening any light considered liable to cause any difficulty to landing aircraft. So, to enable lights near an aerodrome to be dealt with so as not to confuse pilots, officials have been given power to enter every house in Great Britain. Others of these officials are employed in the War Damage Commission, and the Inland Revenue Valuation Office. Of course, these extraordinary powers should have been withdrawn long ago, but the point I wish to make is that powers of this character should not be exercised unless the exercise be justified, and in the event of disagreement between the official and, say, the occupier of the house, the dispute should be settled by an independent tribunal having power to go into the merits of the case and to make a binding decision as to whether the administrative function should be exercised or not.

The ordinary courts have indicated over and over again that they do not wish to have jurisdiction in respect of such a matter, and when they feel that they are getting too near "policy" they refer to the power involved as being an "administrative" one, and in that way usually avoid having to review the exercise of the power.[62] If an administrative power is conferred in absolute terms, the ordinary courts will only review its exercise or purported exercise if the doctrine of *ultra vires* can be invoked. If the administrative power is conferred in qualified terms, then, in addition to *ultra vires*, the ordinary courts will review its exercise or purported exercise if such exercise involves abuse of power, not including the principles of natural justice. That the ordinary

[62] See Batt, Judicial Control of Administrative Acts and Decisions in Canada, p. 65, where he cites *The King* v. *Weddell Ltd.*, [1945] Ex. C.R. 96, with which case he compares *Pioneer Laundry and Dry Cleaning Ltd.* v. *Minister of National Revenue*, [1939] 4 D.L.R. 481; [1940] A.C. 127.

courts are not averse from regarding a power as conferring an absolute discretion on a Minister is clearly shown by the cases of *Liversidge* v. *Anderson*[63] and *The King* v. *Noxzema Chemical Company of Canada, Ltd.*,[64] in both of which cases the courts applied the "subjective" test, thus, in effect, making the power an absolute one, since it is, in practice, impossible to prove that the power was exercised *mala fide*.

On occasions the ordinary courts show an inclination to review the exercise of a discretion conferred upon a Minister. A good illustration of this is the decision of the Judicial Committee of the Privy Council in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.*[65] The Minister, by virtue of the (Canadian) Income War Tax Act, 1927, "may disallow any expense which he in his discretion may determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer, or which was incurred in respect of any transaction or operation which in his opinion has unduly or artificially reduced the income".[66] In the instant case the Minister disallowed certain deductions made by the Company, on the ground that they were in excess of what was reasonable for the Company's business. The Judicial Committee held that they could not find in any of the documents shown to have been before the Minister any material on which his determination could lawfully be founded; that there was no support for the Minister's finding; and that therefore he had exercised his discretion improperly. The Judicial Committee agreed that there was nothing in the Act or in the general law to compel the Minister to state his reasons for acting under section 6(2), "But this does not mean that the Minister by keeping silence can defeat the taxpayer's appeal. To hold otherwise would mean that the Minister could . . . render the right of appeal given by the statute completely nugatory".[67] Here the attitude adopted by the ordinary court was of some real assistance to the taxpayer.

All that exists at the present time in the sphere of administrative activities is a bewildering variety and number of administrative tribunals with a specialized jurisdiction, but there is no court with a general jurisdiction to deal with disputes between the State and the individual arising out of administrative acti-

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[63] [1942] A.C. 206.
[64] [1942] 2 D.L.R. 51; [1942] S.C.R. 187. See also the note on this case in (1942), 20 Can. Bar Rev. 464.
[65] [1947] 1 D.L.R. 721; [1947] A.C. 109.
[66] See s. 6(2).
[67] [1947] A. C. 109, at p. 123.

vities. Surely what is wanted is a Supreme Court of Administration with power (a) to inquire in disputed cases into the motives for exercising an administrative act affecting private interests; (b) to annul an executory administrative decision; and (c) to award damages for loss suffered as the result of a wrongful act committed by an agent of a public service in the exercise of his administrative function, that is the equivalent of the French *fait de service* (an act of execution) which is a *faute de service* (a wrongful act, committed by an agent of a public service in the exercise of his administrative function).[68]

The following illustrations show the kind of problem I have in mind. An administrative body has power to requisition private property. Suppose it exercises that power in respect of a private house, Blackacre. Now, if the power has been exercised in such a way that the doctrine of *ultra vires* cannot be invoked, the ordinary courts will not review the exercise of the power. But the circumstances may be such that it can fairly be contended that, in the public interest, Greenacre (a private house, not requisitioned), ought to be requisitioned instead of Blackacre. There should be an independent court with power to inquire into the motive for the requisitioning of Blackacre, and if that court decided that the motive was "bad", then it should have power to annul the requisitioning, and to award damages for any loss suffered by the owner and occupier of Blackacre at the date of requisitioning as a result of the requisitioning. Again, if a licence has to be obtained from an administrative body before one can, for example, open a business, or build a house, the refusal of such body to grant the necessary licence should be open to review by an independent court having the powers just described. Or if a farmer is given instructions by an administrative body having power to do so to deal with his land in a specified manner, and the farmer is convinced, from his personal knowledge of his farm lands, that it would not be in the public interest to give effect to the instructions of the administrative body, why should not those instructions be subject to a full review by an independent court? Why should not any official who has a power of entry have to satisfy an independent court, in the event of his exercise of the power in any specific case being disputed, that the particular exercise is necessary, desirable or justified in the interest of the community? Why should not the assessment of a fair rent made by a Furnished Houses Rent Tribunal be subject to full review? Is it impossible for the members of such a tribunal to go wrong

[68] Sieghart, Government by Decree, pp. 237-8.

in finding the facts? Are not members of these tribunals liable to be unfairly influenced by what they see, hear and are told when inspecting the furnished premises? "Both tenants and landlords are often desirous of saying things to members of the tribunal behind the back of the other party on the occasion of the inspection."[69] The "Tribunals differ in their methods of assessment, and some are perhaps a little mean in allowing profit to the small landlord as a reward for his trouble."[70]

To say that all these matters and things fall within "policy", and that the person affected by the decision must assume that the requisitioning, the refusal of the licence, the giving of farming directions, or whatever it may be, would not have been done unless it were proper in the public interest is asking too much. Should any administrative body be regarded as infallible? To ask the question is to answer it. As Lord Justice Denning has said, ". . . an official who is the possessor of power often does not realise when he is abusing it. Its influence is so insidious that he may believe that he is acting for the public good when, in truth, all he is doing is to assert his own brief authority. The Jack-in-office never realises that he is being a little tyrant."[71] ". . . the bias to which a public-spirited man is subjected if he adjudicates in any case in which he is interested on public grounds is more subtle and less easy for him to detect and resist."[72] Also, as Lord Justice Scrutton said just over a quarter of a century ago, "Good faith is not, in my view, sufficient by itself; some of the most honest people are the most unreasonable; and some excesses may be sincerely believed in, but yet quite beyond the limit of reasonableness".[73]

The Supreme Court of Administration that I have in mind would be established on something like the following lines.[74] Its judges would be appointed by the Crown on the advice of a Board of Selectors consisting of representatives of Ministers of the Crown and of the Judges of the Supreme Court of Administration itself, and they would hold office until attaining the age of 65 years, subject to prior removal for serious offences (*e.g.* corruption) by the Crown on the advice of a Board consisting solely

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[69] "Adjutor", Furnished Houses Rent Tribunals, in Administrative Tribunals at Work, p. 73.

[70] *Ibid.*, pp. 75-6.

[71] Freedom under the Law, p. 100.

[72] Cmd. 4060, p. 78.

[73] *R.* v. *Roberts, Ex parte Scurr and Others*, [1924] 2 K.B. 695, at p. 710.

[74] These suggestions are based on those made by the present writer in his public lecture on "Administrative Tribunals" delivered at University College, London, on November 28th, 1946.

of the judges of the ordinary Supreme Court and the Supreme Court of Administration. Appointment as a judge of the Supreme Court of Administration would be open to all persons with suitable qualifications, and if a Civil Servant were appointed he would, of course, sever his connection with his former Government Department. "What is needed is a combination of judges with a special training in constitutional and administrative law, and administrators with a wide and practical experience of administrative requirements. Such training will only be possible if public law is treated on terms of equality with Common Law and Equity, if it comes to be regarded as a special body of law within the legal framework."[75] Dr. C. K. Allen is now of the opinion that "There is no reason why an appellate administrative tribunal should not combine the purely judicial with the expert administrative elements . . . *provided always that in conception and function the tribunal remained essentially judicial and not executive* . . . i.e. that it decided the issue before it as a matter of pure adjudication, without regard to the convenience or inconvenience of the result."[76] (The italics are Dr. Allen's.) The salaries of the judges would be a direct charge on the Consolidated Fund so as to preclude annual review by the House of Commons, and they would have to be sufficiently high so as to attract persons of really first-class abilities. The judges would be disqualified from membership of the House of Commons, and they would enjoy the same judicial immunities as the judges of the present superior courts. They would have power to give advisory opinions to the Executive on any matter within their jurisdiction. Put shortly, the Supreme Court of Administration would enjoy the same exalted position in the sphere of administrative law as the present Supreme Court enjoys in the sphere of ordinary law.

As regards jurisdiction, appeal should lie to the Supreme Court of Administration from any decision of any administrative authority. Whenever a person alleged that he had been wronged in his rights as a result of a decision of an administrative authority he would first of all have to exhaust his remedies provided by the administrative system. The powers of the Supreme Court of Administration would be on the lines suggested above, namely, (a) to inquire into the motives for an administrative decision; (b) to annul an executory administrative decision; and (c) to award damages for loss suffered as the result of a wrongful act committed by an agent of a public service in the exercise of his admin-

[75] Sieghart, Government by Decree, pp. 317-8.
[76] See his Foreword (at p. xiii) to Sieghart, Government by Decree.

istrative function. The doctrine of judicial precedent would have no application to the Supreme Court of Administration, and the hearings of the court should be in private unless the appellant or respondent expressly asked for a public hearing, when the hearing should be in public. The court would, of course, have to state the reasons for its judgment, and it should sit in benches of three judges. The court would, of course, have no power over matters within the jurisdiction of the ordinary courts or over matters falling strictly within the royal prerogative. It is submitted that a Supreme Court of Administration would, together with the present Supreme Court of Judicature, be able to cover the whole field of matters in which administrative authorities should not have the final word. There should be appeals on questions of fact as well as of law, and why should not a Supreme Court of Administration be able to adjudicate on whether or not a public corporation has performed such an obligation as seeking consultation with any organisations which appear to the corporation to be appropriate with a view to the conclusion of agreements on wage adjustment machinery? [77] Professor Wade considers it is "difficult to see how the courts could intervene to enforce a duty thus loosely defined". [78] It is admitted that the ordinary courts would find it difficult, but would it necessarily be difficult for a Court of Administration?

As regards the question of safeguards, the constitutional position in Canada is not exactly the same as in the United Kingdom. Thus, the construction of section 96 of the British North America Act, 1867, as prohibiting the delegation of certain judicial functions by a provincial legislature to a provincially appointed administrative body so as to make the latter a tribunal analogous to a Superior, District or County Court,[79] is a problem which does not arise in the United Kingdom. Neither does the problem of whether the statute conferring administrative powers is itself a valid statute. The distribution of legislative power between central and provincial legislatures in Canada can and does raise the question of whether, on a proper construction of sections 91 and 92 of the British North America Act, 1867, any particular statute is *intra vires* the legislature passing the statute. But these constitutional differences do not really affect the question of the best steps to take, in the interests of the community, to control the vast powers now vested in the Executive.

[77] See, *e.g.*, Civil Aviation Act, 1947, s. 19.

[78] The Courts and the Administrative Process (1947), 63 L.Q.R., p. 168.

[79] *Toronto Corporation* v. *York Corporation*, [1938] 1 D.L.R. 593; [1938] A.C. 415; and *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* (*supra*).

Suggested Safeguards

The safeguards now about to be suggested are, it is thought, in the main as applicable to Canada as to the United Kingdom. The suggested safeguards, which are largely based on the recommendations of the C.M.P., are:—

(1) Judicial functions should normally be entrusted to the ordinary courts of law, unless the circumstances are so exceptional as to justify a departure from this rule. Assignment by Parliament to a Minister or Ministerial Tribunal should be regarded as exceptional and requiring justification in each case.[80]

(2) When Parliament departs from the normal course, such functions should be entrusted to a tribunal independent of the Minister in the exercise of its functions, particularly when departmental "interest" may be involved.[81] This has been achieved in the United States. ". . . American administrative agencies . . . are, in the main, of the commission type, to a large extent independent of the Executive. . . . Though appointed by the President, they have been given a degree of independence approaching that of the judiciary by a leading Supreme Court decision restricting the Executive power of removal. (*Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935)".[82]

(3) Such a tribunal should be appointed by the Minister and the Lord Chancellor. Presumably, in Canada the Minister of Justice would take the place of the Lord Chancellor.

(4) Quasi-judicial functions should be shared by the ordinary courts or the tribunal referred to in (2) above, on the one hand, and the administrative body, on the other hand. The former should exercise the judicial functions involved, their decision to be binding on the administrative body when the latter completes the exercise of the quasi-judicial function by administrative action.[83]

(5) Every party to the dispute should have the right of stating his case in some form (*i.e.* not necessarily orally), and of knowing the case which he has to meet and of answering it if he can.[84] As Mr. Justice Thorson said, ". . . it is obviously essential to the proper performance of its judicial duties by an administrative body that before it decides a person's case it should afford such person an opportunity of placing his side of the case before it; it

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[80] Cmd. 4060, pp. 115-6.
[81] See *ibid.*, p. 116.
[82] Schwartz, The American Administrative Procedure Act, 1946 (1947), 63 L.Q.R., p. 46.
[83] See Cmd. 4060, p. 116.
[84] *Ibid.*

cannot act judicially unless it does so".[85] *Re Allinson and the Court of Referees*[86] also illustrates this safeguard. In that case, which was an appeal by an employee, Allinson, from the decision of a selective service officer granting Allinson's employer permission to terminate his employment under certain Regulations, each of the parties was heard by the Court of Referees in the absence of the other party, after which the Court of Referees dismissed Allinson's appeal. But the Supreme Court held that Allinson, by being deprived of hearing the other party state his case, had not been given a reasonable opportunity to make all the representations he desired the Court of Referees to consider before that court arrived at its decision. The Supreme Court of Canada consequently quashed the decision of the Court of Referees. This safeguard necessarily involves the giving of proper and adequate notice to the person by the administrative body who will make the adjudication, because, as Roach J.A. said in *Re Brown and Brock and the Rentals Administrator*,[87] ". . . the giving of notice and an opportunity to be heard in a judicial proceeding affecting substantive rights, even where notice is not required by statute, is a condition precedent to any tribunal exercising jurisdiction which it would otherwise have". But apparently the failure to give notice does not amount to a breach of the principles of natural justice if the person concerned is aware that the administrative body is dealing with the matter in dispute and he is given subsequently reasonable opportunity to state his case.[88] The American Administrative Procedure Act, 1946, expressly enacts that "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts".[89]

(6) All decisions should take the form of a reasoned document, being either a judgment in usual form, or specimen letters conveying the decisions of the administrative tribunals.[90] In the United States, all administrative decisions have to be supported by reasoned documents, since all administrative decisions must include a statement of findings and conclusions, as well as the reasons or

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[85] *Nicholson Ltd.* v. *Minister of National Revenue*, [1945] Ex. C.R. 191, at p. 196.

[86] [1945] 2 D.L.R. 717. Cf. the English case, *Errington* v. *Minister of Health*, [1935] 1 K.B. 249.

[87] [1945] 3 D.L.R. 324, at p. 331.

[88] *Re Imperial Tobacco Co.*, [1939] 3 D.L.R. 751; [1939] 4 D.L.R. 99 (Ont. C.A.).

[89] S. 7(c).

[90] Cmd. 4060, p. 116.

basis therefor, upon all the material issues of fact, law or discretion presented on the record.[91]

(7) Where a statutory public inquiry is held in connection with the exercise of judicial or quasi-judicial functions, the report made by the person holding the inquiry should always be published.[92] This is contrary to the unanimous judgment of the House of Lords in *R.* v. *Local Government Board, Ex parte Arlidge*,[93] where it was held that an appellant was not entitled as of right, as a condition precedent to the dismissal of his appeal, to see the report made by the Board's inspector upon the public local inquiry. In the United States, ". . . the problem presented in the *Arlidge* case has never arisen. The usual practice has been for copies of the hearing officer's report to be made available to the parties as soon as it is transmitted to the [administrative] agency. The American usage goes even further than the recommendations upon this score of the Donoughmore Committee",[94] that is, the C.M.P.

(8) The jurisdiction of the ordinary courts of law to compel Ministers and administrative tribunals to keep within their powers, and to exercise their judicial and quasi-judicial powers in good faith and uninfluenced by extraneous and irrelevant considerations and fairly and not arbitrarily, should be vigilantly maintained.[95] "The Canadian courts possess the same supervisory authority as do the English courts, their hand being strengthened through their position as the interpreters of a written constitution. The principles they apply are those applied by the English courts, and the doctrines enunciated in the great English cases are cited and acted upon in the Canadian courts."[96]

(9) Any party aggrieved by the judicial decision of a Minister or administrative tribunal should have an absolute right to appeal to the ordinary courts of law on any question of law.[97] In the United States "Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such

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[91] American Administrative Procedure Act, 1946, s. 8(b).

[92] The C.M.P. recommended that only the most exceptional circumstances and the strongest reasons of public policy should be held to justify a departure from this rule: see Cmd. 4060, p. 117.

[93] [1913] 1 K.B. 463; [1914] 1 K.B. 160; and (*sub nom. Local Government Board* v. *Arlidge*) [1915] A.C. 120. See Cmd. 4060, p. 102.

[94] Schwartz, American Administrative Procedure Act, 1946 (1947), 63 L.Q.R., p. 55.

[95] Cmd. 4060, p. 117.

[96] Batt, Judicial Control of Administrative Acts and Decisions in Canada, p. 6.

[97] Cmd. 4060, p. 117.

action, within the meaning of any relevant statute, shall be entitled to judicial review thereof".[98]

(10) A Supreme Court of Administration should be established, somewhat on the lines suggested previously.

(11) There should be an absolute right to appeal to the Supreme Court of Administration from the decision of a Minister or administrative tribunal on any issue of fact involved in an administrative decision affecting private rights.[99]

When considering the question of safeguards one should remember the observation of the Committee on Ministers' Powers that "The same process which built up the constitution may also undermine it".[100]

Administrative Tribunals

There is no doubt that the new tribunals in England do constitute a set of administrative courts: but they have grown up in so haphazard a fashion that it is difficult to fit them into any recognizable pattern: and one of the most important tasks of the lawyers of to-day is to mould them into a coherent system of courts which will keep a just balance between the claims of the community on the one hand and the freedom of the individual on the other. There is no need for the ordinary courts to be jealous of the new tribunals. It should be recognized that they are a separate set of courts dealing with a separate set of rights and duties. Just as in the old days there were the ecclesiastical courts dealing with matrimonial causes and the administration of estates — and just as there was the Chancellor dealing with the enforcement and administration of trusts — so in our day there are the new tribunals dealing with the new rights and duties as between man and the State. The great need is to work out the principles and procedure which should govern these tribunals. (Rt. Hon. Sir Alfred Denning: Freedom under the Law. 1949)

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[98] American Administrative Procedure Act, 1946, s. 10(a).

[99] The C.M.P. recommended against any appeal to any court of law from the decision of a Minister or a Ministerial Tribunal on any issue of fact, except in exceptional cases, such as war pensions: see Cmd. 4060, p. 117.

[100] Cmd. 4060, p. 73.