Judicial Review in Administrative Law:

A Comparative Study of Rights Consciousness
with Special Reference to Sri Lanka.

A thesis presented to the University of London, for examination,
for the award of the degree Doctor of Philosophy,

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Abstract.

This thesis examines the interface between administrative law, human rights and jurisprudence. It is the author’s contention that judicial review is a very important tool for the vindication of fundamental human rights and that the development of a rights culture is a prerequisite for the promotion of the rule of law and for firmly establishing a liberal democracy. Such a form of review has the advantage of objectivity, candour and legitimacy.

The extent to which rights consciousness can be used as a justification for judicial review, in administrative law, is examined in this thesis. For this purpose, developments in a number of jurisdictions, sharing a common heritage, including England, Canada, Australia, New Zealand and India are examined, with special reference being made to Sri Lanka.

Various aspects of judicial review, in administrative law, are examined and it is sought to identify certain underpinning human rights norms so as to justify such review. After a brief introduction (chapter 1), followed by an examination of the justification for rights based review (chapter 2), the thesis examines the manner in which the right of access to the courts has been protected by the adoption of flexible rules of standing (chapter 3) and the manner in which the courts have resisted ouster clauses (chapter 8).

The thesis examines the manner in which rights consciousness has been advanced by the development of principles of good administration such as natural justice (chapter 4), legitimate expectations (chapter 5), reasonableness (chapter 6) and legality (chapter 7). The final chapter (chapter 9) examines the implications of rights based review. The law is stated at 31 December 1999 although certain subsequent developments have been taken into account.
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1. General Introduction.

I. Rationale for the Study.

The past few years have been a very exciting period for judicial review in Commonwealth administrative law. There has been a substantial expansion of the frontiers of judicial review and the courts no longer appear to be subservient to the fiction that the doctrine of *ultra vires* is the basis of judicial review. The courts have, increasingly, demonstrated a willingness to found judicial review on principles of good administration and the rule of law. There has been a shift in trends in judicial review, from one concerned merely with *vires* or formal legality, towards a more intensive form of review encompassing substantive, merits-based, rights centred review.

II. Aims and Objectives of Thesis.

This thesis seeks to examine the extent to which rights consciousness can be used as a justification for judicial review. Judges have, for too long, been circumscribed by their perception of the proper function of judicial review. It has been the generally accepted view, for a long period of time, that the court, when exercising judicial review, is not concerned with the substance of a decision; the court is solely concerned with the procedure, decision-making process or reasoning process adopted by the decision-maker or executive agency. The *ultra vires* doctrine was, therefore, a central theme of

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1 The issue as to whether the *ultra vires* doctrine can justifiably be regarded as the basis of judicial review is examined, in more detail, in chapter 2.

2 See, e.g., Rizvi, Syed Iqbal Hadi, *Public Interest Litigation Liberty and Justice for All* [Delhi: Renaissance Publishing House, 1991]; Gomez, Mario, *In the Public Interest* --
administrative law because what was expected from the courts was the exercise of a supervisory jurisdiction in respect of the legality, in the strict sense, of the manner in which a decision was reached.

It was accepted, without question, that Parliament, elected by the will of the people, was capable of legislating in a manner consistent with democratic ideals and that it was not up to the courts to act as an alternative centre of power – in fact the view had gained currency that judicial review that sought to challenge Parliament’s monopoly on power was incompatible with the principle of representative democracy. This notion of democracy has now undergone a substantive change and, as a result, it is no longer possible to be merely satisfied with periodic elections alone by which legislators are elected. It has become necessary for a society that claims to espouse liberal democratic ideals to have a much sharper focus upon individual and group rights. This is an important aspect of the rule of law. There must be a healthy tension between majority goals, articulated by an elected legislature, and minority rights, protected by the judiciary, if that society is to progress towards liberal democratic ideals.

It is in this context that we seek to assert that the role of judicial review is not to act as a deputy legislature but to articulate a rights culture so as to protect the rule of law (the term rule of law is used here not in a merely formal sense but in a substantive

Essays on Public Interest Litigation and Participatory Justice [Colombo: Legal Aid Centre, University of Colombo, 1993].


sense). This study seeks to examine the different areas of judicial review so as to identify certain underpinning human rights norms. In some instances, although the decision does not depend on a direct human rights issue the outcome is such that it results in a human right being better protected. In other instances explicit reference has been made to human rights issues and cases have been decided accordingly.

In recent years there has been a healthy trend, in most liberal democracies, to move towards a more rights centred, merits-based review. This study examines developments in human rights jurisprudence, in recent years, in Commonwealth jurisdictions (with special reference to Sri Lanka), in the direction of a rights culture. It is a central theme of our thesis that such developments are both desirable and salutary if a given society is to remain committed towards the ideals of the rule of law so as to have a democracy which is meaningful.

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III. Terminology Adopted.

(a) Administrative Law.

In the course of our study the term administrative law is used in the context of a rights based model.\(^7\) Administrative law is wide in scope and offers various different mechanisms for a citizen to vindicate his or her rights without having recourse to the courts.\(^8\) In this thesis the focus of our attention is that aspect of administrative law which is determined by the courts by way of judicial review.

It is our view that the courts should interpret legislation and scrutinize the exercise of administrative discretion in a manner compatible with fundamental human rights norms. Additionally, it is our view that the function of judicial review is to ensure that decision-makers and administrative agencies, in addition to respecting and advancing fundamental human rights, act in a manner compatible with principles of good administration. According to Craig, the principles of good administration encompass conceptual notions such as “legality, procedural propriety, participation, openness, rationality, relevancy, propriety of purpose, reasonableness, legitimate expectations, legal certainty and proportionality.”\(^9\)

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\(^8\) See, e.g., Birkinshaw, Patrick, *Grievances, Remedies and the State* [London: Sweet & Maxwell, 1994].

Public functionaries are entrusted with power. This power should be exercised in a responsible manner as if it were a trust. It is necessary that the repository of a power discharges the obligations incumbent upon that office in a manner consonant with fundamental human rights norms and principles of good administration. The adoption of principles of good administration, examined by us in chapters 4 – 6, results in either the express or implied promotion of fundamental human rights dealing with due process or substantive fairness and justice. It is, therefore, our view that the role of judicial review must be to advance a rights culture.

Whilst it is acknowledged that different societies may attach varying degrees of importance to certain rights there is a central core attached to these rights which is common to any liberal democracy. However, at the peripheries there can be other visions of liberty whereby the weight to be attached to particular civil and political rights, as opposed to social and economic rights, can vary to a significant degree. Whilst acknowledging this inherent limitation to this rights based analysis of administrative law we nevertheless suggest that, in our view, this is the most desirable model of administrative law for a democracy built upon the notion of the rule of law.

(b) Rights Consciousness.

The term rights consciousness is used in this thesis in a context where, as a general principle, individual rights are favoured other than in situations where there is a strong and compelling public interest justification to derogate from such rights. Rights

\(^{10}\) ibid., at p. 22.
consciousness requires that decision-makers and administrative agencies make decisions that are compatible with fundamental human rights norms and, in order to further such norms, that they act in a manner that is consistent with the principles of good administration.

A rights based model of administrative law will require decision-makers and administrative agencies to advance rights consciousness. The Supreme Court of India, for instance, has made giant strides in making justice more meaningful and accessible to all.\(^{11}\) The Supreme Court has been very activist and has, in fact, been able to expand the frontiers of the human rights discourse in a significant manner.

Our vision of rights consciousness and our justification of it, as a basis for judicial review, is examined, in more detail, in chapter 2.

\(\text{(c) The Rule of Law.}\)

The rights based model, favoured by us for the operation of judicial review presupposes the existence of the rule of law. The term 'rule of law' is not used with the meaning attributed to it by Dicey.\(^{12}\) Dicey's model of the rule of law was one which was formal in character, although his use of the expression 'rule of law' had three different meanings: (i) in order to denote the supremacy of the regular law as opposed to the

influence of arbitrary power; (ii) it was used to express the idea of equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts, and (iii) to express the idea that the constitution was the result of the ordinary law of the land and that the law of the constitution was not in fact the source but the consequences of the rights of individuals.

It is submitted that Dicey's model of the rule of law was capable of being oppressive of individual rights and was fully capable of being incompatible with the democratic form of governance. Yet, it was Dicey's view that "Parliamentary sovereignty has favoured the rule of law, and that the supremacy of the law of the land both calls forth the exertion of Parliamentary sovereignty, and leads to its being exercised in a spirit of legality."

Dicey's vision of the rule of law was one that functioned in a liberal democracy and if it was possible for a given society to agree upon a minimum set of values and common standards, then, these standards would operate as a constraint upon the exercise of legislative power. Dicey placed a great deal of trust upon Parliament's good sense when it legislated. The reality, however, is that there is always a risk that the legislature could act in a manner that is incompatible with individual rights and there is, therefore, a need to ensure that a rights culture is advanced for the protection of minority rights.

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13 *ibid.*, at p. 188.
14 *ibid.*, at p. 193.
15 *ibid.*, at p. 195.
16 *ibid.*, at p. 414.
Thus, the formal conception of the rule of law may not be a sufficient, nor adequate, safeguard for the protection of individual liberty.

It is our view that a society that claims to be governed under the rule of law must not merely be satisfied by its 'formal content'; on the contrary, such a society must ensure that it observes the rule of law in a 'substantive sense'. The rule of law, in this sense, is referred to by Dworkin as the 'rights conception' (whilst he refers to the formal conception of the rule of law as the 'rule book conception'). Referring to the rights conception of the rule of law (which is our preferred model for the purpose of advancing rights consciousness), Dworkin states:

"I shall call the second conception of the rule of law the "rights" conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights."  

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17 See, e.g., Raz, Joseph, 'The Rule of Law and its Virtue' (1977) 93 L. Q. R. 195, at p. 196, where Raz explains that the rule of law is just one of the virtues by which a legal system may be judged and that it must not be confused with notions such as democracy, equality, justice, human rights, respect for the person or the dignity of man which are separate ideals.


20 ibid.
Consequently, Dworkin’s rights conception of the rule of law envisages that the notion has a substantive content. Dworkin, referring to what type of political question the rights conception asks in a ‘hard case’, states:

“For the ultimate question it asks in a hard case is the question of whether the plaintiff has the moral right to receive, in court, what he or she or it demands. The rule book is relevant to that ultimate question. In a democracy, people have at least a strong prima facie moral right that courts enforce the rights that a representative legislature has enacted. That is why some cases are easy cases on the rights model as well as on the rule-book model. If it is clear what the legislature has granted them, then it is also clear what they have a moral right to receive in court. That statement must be qualified in a democracy whose constitution limits legislative power. It must also be qualified (though it is a complex question how it must be qualified) in a democracy whose laws are fundamentally unjust.”

It is our view that a healthy democracy must have respect for individual rights and the best mechanism to do so is through the courts rather than to entrust the legislature with this task. This does not mean that the derogation from individual rights can in no circumstances be justified. Individual rights can be trumped by utilitarian goals if the justification for doing so is compelling and they pass the test of moral scrutiny. Thus, in a society which operates under the rule of law (the expression being used in a substantive sense) utilitarian goals can provide the background justification for adjudication on individual rights.

IV. Outline of Thesis.

The thesis examines the manner in which rights consciousness can be used as a justification for judicial review in administrative law. The thesis examines developments in a number of jurisdictions including England, Canada, Australia, New Zealand, India
and Sri Lanka. Each of these jurisdictions has a common law heritage and each has enriched its administrative law jurisprudence with the cross-fertilization of ideas and concepts borrowed from the different jurisdictions coupled with indigenous innovations. Our study will make special reference to Sri Lanka because there appears to be a discernible trend, in recent times, of a movement towards a rights based model of administrative law as a result of an expansion in fundamental rights litigation.

In this thesis we have examined the theoretical justification for a rights based model for judicial review.\(^22\) We have also examined the manner in which the right of access to the courts should be protected by the adoption of flexible rules of standing\(^23\) and the manner in which the courts have disregarded the effect of ouster or privative clauses\(^24\) so as to protect the same right although the courts have not always been very explicit about their motives.

Chapter 4 – 7 examines the manner in which the courts have or ought to expand rights consciousness by the application of the principles of good administration encompassing (i) natural justice;\(^25\) (ii) legitimate expectations;\(^26\) (iii) unreasonableness (irrationality),\(^27\) and (iv) illegality.\(^28\) Other than where natural justice is concerned (which is purely procedural in character and is, therefore, a process right) we have attempted to show that judicial review on other grounds can involve a certain degree of

\(^{21}\) ibid., at p. 16.
\(^{22}\) See chapter 2.
\(^{23}\) See chapter 3.
\(^{24}\) See chapter 8.
\(^{25}\) See chapter 4.
\(^{26}\) See chapter 5.
\(^{27}\) See chapter 6.
substantive review. It is our view that such substantive review is desirable if it is based upon objective standards or norms. A rights based regime of judicial review would provide such objectivity and avoid a situation where judges are called upon to substitute their own subjective preferences for that of the primary decision-maker or administrative agency.

In this thesis special attention is given to developments in Sri Lankan administrative law. Sri Lanka is heir to a liberal democratic tradition and, although a developing country, has a very high level of literacy. With fundamental rights being accorded constitutional status and treated as an aspect of the sovereignty of the people, Sri Lanka is, in our opinion, an appropriate jurisdiction for the study of rights consciousness.

The final chapter, containing the summation, will evaluate the implications of rights based review and examine whether it is a satisfactory basis for judicial review in administrative law.

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28 See chapter 7.
2. The Justification for Rights Based Review.

I. Introduction.

English administrative law and, as a consequence, much of Commonwealth administrative law has suffered by reason of the fact that the *ultra vires* doctrine has, for too long, been widely perceived as the basis for judicial review. Assuming, without deciding, that there is some justification for the adoption of the doctrine in England, because of that country's peculiar constitutional structure, it is submitted that there can be no justification for it being the basis of judicial review in any other Commonwealth country because the constitutional structures of those countries are fundamentally different.

Yet for many years the doctrine has plagued English administrative law and has, until recent times,¹ been widely regarded as the central principle of administrative law.² Yet, even the strongest proponents of such a view do concede that the concept is closely linked to the notion of the sovereignty of Parliament and that it could have no place in a country with a written constitution. If it is conceded that the *ultra vires* rule is not the basis of judicial review, outside England, then, it must be accepted that some other

¹ The question as to whether the *ultra vires* rule can still be regarded as the basis of judicial review will be discussed in part III and VI of this chapter.
justification must be provided so as to explain the manner in which the courts exercise their judicial review jurisdiction. It is our view that a rights based model of judicial review would be the most appropriate in such circumstances. It is also our view that the *ultra vires* doctrine cannot realistically be regarded as the basis of judicial review even in England. This view can be justified both on historical and theoretical grounds and it is consistent with modern notions of democracy. In order to facilitate our analysis it is necessary, as a preliminary step, to examine the theoretical justification underpinning the *ultra vires* doctrine.

II. The Nature and Justification of the *Ultra Vires* Rule.

The recognition accorded to the notion of the sovereignty of Parliament (which implies, among other things, that Parliament possesses a monopoly on power, has no rival to its authority and cannot be bound by its predecessors nor bind its successors) provides the legal justification for the view that the *ultra vires* rule is the basis of judicial review.\(^3\) Munro,\(^4\) commenting upon the unique position occupied by the United Kingdom, as regards the sovereignty of Parliament, states:

"In most of the other states of the world, there are limits to the legislature's power to make or alter laws, often expressed (or implied) in the country's constitution. If the United Kingdom is peculiar in this respect, it would not be so from logical necessity, but only as a result of constitutional history."

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Consequently, the notion of a sovereign legislature is unique to the United Kingdom and, therefore, if this notion provides the legal justification for the *ultra vires* doctrine, then, it must indeed be conceded that the doctrine would have no validity in any other country where the constitutional arrangements are quite different.

Prior to an examination of the nature of the *ultra vires* doctrine it would be necessary to consider the nature of the notion of the sovereignty of Parliament. A. V. Dicey, its strongest proponent, described it thus:

"The sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions."\(^5\)

Expressing, in a very succinct manner, what the expression 'sovereignty of Parliament' entails, Dicey states:

"The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."\(^6\)

Dicey points out that the expression `sovereignty of Parliament’ can be defined in terms of both a positive aspect and a negative aspect. He states:

"The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament"\(^7\)

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\(^6\) ibid., at pp. 39 – 40 (it is important to note that Dicey was referring to the English constitution when he sought to define the term ‘sovereignty of Parliament’ and did not envisage a definition that had validity in any other constitutional context).

\(^7\) ibid., at p. 40.
It was Dicey's view that judges were able to develop a body of rules based on precedent. Yet he was of the view that 'judicial legislation' of this nature was not inconsistent with the notion of the sovereignty of Parliament because they played a secondary role to the legislature:

"English judges do not claim or exercise any power to repeal a Statute, whilst Acts of Parliament may override and constantly do override the law of the judges. Judicial legislation is, in short, subordinate legislation, carried on with the assent and subject to the supervision of Parliament."\(^8\)

Dicey provides no justification for regarding the sovereignty of Parliament as the central principle in English constitutional law. He prefers to regard it as a historical and legal fact, to be accepted as correct.

Yet Dicey's aversion to arbitrary power is clear: this is illustrated by his identification of 'the rule of law' as the second most important feature of the English constitution.\(^9\) Justifying this view, by comparing the English constitution with that of continental states, he posits:

"During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. The singularity of England was not so much the goodness or the leniency as the legality of the English system of government."\(^10\)

Thus, Dicey favoured a state that was pledged to uphold the rule of law. His strong defence of the sovereignty of Parliament was due to his aversion of arbitrary power (that was likely to arise if power was concentrated in the hands of the monarch) and it was his view that Parliament consisting of the monarch, the House of Lords and the House of

\(^8\) ibid., at pp. 60 – 61.
\(^9\) ibid., at p. 183.
\(^10\) ibid., at p. 189.
Commons had more democratic legitimacy and would be better equipped to represent the
views of the people. Dicey believed that political society and public opinion would have
a significant impact upon Parliament.

The *ultra vires* rule, as the foundation of judicial review, is based upon the
recognition accorded to the notion of the sovereignty of Parliament. It results in judges
regarding their role as secondary to that of the elected legislature which alone has a
monopoly on power and has democratic legitimacy. The doctrine has, as we shall see in
part III, been challenged by many as lacking in validity and being inconsistent with the
ideals of the rule of law and a liberal democracy. It is, however, important to note that
some modern writers still maintain that the *ultra vires* doctrine is the central principle of
administrative law—a position that was of doubtful validity even during Dicey’s time and
is certainly tenuous to maintain today.

Christopher Forsyth, in an influential article, maintains that the *ultra vires*
decision is still the central principle of English administrative law. In his defence of the
*ultra vires* doctrine Forsyth responds to what he perceives as both weak and strong
criticisms of the doctrine. It is Forsyth’s view that the weak criticisms “either call for or
assert that it is the common law, rather than the implied will of the legislature, that
requires that decisions should be fairly and reasonably made. Consequently, when
judicial review quashes a decision of a public body, it is vindicating the common law, not
heeding the will of the legislature.” The strong criticisms of the *ultra vires* doctrine, on

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1 Forsyth, Christopher, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The
2 ibid., at p. 127.
the other hand, "use the deficiencies, real or perceived, of the *ultra vires* doctrine as the base for a direct challenge to the legislative supremacy of Parliament."^13

Responding to the weak criticisms of the *ultra vires* doctrine Forsyth, using, for the purpose of illustration, a situation where vague regulations, made by a minister, are being challenged, points out that what is sought to be challenged is, in effect, Parliament's hegemony on power. He states:

"The analytical difficulty is this: what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly. Likewise if Parliament grants power to a minister, that minister either acts within those powers or outside those powers. There is no grey area between authorisation and prohibition or between empowerment and the denial of power. Thus, if the making of the vague regulations is within the powers granted by a sovereign Parliament, on what basis may the courts challenge Parliament’s will and hold that the regulations are invalid? If Parliament has authorised vague regulations, those regulations cannot be challenged without challenging Parliament’s authority to authorise such regulations."^14

What Forsyth is trying to say is that common law based judicial review, unless subservient to the notion of the sovereignty of Parliament, poses an unacceptable threat to Parliament’s authority. In his rebuttal of the so called weak criticism of the *ultra vires* doctrine as the foundation of judicial review, what Forsyth fails or appreciate, or chooses to ignore, is the fact that the concept of the sovereignty of Parliament was allowed to develop, in English law, due to the recognition accorded to it by the judges; it would, therefore, be up to the same judges, with the evolution of the common law, to decide whether the concept should now be jettisoned because it had outlived its utility. The example that he uses, with regard to South Africa,^15 can have no parallel with England because that country’s constitutional arrangement is quite different.

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^13*ibid.*

^14*ibid.*, at pp. 133 – 134.

^15*ibid.*, at pp. 138 – 139.
Forsyth also responds to the strong criticisms of the *ultra vires* doctrine - the proponents of which argue that judges should have the power to strike down acts of Parliament on substantive grounds. Forsyth’s criticism of judicial review of legislation on the ground that it threatened the democratic order or infringed fundamental rights is founded upon his notion of democracy (which appears to be, essentially, majoritarian in character with little regard for minority rights). Using an argument founded upon democracy, to justify an Act of Parliament that threatened the democratic order or fundamental rights, Forsyth states:

"Were Parliament to enact such measures, we may be sure that the issues involved would be the subject of intense, passionate and doubtless vituperative debate in Parliament and elsewhere. The measures, thoroughly bad though they might be, would enjoy the support of a majority of the elected representatives of the people and there would be large swathes of opinion in the country that supported the measures."\(^16\)

Assuming, without deciding, that an argument based upon the majoritarian notion of democracy is justified, then, Forsyth’s argument is deeply flawed even on this score. When Forsyth refers to Parliament, as being representative of the people, he fails to appreciate and/ or chooses to ignore the fact that the Queen in Parliament, in the United Kingdom, consists of (i) the monarch; (ii) the House of Lords; and (iii) the House of Commons. It is only the House of Commons that has elected members. The monarch is selected on a hereditary principle whilst members of the House of Lords are not elected but are either life peers or hereditary peers and can be Lords spiritual or temporal.\(^17\) Additionally, the current method of electing Members of Parliament (resulting in the

\(^{16}\) *ibid.*, at p. 139.

\(^{17}\) It should be noted, however, that with the current constitutional reforms it is envisaged that hereditary peerages will, eventually, be abolished and the first steps in this direction have already been implemented. For an appraisal of the Labour Government’s constitutional reform agenda for the House of Lords see, e.g., Blackburn, Robert, *The
adoption of the first past the post system) could result in a distortion of the will of the people. For instance, a party with a majority in the House of Commons need not, necessarily, have the support of over fifty percent of the electors. Thus, for instance, the Labour Party which won a large majority in the House of Commons in 1997 did not, in fact, receive even fifty percent of the votes in the country. As no system of proportional representation is being adopted the current system of elections can result in a lack of adequate interest representation in the House of Commons.  

It is submitted, therefore, that merely because a piece of legislation is successfully piloted through the House of Commons it does not necessarily follow that such legislation enjoys the support of the majority of the people in the country. It should also be remembered that people often do change their minds. This is the basis upon which governments are elected and defeated at successive elections. Thus, it cannot be assumed that public opinion should only be considered at periodic elections and that such opinion is, thereafter, frozen in terms of time until the next election. It is our view that if the justification for the ultra vires rule as the basis of judicial review, as expounded by Forsyth, is founded upon an argument based on democracy, then, it is deeply flawed.

Mark Elliott realizing, perhaps, that the traditional ultra vires rule is difficult to justify as the basis for judicial review seeks to promote a modified ultra vires rule based

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18 This has been the bitter experience of the Liberal Democrats for many years.
The justification for the *ultra vires* doctrine, apparently, no longer flows from the notion of the sovereignty of Parliament in terms of Parliament’s monopoly on power; on the contrary, the doctrine is justified on the basis of its constitutional utility.\(^{20}\)

Elliott, referring to the implications for judicial review and the *ultra vires* doctrine, if an attenuated sovereignty model is adopted, states:

> "Under this approach, it may be that Parliament’s legislative capacity would be limited such that it would lack the ability to empower decision-makers to act contrary to the principles of good administration: those principles could then be viewed as constituting part of the definition of Parliament’s competence. The courts’ enforcement of principles of good administration could not then be rationalised by reliance on the present intention based technique. In truth, judicial analysis would shift from the determination and effectuation of the limits of discretionary power which Parliament had chosen or intended to grant, to the ascertainment and enforcement of those fetters on statutory power which would derive from Parliament’s limited legislative capacity."\(^{21}\)

It is Elliott’s view that there are many parallels between this attenuated sovereignty model and the *ultra vires* doctrine. He posits that “in both models, the obligation to adhere to principles of good administration follows from the limited nature of the power granted to the donee.”\(^{22}\) Yet, Elliott does acknowledge that the *ultra vires* rule is ripe for reform and he expresses the view that “a more convincing explanation of the connection between Parliamentary intention and the principles of good administration is

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\(^{21}\) *ibid.*, at pp. 131 – 132.

\(^{22}\) *ibid.*, at p. 132.
necessary."However, Elliott favours a modified *ultra vires* doctrine as the basis of judicial review:

"Hence, the *ultra vires* doctrine, once placed in its proper constitutional setting by acknowledging the important contribution of judicial creativity within an interpretive framework based on the rule of law, provides a convincing account of the theoretical basis of the supervisory jurisdiction. It reconciles judicial review with the doctrine of legislative supremacy, while eschewing the implausible, direct relationship between parliamentary intention and the ground of review which the traditional approach posits."24

Thus, even the supporters of the *ultra vires* rule, as the basis of judicial review, have now begun to acknowledge that any justification for the doctrine must necessarily flow from a principle of constitutional utility rather than one based on the doctrine of the sovereignty of Parliament.

III. Rights Based Review.

(a) The Theoretical Foundations of Rights Based Review.

If the *ultra vires* rule cannot provide a satisfactory rubric to accommodate judicial review, then, it would be necessary to seek an alternative justification for it. This has been a matter which has been focussed upon by distinguished academics and judges.25

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23 *ibid.*, at p. 137.
Although there are significant differences between the theories, posited by each of these distinguished writers, it is common ground that the *ultra vires* doctrine either cannot or is no longer able to function as the basis of judicial review. It would be appropriate, therefore, to examine each of these theories, albeit, briefly before proceeding on to examine our justification of rights based review.

(i) **Dawn Oliver.**

In an important and influential article Dawn Oliver sought to challenge the orthodox view, prevailing at that time, that the *ultra vires* rule was the basis of judicial review.\(^{26}\) It was her view that “judicial review has moved on from the *ultra vires* rule to a concern for the protection of individuals, and for the control of power, rather than powers, or *vires.*”\(^{27}\)

Central to Oliver’s thesis is the fact that a considerable part of government activity is carried on under *de facto* or common law powers.\(^{28}\) Thus it would be difficult to assert that such powers are subject to any express or implied limitations referable to the donor of the power. Judicial review of such decisions cannot, therefore, be referable to the *ultra vires* doctrine. Oliver, summarizing her view on the proper basis of judicial review, states:

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\(^{27}\) ibid., at p. 543.

\(^{28}\) ibid., at p. 545.
"In place of the ultra vires rule a doctrine is emerging that, in the public sphere, the courts in exercising a supervisory jurisdiction are concerned both with the vires of public authorities in the strict or narrow sense ..... and with abuse of power. If abuse of power is established, the courts may properly intervene. If no abuse is established, the courts should leave to the political process the function of dealing with complaints about the exercise of power. The judicial requirements about the exercise of public power, and even to an extent private power, are that the exercise of power should accord with certain broad principles of good administration, involving participatory procedures, rationality and some substantive principles of compliance with “constitutional fundamentals.” For the most part, these principles are administered through the procedure of the application for judicial review. ... However, similar principles may be applied to private bodies. Out of this is emerging a general theory about the exercise of power: the doctrine may apply to power whatever its source, if it affects vital private interests, or is in the “public domain,” whether in public or private hands."29

Thus, Oliver suggests that what is of essence is to understand the nature of the problem posed by an abuse of power. Once the true nature of the problem has been identified, then, the principles of good administration could be used to solve problems associated with the exercise of a power.

It is her view, therefore, that the principles of good administration provide a rubric by which the manner that public power has been exercised can be judged. What is important is not the source of a power but its consequences. The ultra vires rule is unable to control an abuse of power that is referable to a non-statutory source. In the circumstances it is necessary to have recourse to the principles of good administration as the basis for judicial review.

29 ibid., at p. 567.
Galligan, in an important review, published in 1982, sought to cast doubt upon the premise that the *ultra vires* doctrine was the basis of judicial review. Galligan is of the view that the source of review, based on the principles of good administration, cannot be referable to Parliament. He posits that the justification for the principles of good administration “depends on values in the constitutional order that precede the doctrine of sovereignty.”

Galligan criticizes Wade for suggesting that the legitimacy of judicial review rests upon the implicit approval that it, supposedly, has from Parliament. The recent spate of judicial activism has had the effect of putting the *ultra vires* doctrine under an unacceptable strain. Galligan, referring to the need for a coherent body of principles, in order to justify judicial review, states as follows:

“*To put it in another way, as a result of new activism, the heads of review, whether natural justice, abuse of discretion, error of law, or whatever, are based on loose and open-textured considerations. If they are to be formed into a coherent body of principles mediating between administrative power and the citizen, two things are necessary: (a) a set of wider principles of good administration, (b) a set of more specific principles giving meaning and content to each head of review. For example, it is difficult to assess the development of natural justice unless one has general principles a to its purpose and basis; once this is clear, the more specific principles towards this end can be formulated. Wade’s analysis lacks both sorts of principles. Any discussion of the first is put in terms of legality, the rule of law, the requirements of administrative justice,*

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32 *ibid.*, at p. 262.
33 *ibid.*
It is Galligan’s view that administrative law “is not a self-contained discipline” and that it is inadequate to merely look at judicial decisions alone so as to understand the underlying principles of the subject. There is a need to articulate theoretical principles and concepts in the development of administrative law because, not being a self-contained discipline, it is “one of the sub-systems trying to make sense of modern societies.”

(iii) Paul Craig.

Paul Craig, in a series of important articles, has argued that the ultra vires doctrine is unsatisfactory as the basis for judicial review. Craig posits, in a manner consonant with the views of other critics of the ultra vires doctrine, that the doctrine is unable to provide a rubric for the review of the decisions of non-statutory bodies. Craig also argues that even in the context of statutory powers the ultra vires doctrine, if it is to be regarded as the basis of judicial review, is fraught with a number of weaknesses.

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34 ibid., at p. 265.
35 ibid., at p. 276.
36 ibid.
Craig in his well-known work, *Administrative Law*, now in its fourth edition, develops a sustained critique of the *ultra vires* doctrine as the basis of judicial review. Craig, outlining the central theme of his thesis, that the *ultra vires* rule cannot be the basis of judicial review, states:

“At the most basic level the traditional view was flawed because the premises about the way in which democratic society operated were themselves false. The idea of unitary democracy and legislative monopoly in which all public power was channelled through Parliament, and in which Parliament controlled the executive, was flawed. There was a growing awareness that the legislature did not in fact control the executive but vice-versa. Legislation became the prerogative of the executive and parliamentary acquiescence was ensured by the managers of the party machine. There was an increasing realisation that Parliament did not in fact wield all public power, and that many other institutions exercised some species of public authority.”

Craig criticizes the orthodox view, that the *ultra vires* rule is the basis of judicial review, on a number of different grounds.

Firstly, the traditional model is based upon a distrust of the administrative state. The function of the court was to ensure that an administrative agency did not make a mistake by exceeding its powers. The twin themes of the avoidance of mistakes and distrust have been challenged due to a change in the attitudes of people. The purpose of administrative law was not to ensure that agencies avoided mistakes by overstepping their boundaries. There has been an increasing desire to ensure that an administrative agency is able to successfully implement the policy assigned to it.

Secondly, the traditional model seeks to preserve the legislative monopoly of Parliament. Thus, review using the traditional basis is underpinned by the notion of

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38 *supra.*, note 37, pp. 12 - 20.
39 *ibid.*, at p. 12.
40 *ibid.*, at pp. 12 - 13.
legislative intent. The conceptual notion of legislative intent, however, is indeterminate due to the following reasons: (i) it is difficult to define the precise scope of an institution’s designated area of authority; (ii) the traditional model is unable to offer a satisfactory explanation for judicial review in situations where Parliament has expressly intended to preclude such review; (iii) the ultra vires principle is unable to cope with the development of the law across time: the evolution of the various heads of review is, essentially, judge made and is not referable to legislative intent; (iv) the traditional model also faces a difficulty in connection with the relationship between direct and collateral attack because in the latter case, where it is sought to challenge the validity of delegated legislation, it is difficult to refer to legislative intent because the legislature normally provides no guidance on the matter; and (v) the changing nature of legislation has resulted in broad, open-textured, legislation having to be interpreted by the courts with the inevitable consequence that legislative intent becoming more indeterminate and its application more contentious.

Craig’s third criticism of the ultra vires rule is based on the range of institutions, and the type of subject matter, amenable to judicial review. This is particularly evident in situations where judicial review has been exercised in circumstances where power does not flow from a statutory source. The ultra vires rule is unable to account for judicial review, in such a context, because it cannot be referable to legislative intent.

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41 ibid., at pp. 13 – 14.
42 ibid., at p. 14.
43 ibid., at pp. 14 – 15.
44 ibid., at p. 15.
45 ibid., at pp. 15 – 16.
The final criticism of the *ultra vires* doctrine is based on the defects of the private rights theme which is a characteristic of that model of judicial review. Consequently, access to administrative law was only available to those who possessed private rights in tort or contract etc. This, according to Craig, had the following defects: (i) if the private rights theme was present, it would mean that the courts would be powerless to monitor the boundaries of legislative intent unless such rights were present; (ii) even if private rights were present, it would be a mistake to suppose that it were simply a private dispute in which the defendant happened to be a public body; and (iii) the private rights theme did not recognize the fact that interests, which do not assume the form of rights, should properly be subject to administrative law.

It is Craig's view that the *ultra vires* doctrine fails in its attempt to provide a justification for judicial review. On the contrary, it is his view that the common law is able to provide such a justification. Craig, in an important article, published in 1998, in which he outlines the rationale for his thesis, posits thus:

"There is no doubt that the institution of judicial review must be justified, as too must the heads of review and the particular meaning accorded to them. The *ultra vires* doctrine conceived in terms of legislative intent cannot provide this. We should recognise what was self-evident to our intellectual ancestors that review is the creation of the common law. We should recognise also that the ambit of review can only be legitimated in the same way as other common law powers, by asking whether there is a reasoned justification which is acceptable in normative terms for the controls which are being imposed. The institution of judicial review both demands and deserves legitimation in this manner. This is the proper way to conceive of judicial review in a constitutional democracy."

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46 ibid., at p. 17.
47 ibid.
48 ibid.
49 ibid.
(iv) Sir John Laws.

Sir John Laws has argued in favour of rights based review in a number of important publications. It is his view that legislative intention cannot be the foundation for the principles of judicial review which have been developed by the courts. "They are categorically, judicial creations. They owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins."

Laws is, therefore, of the view that the protection of individual rights cannot be left solely in the hands of the legislature. It is imperative that there is a higher-order law which is logically prior to the intention of Parliament. He states:

"Now it is only by means of compulsory law that effective rights can be accorded, so that the medium of rights is not persuasion, but the power of rule; the very power which, if misused, could be deployed to subvert rights. We therefore arrive at this position: the constitution must guarantee by positive law such rights as that of freedom of expression, since otherwise its credentials as a medium of honest rule are fatally undermined. But this requires for its achievement what I may call a higher-order law; a law which cannot be abrogated as other laws can, by the passage of a statute promoted by a government with the necessary majority in Parliament. Otherwise the right is not in the keeping of the constitution at all; it is not a guaranteed right; it exists, in point of law at least, only because the government chooses to let it exist, whereas in truth no such choice should be open to any government."

Referring to the pre-eminent status that must be accorded to fundamental human rights and to democratic accountability, Laws states as follows:

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"[T]he fundamental sinews of the constitution, the cornerstones of democracy and of inalienable rights, ought not by law to be in the keeping of the government, because the only means by which these principles may be enshrined in the state is by their possessing a status which no government has the right to destroy. I have already argued this position in relation to fundamental individual rights; now I assert it also as regards democracy itself. It is a condition of democracy's preservation that the power of a democratically elected government – or Parliament – be not absolute. The institution of free and regular elections, like fundamental human rights, has to be vindicated by a higher order law: very obviously, no government can tamper with it, if it is to avoid the mantle of tyranny; no government, therefore, must be allowed to do so."53

Laws sets out his thesis very powerfully in an important chapter in Judicial Review.54 It is his view that the ultra vires doctrine has served its purpose and it is now time to move on. He observes thus:

"And so we must build a new theory in place of ultra vires. But there is one reason why, perhaps, respect needs to be paid to past formulations of the court's power which have been expressed in terms of the doctrine. 'Ultra vires' is, in truth, a fig-leaf; it has enabled the courts to intervene in decisions without an assertion of judicial power which too nakedly confronts the established authority of the executive or other public bodies. It provided, moreover, in 1968, the conceptual means by which the no certiorari clause in Anisminic55 was prevented from ousting the court's jurisdiction. The fig-leaf was very important in Anisminic; but fig-leaf it was. And it has produced the historical irony that Anisminic, with all its emphasis on nullity, nevertheless erected the legal milestone which pointed towards a public law jurisprudence in which the concept of voidness and the ultra vires doctrine have become redundant. Intellectual fig-leaves surely have their part to play in the development of the common law, whose peculiar characteristic is the possession of a benign alchemy by which the recall of old principles is without offence to other interests turned into new law. That it was done, in the end, by something no more than ledgermain, should be a cause, not of purist disapproval, but of a recognition that our law, in this field at least, can meet and answer new challenges without disturbing the tranquillity of

53 ibid., at p. 85.
55 Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A. C. 147. The implications of this case, for judicial review, is discussed by us in chapter 8, part V (a) and VI (c).
the state. But now in can be done by the development of constitutional principles over which there need be no pretence."56

(v) Jeffrey Jowell.

Alan is also supportive of the view that the ultra vires doctrine provides an inadequate justification for judicial review57 but, at the same time, he is quick to acknowledge that the common law doctrine has the attraction of frankness.58 Yet he makes the following important point:

"If standards of judicial review are being developed apace, as they are, and if these standards are generally accepted as right and just, does it matter whether they are modestly attributed by the courts to the implied intent of the legislature, or brashly asserted as independent creations of their own? Since, after all, implied intent is a judicial construction, the judges can be as bold in their manipulation of that construct as they can under the model of the common law. So why the fuss?"59

It is Jowell's view that judicial review can be enriched by both the ultra vires doctrine and the common law provided that an appropriate synergy can be achieved. He, therefore, posits thus:

"Legitimate judicial review of statutory discretion must always begin with an assessment of vires – of the powers intended by a legislative scheme. Those powers, however, must not be construed in a vacuum. The process of construction must begin with close evaluation of the capacity for decision of both the reviewing court and the primary decision-making body. It must then proceed to identify the underlying principles which should govern the decision in question. To this end the general notions of fairness which may reside in the common law may prove helpful, but it is more helpful still to engage openly with the necessary qualities of a modern constitutional democracy."60

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56 supra., note 54, at pp. 34 – 35.
58 ibid.
59 ibid.
60 ibid., at p. 460.
Jowell is of the view that the rule of law is one of the constraints upon the exercise of discretionary power. It provides a rubric for judicial review. "In a country without a written constitution it is a principle that constrains the uninhibited exercise of official power. It is enforced through judicial review but also serves as a critical focus for public debate."\(^{61}\)

(b) Is Rights Based Review Justified?

Rights based review is justified, even in the United Kingdom, which has no written constitution, because the *ultra vires* model has failed to be a satisfactory rationale for judicial review. Rights based review is justified because (i) there has been a change in what the notion of democracy entails; (ii) the *ultra vires* doctrine fails on a historical appraisal to establish that it was indeed the foundation of judicial review; (iii) the doctrine fails to attract legitimacy, in modern times, even if a majoritarian view of democracy is adopted; (iv) it provides objective criteria by which judges could evaluate the lawfulness of the exercise of official discretion instead of having recourse to their own subjective preferences. Each of these different justifications for rights based review warrant separate analysis.

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(i)  **The Change in the Notion of Democracy.**

Democracy has progressed well beyond the conceptual notion of being synonymous with majority rule. It could hardly be seriously contended that a society which fails to accord respect for fundamental human rights will, nevertheless, satisfy the requisites of a democracy.

According to Dworkin the meaning of the word 'democracy' is not free from controversy. Dworkin strongly rejects the majoritarian conception of democracy. It is his view that “we need a different, better account of the value and point of democracy”. Dworkin identifies the constitutional conception of democracy, in relation to the notion of majoritarian government, in the following terms:

"Democracy means government subject to conditions – we might call these the "democratic" conditions- of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better. The democratic conditions plainly include, for example, a requirement that public offices must in principle be open to members of all races and groups on equal terms. If some law provided that only members of one race were eligible for public office, then there would be no moral cost – no matter for moral regret at all- if a court that enjoyed the power to do so under a valid constitution struck down that law as unconstitutional. That would presumably be an occasion on which the majoritarian premise was flouted, but though this is a matter of regret according to the majoritarian conception of democracy, it is not according to the constitutional conception. Of course, it may be controversial what the democratic conditions, in detail really are, and whether a particular law does offend them. But according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes

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63 ibid.
that the laws in question respect the democratic conditions, and that is the very issue in controversy.\textsuperscript{64}

Thus, it is Dworkin's view that we need more than a statistical governing in a genuine democracy.\textsuperscript{65} It is Dworkin's view that democracy entails a tension between majority goals (articulated by the elected legislature) and minority rights (articulated by the judges). Goals represent matters of policy and rights represent matters of principle.\textsuperscript{66}

John Hart Ely,\textsuperscript{67} in an important work, argues that "a majority with untrammeled power to set governmental policy is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups." Thus, Ely is of the view that it is vital that, in a democracy, certain controls are exercised over majority power. Ely, making a powerful assertion in favour of protecting minority rights as an important aspect of democracy, states:

"Simultaneously, we came to recognize that the existing constitutional devices for protecting minorities were simply not sufficient. No finite list of entitlements can possibly cover all the ways majorities can tyrannize minorities, and the informal and more formal mechanisms of pluralism cannot always be counted on either. The fact that effective majorities can usually be described as clusters in question has sufficient power and perceived community of interest to advantage itself at the expense of a minority (or group of minorities) it is inclined to regard as different, and in such situations the fact that a number of agencies must concur, and others retain the right to squawk, isn't going to help much either. If, therefore, the republican ideal of government in the interest of the whole people was to be maintained, in an age when faith in the republican tenet that the people and their interests were essentially homogeneous was all but dead, a frontal assault on the problem of majority tyranny was needed. The existing theory of representation had to be extended so as to ensure not simply that the representative would not sever his interests from those of a majority of his constituency but also that he

\textsuperscript{64} ibid., at pp. 17 – 18.
\textsuperscript{65} See, e.g., Guest, Stephen, Ronald Dworkin [Edinburgh: Edinburgh University Press, 2\textsuperscript{nd} edn., 1997], at p. 80.
would not sever a majority coalition's interests from those of various minorities."  

The important point made by Ely is, therefore, that the protection of minority rights is an important part of interest representation. His ideas converge with what has been expressed by Dworkin that "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them."  

Thus, it can be seen that the notion of democracy can no longer be validly referable to conceptions of majoritarianism. Minority interest protection, which is undertaken by judges, when determining applications for judicial review, is also an important check on the possible tyranny of the majority and is a vital aspect of interest protection. In the circumstances it would be correct to state that the modern notion of democracy is just as concerned with promoting majority aspirations as it is concerned with protecting minority rights.  

(ii) The Historical Justification for Rights Based Review.

In the United Kingdom there is historical evidence to affirmatively indicate that judicial review predated the notion of the sovereignty of Parliament.  It is clear, however, that the notion of the sovereignty of Parliament is essentially a judicial creation;

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68 ibid., at pp. 81 – 82.
therefore, it naturally follows that the notion parliamentary supremacy can just as easily
be jettisoned by the judiciary.

The notion of the supremacy of the English Parliament is summed up succinctly
by Barendt\textsuperscript{71} in the following manner:

"There was a time when the judges were unclear whether there are limits to the
scope of parliamentary legislative supremacy. Early in the seventeenth century
Coke CJ wrote that Acts of Parliament contrary to common right and reason
should be regarded as of no effect. But it is very rare to find anyone saying that
after the Glorious Revolution of 1688. Judge gradually accepted Parliamentary
rule, and during the course of the eighteenth century the principle of its legislative
supremacy became firmly established. Naturally, it has generally been welcomed
by politicians and ministers, for they can employ it to secure compliance with
their policies, at least when they control Parliament."

It stands to reason that Parliamentary supremacy, in the United Kingdom, became firmly
established largely due to historical reasons. It is clear, however, that prerogative writs
have been issued by the courts well before 1688. de Smith,\textsuperscript{72} in an article published in
1951, refers to an instance where reference had been made to a writ of \textit{certiorari} in a
letter written in 1252.

The writ of prohibition, for instance, was one of the earliest prerogative writs and
was a means of restraining ecclesiastical courts from interfering with temporal causes.\textsuperscript{73}

In fact \textit{Glanvill} makes reference to the form of such prerogative writs.\textsuperscript{74} It should be

\textsuperscript{71} Barendt, Eric, \textit{An Introduction to Constitutional Law} [Oxford: Oxford University
Press, 1998], at p. 87.
\textsuperscript{73} See, e.g., Baker, J. H., \textit{An Introduction to English Legal History} [London:
Butterworths, 3\textsuperscript{rd} edn., 1990], at p. 166.
\textsuperscript{74} See, e.g., Hall, G. D. G. (editor), \textit{The Treatise on the Laws and Customs of the Realm
- 14 (the original of this work is commonly believed to have been written, between 1187
noted that by 1531, far before the concept of Parliamentary supremacy had gained currency, the writ of prohibition was frequently being used.\textsuperscript{75}

The justification of Parliamentary supremacy is based upon the perceived excellence of the balanced union of the three powers, namely, the monarchical, the aristocratic and the democratic in the English Constitution.\textsuperscript{76} This view is described as "erroneous" by Bagehot.\textsuperscript{77} Setting out the common, but erroneous, description of the English Constitution, in relation to the union of the three powers, Bagehot states:

"It is insisted that the peculiar excellence of the British Constitution lies in a balanced union of three powers. It is said that the monarchical element, the aristocratic element, and the democratic element, have each a share of the supreme sovereignty, and that the assent of all three is necessary to the action of that sovereignty. Kings, lords and commons, by this theory, are alleged to be not only the outward form but the inner moving essence, the vitality of the Constitution. A great theory, called the theory of 'Checks and Balances', pervades an immense part of political literature, and much of it is collected from or supported by English experience. Monarchy, it is said, has some faults, some bad tendencies, aristocracy others, democracy, again, others; but England has shown that a Government can be constructed in which these evil tendencies exactly check, balance and destroy one another – in which a good whole is constructed not simply in spite of, but by means of, the counteracting defects of the constituent parts."\textsuperscript{78}

Bagehot is of the view that this is not an accurate description of the English Constitution. He explains the essentials necessary for a proper understanding of the English institutions, that make up that country’s Constitution, in the following terms:

\textsuperscript{75} See, e.g., St German’s Doctor and Student, (1531) Vol. 91 Selden Soc. 232.

\textsuperscript{76} See, e.g., Blackstone, William, Commentaries on the Laws of England, Vol. I, [Chicago: The University of Chicago Press, 1979], at p. 149 (this work was originally published in 1765).

\textsuperscript{77} Bagehot, Walter, The English Constitution [Brighton: Sussex Academic Press, 1997], at p. 3 (this work was first written in 1867 and revised in 1872).

\textsuperscript{78} ibid., at pp. 3 – 4.
"No one can approach to an understanding of the English institutions, or of others, which, being the growth of many centuries, exercise a wide sway over mixed populations, unless he divide them into two classes. In such constitutions there are two parts (not indeed separable with microscopic accuracy, for the genius of great affairs abhors nicety of division): first, those which excite and preserve the reverence of the population – the dignified parts, if I may so call them; and next, the efficient parts – those by which it, in fact, works and rules. There are two great objects which every constitution must attain to be successful, which every old and celebrated one must have wonderfully achieved: every constitution must first gain authority, and then use authority; it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government."

Yet, Bagehot describes the efficient secret of the English Constitution as “the close union, the nearly complete fusion, of the executive and legislative powers.” It was Bagehot’s view, in the context of the situation prevailing during his time, that Parliament did not have adequate checks and balances.

It is in such circumstances that there is justification for an independent body to act as a check on the executive which is in a position to dominate Parliament. Historically, the English judges were closely identified with the monarch. In fact some Lord Chancellors even had separate apartments in royal residences. In such circumstances, there was doubt about the impartiality of the judges. In such a context, the assertion of parliamentary supremacy could be justified on the ground that it provided some sort of check against a monarch who may possibly have wished to act in an arbitrary or tyrannical manner.

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79 ibid., at pp. 4–5.
80 ibid., at p. 8.
81 ibid., pp. 120–138.
Yet, despite the fact that judges were sometimes perceived to have been closely associated with the monarch, judicial review has always been regarded as being historically prior to the notion of parliamentary supremacy. In fact, in terms of time, it precedes the concept of a Parliament.

Thus, any justification of the *ultra vires* doctrine as the basis of judicial review must begin at the Glorious Revolution of 1688. It is not possible to assert that the doctrine has an origin which is much longer in terms of time if a historical justification is to be proposed. It is significant to note that even by 1688 universal franchise was unknown and voting, if any, for election to the House of Commons was widely perceived to be a property right rather than a right to be shared by all mankind. Thus, the so-called democratic legitimacy, on which the notion of the supremacy of Parliament is based, on a historical basis, is open to serious challenge. In any event, Parliament was not composed of only elected members (this was limited to the House of Commons). The monarch and the lords were unelected and were chosen mainly on a hereditary principle.

It is submitted, therefore, that the *ultra vires* doctrine fails on a historical score to establish that it is indeed the basis of judicial review because judicial review has a much longer history than that of Parliament. Additionally, the historical justification, after 1688, fails to satisfy the test of democratic legitimacy. If Parliament is not democratic, in a majoritarian sense, then, there is no reason to base judicial review on the *ultra vires* doctrine because of the manner in which judges have been appointed.
(iii) **Does the British Parliament Satisfy the Majoritarian Notion of Democracy Even Today?**

Even today, the British Parliament consists of the Queen, the House of Lords and the House of Commons. The House of Lords has now been reformed and it is envisaged that, eventually, hereditary peers will no longer have voting rights. Yet, the monarch is selected upon a hereditary principle and the current members of the House of Lords, excluding the hereditary peers, are not elected and are appointed for life.

The question is whether even the House of Commons is truly representative of the views of the population of the country. In Britain, with the adoption of the first past the post system of election, a party with a majority in the House of Commons need not necessarily have obtained a majority of the votes in the country. For instance the Labour party received less than fifty percent of the votes in the country in the 1997 general election but received much more than half the total number of seats in the House of Commons. Therefore, it is submitted that legislation passed by the House of Commons need not, necessarily, reflect the views of the population at large because party representation in the House may be a distortion of the views of the people at large. The Liberal Democrats, for example, have for many years enjoyed a level of representation in the House of Commons which is far less in proportion to the support enjoyed by that party in the country.
In the circumstances, judicial review, in the United Kingdom, need not be circumscribed by the notion of parliamentary supremacy because that notion does not enjoy democratic legitimacy, even if a majoritarian view of democracy is adopted.


Rights based review is superior to the *ultra vires* doctrine because it results in judges being able to adopt objective criteria when judging the lawfulness of official action. The Human Rights Act 1998 has enormous potential for advancing a rights culture in the United Kingdom and it is now time to jettison the *ultra vires* doctrine as the basis of judicial review.

Judges by their training will be able to determine the lawfulness of official action, against the standard of the human rights norms laid down by the European Convention on Human Rights and Fundamental Freedoms, which will now, by virtue of the Human Rights Act 1998, be very much part of English law.\(^3\)

Thus, unlike a situation where by way of judicial review judges are permitted to allow their subjective preferences to replace the views of the primary decision-maker, having recourse to human rights norms will give judicial decisions, reached in such

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\(^3\) See, e.g., Beloff, Michael J. and Mountfield, Helen, 'Unconventional Behaviour? Judicial uses of the European Convention in England and Wales' *[1996] E. H. R. L. R. 467*, wherein the writer suggests that, by means of judicial activism, English judges have made use of the European Convention in the development of the common law so that recognition is accorded to fundamental human rights.
circumstances, a certain measure of objectivity. The risk of judges being accused of pursuing their own agenda or being partisan will be minimized if their decisions are referable to human rights norms.

The ultra vires doctrine, on the other hand, places its complete trust in the good sense of the legislature. A legislature is quite capable of acting in a manner that violates fundamental human rights and if judges are to ignore such transgressions, then, minority interest protection is likely to suffer significantly. This is a development which is inconsistent with the rule of law (if the term is used in a substantive sense) resulting in the failure of a necessary condition for the existence of a vibrant democracy.

IV. Does the Ultra Vires Doctrine have any Application Outside the United Kingdom?

Even the most ardent supporters of the ultra vires doctrine do not suggest that the doctrine has any validity outside the United Kingdom. This is because the essential precondition necessary for the existence of the doctrine, namely, the monopoly of power enjoyed by the legislature, cannot be satisfied. A country which has a written constitution will have a legislature which is expected to legislate in a manner consistent with that constitution. In the circumstances there are many practical and legal constraints imposed upon the legislative competence of the legislature.

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For instance, the Canadian Charter of Rights and Freedoms\textsuperscript{85} provides the court with the power of enforcing guaranteed rights and freedoms.\textsuperscript{86} Thus the court can review the actions of state agencies in terms of the Charter and has the power to even strike down legislation which is incompatible with the Charter. However, section 33 (1) of the Charter provides an exception in terms of which Parliament can, by a specific declaration, legislate in a manner incompatible with the Charter. However, section 33 (3) imposes a five year limitation subject to the legislature’s power to re-enact such a declaration.\textsuperscript{87}

It has been pointed out that the fact that the Charter provides for overriding its provisions entails recognition of the notion of the supremacy of the legislature.\textsuperscript{88} Yet, in Canada both Parliament and the Provincial Legislature has been to a number of constitutional limitations on their powers and, it cannot therefore, be said that they have a monopoly on power similar to the British Parliament.

In any event, if Parliament is compelled to make a declaration of incompatibility, initially valid for only five years, it indicates that recognition is accorded to the supremacy of the Constitution from which such a power is derived. Thus the

\textsuperscript{85} See, Constitution Act, 1982 [Schedule B to Canada Act 1982 (U. K.)].
\textsuperscript{86} See section 24.
\textsuperscript{87} See section 33 (4).
\textsuperscript{88} See, e.g., Hogg, Peter W., \textit{Constitutional Law of Canada} [Toronto: Carswell, 4\textsuperscript{th} edn., 1996], at pp. 258 – 259.
Constitution imposes limitations upon the powers of Parliament and the Provincial Legislature in terms of federal values and civil libertarian values.\(^89\)

In Sri Lanka sovereignty is vested in the people.\(^90\) Parliament has sovereignty to the extent to which it exercises the legislative power of the people.\(^91\) However, the legislative power of the people can be enjoyed by the people themselves at a referendum. Yet, it is significant that article 4 (d) recognizes that fundamental rights are an important aspect of the sovereignty of the people.

Additionally, the Constitution has certain entrenched features and it is unlawful for Parliament to legislate in a manner that is inconsistent with such articles unless it is passed by a two third majority together with the approval of the people at a referendum.\(^92\)

In the circumstances, if Parliament or any other Provincial Legislature is not supreme, in jurisdictions other than the United Kingdom, then, the justification for the ultra vires doctrine fails. It is, therefore, submitted that the doctrine should have no application outside the United Kingdom because the legislature in such countries does not enjoy a monopoly on power.

\(^{89}\) *ibid.*, at p. 258.


\(^{91}\) article 4 (a).

\(^{92}\) See, e.g., article 83.
V. Conclusion.

Judicial review of unlawful administrative action is an essential feature of a liberal democracy. The *ultra vires* model is inadequately equipped to perform this function properly. Rights based review will ensure that decision-makers and administrative agencies have due regard for fundamental human rights norms when making decisions.

One of the problems associated with replacing the *ultra vires* doctrine, with any other model of judicial review, is that there is considerable concern that it will impinge upon judicial neutrality. Rights based review will, no doubt, help to allay such concerns. Judges will be able to have recourse to objective standards or norms when reviewing the lawfulness of administrative action if they review decisions against a human rights background. This also has the virtue of certainty because decision-makers will know in advance what criteria will be adopted by judges when reviewing decisions.

It is submitted, therefore, that the advancement of rights consciousness is a desirable ideal that should be achieved so as to enhance the quality of democracy in a country.
3. **Locus Standi** and Public Interest Litigation.

I. Introduction.

Different perspectives regarding the role of the state lie behind every theory of public law.\(^1\) *Locus standi* is an important device used by the judiciary to filter applications for judicial review.\(^2\) Fundamentally, the concept of standing relates to an appraisal of the role of the judiciary in a particular state.

According to Cotterrell,\(^3\) when the wide range of views on judicial review are surveyed two different kinds of outlook become discernible:

> "One kind assumes courts to be an integral part of the state apparatus or merely servants of the state's own law, which provides a structure of legality for the entire governmental process. Courts thus have a special technical role inside government, overseeing, correcting and facilitating the activity of other state agencies. They are, in this context, a specialist arm of government entrusted with monitoring the rule of law. The other kind of outlook tends to treat the courts in relation to the administrative process as, in some sense, outsiders to this process, in so far as it is to be seen as directive and policy oriented. Courts, in this view, serve independent values of various kinds, which are in some sense rooted in culture or society and which serve as an essential matrix for evaluation of government practices."\(^4\)

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\(^4\) *ibid.*, at p. 19.
According to Cram, the reform of standing rules needs to be situated within a coherent and responsive model of administrative law in which the promotion of standards of good administration is made paramount. The existence of flexible rules of standing is an important aspect of the rule of law. It results in a citizen being able to challenge unlawful administrative action. Jowell is of the view that the rule of law has been responsible for providing the background setting for developing the rules of judicial review. He says that "[the rule of law] is large enough …. to require individuals wishing to enforce their rights to have access to courts."

Although there is much debate about the basis of judicial review, it is often the case that rules of standing are sometimes used to shut out cases that may be 'politically sensitive'. According to Sir John Laws, "good judicial decisions are themselves fuelled by ideals which are not morally neutral, but which represent ethical principles about how the state should be run, and in that sense may be said to be political principles." Thus, when the rules of standing are used, to exclude someone from being recognized by the

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7 ibid.
9 supra., note 8, at p. 74.
courts, “the law regards it as preferable that an illegality should continue than that the person excluded should have access to the courts.”

The law of standing, therefore, raises certain very important and far reaching issues regarding judicial control of decision-makers and executive agencies. Jaffe, commenting upon the need for standing to secure review, in public actions, states:

“It is accepted ..... that the primary role of judicial review is the protection of interests specially affected by allegedly illegal official action; its articulation for this purpose has been highly developed by the courts. If there is controversy, it is controversy concerning the degree of special interest required. But when the plaintiff is not able to satisfy the requirement of special interest, when he brings his action as a representative of the general public, the propriety of judicial intervention is sharply questioned. It is not that private interests and the public interests are mutually exclusive elements of the common weal. The protection of private rights is an essential constituent of the public interest and, conversely, without a well-ordered state there could be no enforcement of private rights. Private and public interests are, both in a substantive and in a procedural sense, aspects of the totality of the legal order. But this truth offers little help in determining the proper role of judicial control of public officers. It may still be argued that judicial control is more necessary, more apt, or more feasible in controversies which specially affect the interests of the litigants, and that in the absence of special injury the judiciary should not intervene.”

It is quite possible for one person to be able to assert a wide variety of interests. According to Harlow and Rawlings, “[a]n employer may be a tax payer or a member of an environmental group; a tax payer may oppose the decision because he lives in the inner city or because he is offended by urban deprivation.”

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Flexible rules of standing are sometimes adopted so as to facilitate public interest challenges to unlawful governmental and administrative action. However, determining what is in the public interest essentially involves the exercise of a value judgment, by the relevant judge, when effect is given to his or her perceptions of the public interest.

It is in the area of public interest litigation that the rules of standing assume the greatest significance; it is here that the rules of standing have been greatly expanded not, merely, as a model for the protection of legal rights but also as a model for interest representation. Stewart, referring to the expansion of the law of standing, in the United States of America, states:

"The transformation of the traditional model into a model of interest representation has in large degree been achieved through an expansion of the class of interests entitled to seek judicial review of agency action. Thus growth has coincided with, and perhaps been shaped by, the expansion of the concepts of liberty and property that has been a response to large-scale government. As a result of this conceptualization, the number of persons with a legally protected stake in any agency decision has multiplied, and standing has been liberally granted to allow judicial enforcement of the requirement that agencies consider all such affected interests."

It has, therefore, been suggested that the distinctive character of the rules of standing is that attention is directed to the interest of the applicant in respect of the outcome of the case. "The sort of interest we require the applicant for judicial review to have will

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depend on what we think judicial review is for.”

Cane, referring to the different types of interests which require protection, states:

“...so far as personal standing is concerned, if the aim of judicial review is seen as being the protection of individuals ....... this would suggest and justify standing rules which require the applicant to show that he, she or it is specially affected by what has been done or decided. If judicial review is seen as going further and being concerned with the protection of groups as well as individuals, standing rules should only require the applicant to show that he, she or it shares some personal interest with others. If the prime function of judicial review is seen as being to provide remedies against unlawful behaviour by government, then there should be no requirement of personal interest.”

It can thus be observed that a variety of interests have to be taken into consideration when locus standi is accorded in a particular case. It is our view that the rules of standing must have an open texture; they must be made flexible so as to be effective as an instrument for articulating rights consciousness.

It is also of importance to note that standing has a very useful practical function. It helps a court to filter applications so that those that are obviously lacking in merit can be disposed of at an early stage without wasting scarce judicial resources. This also helps to prevent the courts from being flooded with unmeritorious litigation. Therefore, unless a person is able to demonstrate that he or she is a person aggrieved, standing will only be accorded by the court after an appraisal of the following factors: (i) the importance of maintaining the rule of law; (ii) the importance of the issues raised; (iii) the likely existence of any other responsible challenger; (iv) the nature of the breach of duty against which relief is sought; and (v) the expertise and experience of the applicant body.

\[17\] ibid.
\[18\] ibid.
In the ensuing sections there will be (i) an examination of standing as a fundamental right; (ii) an appraisal of the different species of standing; and (iii) a survey of developments, in relation to the rules of standing, in Sri Lanka, Britain, Australia, Canada and India. It is our view that where public interest litigation is concerned flexible rules of standing provides a very salutary mode of ensuring the triumph of the rule of law.

II. *Locus Standi* as a Fundamental Human Right.

The adoption of flexible rules of standing, when an application is made to invoke the prerogative writ jurisdiction of the court, is consistent with the fundamental right of access to the courts. Liberal rules of standing are also implicitly consistent with the fundamental right to an effective remedy before a national court or tribunal. The right of access to a court is one of ancient origin and can now be regarded as a constitutional fundamental in most liberal democracies.

Consequent to the importance attached to the right to an effective remedy before a national court or tribunal and the right of access to a court, as fundamental human rights, many international human rights instruments accord due recognition to these rights. Article 2 (3) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), provides as follows:

"Each State Party to the present Covenant undertakes:
(a) to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) to ensure that any person claiming such a remedy shall have his right
therein determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) to ensure that the competent authorities shall enforce such remedies when granted.

Article 2(3) of the ICCPR implicitly acknowledges the right of access to a court whilst explicitly recognizing the right to an effective remedy. Liberal rules of standing, subsumed within the wider right of having access to a court or tribunal, seek to further that right by facilitating public interest challenges. Article 16 of the ICCPR, on the other hand, makes the right to be accorded standing explicit: 'Everyone shall have the right to recognition everywhere as a person before the law.'

The European Convention on Human Rights, 1950 (ECHR) also recognizes the right of access to a court. Article 1 and 13 of the ECHR postulate that the contracting parties provide an effective remedy so as to vindicate the rights and freedoms set out in the Convention. Article 6 of the ECHR has been interpreted so as to encompass the right of access to a competent court or tribunal.

In Gold v. U. K. permission was denied to a convicted prisoner to write to his solicitor so as to explore the possibility of instituting a libel action against a prison official. The European Court was of the view that article 6(1) concerned not only the conduct of proceedings in court, once instituted, but also encompassed the right to institute them in the first place. It was the view of the court that the right of access was implicit in article 6(1). Harris, O’Boyle and Warbrick, are of the view that the decision

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19 Article 6 of the Universal Declaration of Human Rights, 1948, is similar in scope.
of the European Court, in *Golder v. U. K.*, is one of the most creative, in terms of "its interpretation of any article of the Convention"²¹.

A citizen's right of access to a court is also recognized as a constitutional right under the common law. In *R. v. Lord Chancellor, ex parte Witham*,²² the petitioner sought judicial review of a decision of the Lord Chancellor prescribing court fees which had the effect of imposing an obligation to pay fees upon litigants in person, in receipt of income support, contrary to previous practice. It was the petitioner's contention that the Order²³ made by the Lord Chancellor resulted in a denial of his constitutional right of access to the courts.

The Queen's Bench Division of the High Court held that the application for judicial review should be allowed. Laws, J., referring to a citizen's right of access to the courts as a constitutional right, said:

"It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically permitted by Parliament; and this is the meaning of the constitutional right"²⁴.

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²³ Supreme Court Fees (Amendment) Order 1996.
²⁴ *supra.*, note 22, at p. 787.
Rose, L. J., agreeing with the views expressed by Laws, J., expressed the view that "clear legislation" would be necessary if it was contemplated by Parliament that the Lord Chancellor had the power to prescribe court fees so as to preclude poor people from having access to the courts.

In *R. v. Lord Chancellor, ex parte Lightfoot,* the Court of Appeal had occasion to refer to the constitutional right of access to the courts; the court, however, was not disposed towards granting the relief sought due to the fact that the impugned Order did not, in fact, affect a citizen's right of access to the courts.

Thus, the adoption of flexible rules of standing is consistent with a rights culture and can be accorded fundamental rights status. A person must have the right of access to the courts and he or she must also be able to vindicate his or her rights before an appropriate forum as contemplated in many international human rights instruments.

Countries which have legislation dealing with human rights usually adopt a more restrictive approach to standing in situations where direct rights based challenges are concerned. On the other hand, where prerogative writs are concerned, more flexible rules of standing are accorded. This may be because the intention behind permitting direct, rights based, challenges may be to compensate the victims of such violations and, therefore, narrower rules of standing may be more appropriate.

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25 *ibid.*, at p. 788.
27 Insolvency Fees Order 1986 — articles 8 (1) and 9 (b).
The United Kingdom's Human Rights Act 1998 adopts a very narrow approach to standing. In terms of section 7 (1) of the Act only a victim of an unlawful act can complain. However, if a person chooses to adopt the traditional judicial review procedure, then, it would be possible to adopt a 'sufficient interest' criterion, envisaging a more flexible approach to standing. According to Starmer, the result is a mismatch. On the one hand, the Convention approach is broader, particularly in relation to those 'at risk' of a breach of their Convention rights. On the other hand, the Convention approach is narrower in that it is more restrictive of representative actions and/or public interest litigation.

Article 126 (2) of the Constitution of Sri Lanka also limits the scope of fundamental rights challenges to a person whose rights have been infringed or are about to be infringed. However, a petition in this regard can be addressed to the Supreme Court by either the victim himself or by an attorney-at-law on behalf of such a victim.

It is also of relevance to note that the New Zealand Bill of Rights Act 1990 adopts a much more flexible approach to standing, where direct rights based challenges are concerned, when compared with the United Kingdom. Section 27 (2) of the Act provides as follows:

"27. (2) Every person whose rights, obligations, or interests protected or recognized by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination."

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In New Zealand an application for judicial review can also raise issues regarding rights protected by the Bill of Rights Act 1990. Thus, human rights arguments can find their way into a traditional judicial review application where it is sought to invoke the prerogative writ jurisdiction of the courts. This will serve to enrich the prerogative writ jurisdiction of the courts and will contribute towards the promotion of the rule of law.

While we are supportive of the view that narrower rights of standing are desirable for direct rights based challenges (owing to the need to recompense the victim) we are also of the view that broader rules of standing are desirable in circumstances where it is sought to invoke the prerogative writ jurisdiction of the courts.

### III. The Different Species of Standing.

In the field of public law there are a number of different species of standing. It is possible to distinguish these different rules of standing on the basis of the type of interest that is represented.\(^{30}\) Basically, two broad categories of standing can be discerned in public law, i.e., personal standing and representative standing.\(^ {31}\) The former type of standing is asserted when an individual seeks to establish standing based upon his own personal interest; it is the latter type of standing that is of pivotal importance in public

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law litigation. Representative standing gives rise to three distinct subspecies: (i) associational standing; (ii) public interest standing; and (iii) surrogate standing. Public interest standing, particularly, in respect of social action litigation, has witnessed dramatic developments in India in recent times. Each of these different types of standing warrant separate analysis.

(a) Personal Standing.

Personal standing is, perhaps, the most restrictive species of standing; it is only the party aggrieved who is granted permission to maintain an action. Thus, for example, in *Ridge v. Baldwin* only Charles Ridge would have standing to obtain the declaration sought. No other person would have standing for the purpose. Personal standing is deeply rooted in the model of administrative law where access to the system was only granted to those who possessed private rights in tort or contract. Thus the emphasis on private rights "would mean that the courts would not police or monitor the boundaries of legislative intent in any area unless rights were present." It had been the legislative practice, in the 19th century, to enact that only a "person aggrieved" could complain if there had been non-compliance with a statutory requirement. The courts construed such words restrictively: "it was said that a man was not a 'person aggrieved' unless he himself had suffered a particular loss in that he had been injuriously affected in his

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31 Cane, Peter, 'Standing up for the Public' *supra.*, note 30, at p. 276.
money or property rights. To that extent personal standing is broadly concerned with the private rights theme.

It is submitted, however, that even where private rights are affected there could be a wider public interest consideration that could be taken into account. Thus, if Berty claims that a decision of a public official, by which he has been affected, is illegal, on the grounds that a circular empowering the official to act is unlawful, it is clear that Berty is a “person aggrieved” for the purpose of the rules of standing. However, what Berty seeks to challenge is the legality of the circular; assuming that the circular was issued unlawfully, shouldn’t Arthur and David also have equal rights to challenge its validity? The exclusion of review in such a situation, on the basis that Arthur and David lack standing, as they are not “persons aggrieved”, is unsound as a matter of principle. It raises the fundamental question as to what is the proper role of judicial review. Is it the court’s function to check illegality whenever it occurs? Alternatively, is the court’s role in controlling an illegal act limited to only those situations where the said illegality is brought to its notice by a “proper” party?

Thus, the question arises as to whether the right to seek judicial review is relative to the interest protected. If the party, whose interest is protected, chooses not to complain then no one else can do so. Looking at the objections made against extending the rules of standing to citizen action as a matter of right, rather than leaving it to the discretion of the court, Craig states that “there may well be cases in which the interests which the law

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chooses to protect are content with the situation. If this is so, a stranger should not be allowed to raise a possible cause of invalidity.” He, therefore, points out that any test of standing should, as a result, include “a concept of the zone of interests” which the legislation seeks to protect. Wade, on the other hand, states as follows:

“If a licence is granted unlawfully, perhaps to a trader, the trader will not complain since he has got what he wanted. No one else is directly affected. If then no one is allowed to seek judicial review, the licensing authority is left free to disregard the law and the rule of law breaks down. That is exactly what administrative law exists in order to prevent.”

It is in this context that the submission is advanced that, even where private rights are involved, there is a case for expanding the frontiers of judicial review by adopting more liberal rules of standing.

(b) Representative Standing.

The expansion of the rules of standing, so as to admit interest representation, is a necessary consequence of the commitment of the courts towards curtailing excessive governmental power and upholding the rule of law by way of judicial review. The development of principles of good administration is, increasingly, being viewed by the courts as the purpose for which judicial review is be exercised. There also seems to be strong academic support for such a view.


Craig, P. P., Administrative Law, supra., note 34, at p. 714.

ibid.

Wade, Sir William, Public Law in Britain and India [Bombay: N. M. Tripathi Private Ltd., 1992], at p. 46.

See, e.g., the dicta of Lord Donaldson, M. R., in R. v. Lancashire County Council, ex parte Huddleston. [1986] 2 All E. R. 941, at p. 945, regarding the evolution of a “new relationship between the courts and those who derive their authority from the public law,
The expansion of the scope of representative standing has been a salutary development where articulating rights consciousness is concerned. This aspect of the judicial function, in controlling the exercise of power by the executive, has been developed, in a significant manner, by the Supreme Court of India. Andhyarujina, referring to the giant strides made by the Indian Supreme Court in this direction, states:

"Despite working under unparalleled constraints of men and material resources, which no other comparable judiciary is subject to, their achievements have been truly remarkable. Their notable achievement has been the development of a vigorous judicial control over governmental actions by insisting on fair, unbiased and bona fide decision-making."

It has also been argued that the rules of standing have been liberalised because law is increasingly being used as "a device of organised social action for the purpose of bringing about socio-economic change."

Representative standing, therefore, performs a very useful function in ensuring that the rule of law is upheld and acts as a check on the exercise of arbitrary power. What is of fundamental importance is that when an illegality is committed, by an executive agency, persons who are prepared to bring the illegality to the notice of the court must one of partnership based on a common aim, namely the maintenance of the highest standards of public administration."

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have access to justice. It is in this context that representative standing assumes such significance. The type of interest representation can be associational, public interest or surrogate. It would now be apposite to examine the nature of each of these distinct types of standing.

Associational standing usually involves an unincorporated group or corporation which seeks to represent the interests of identifiable individuals who are its members or whom it claims to represent. According to Cane,44 "[t]he main justifications for associational standing are to facilitate access to justice by making it easier for groups (especially the poor and unorganised) to invoke the judicial process, and to promote the efficient conduct of litigation by allowing numerous bilateral disputes which raise similar issues to be resolved in one set of proceedings."

Public interest standing, on the other hand, involves an individual, group or corporation claiming to represent the interests of the public, rather than the interests of the individual, group or corporation. Public interest standing is justified on the basis "that because Parliament and the political process are under the effective control of the elected government, the courts can and should provide an alternative forum for the airing of widely-held grievances about the way the country is being run."45 Wade,46 commenting on the expansion of the rules of standing in public interest litigation in India, states:

43 Rizvi, Syed Iqbal Hadi, Public Interest Litigation Liberty and Justice for All [Delhi: Renaissance Publishing House, 1991], at p. 35.
45 ibid.
"In India, in particular, the courts are willing to entertain actions brought by social workers and social action groups on behalf of backward or deprived classes of citizens who are too weak to assert their rights, for example where protective labour laws are violated by employers. This type of case appears to go well beyond judicial review, since many of the rights in question are ordinary rights in private law."

It is not uncommon, in situations where the public interest element involved is significant, for the courts to completely relax the rules of standing.47

Surrogate standing is also an aspect of representative standing. It results in one individual who is the “nominal applicant representing the interests of another individual who is the real applicant.”48 According to Stewart,49 “the surrogate plaintiff is supposed to represent the quite distinct interests of independent and unrelated third parties.” This, therefore, makes such a plaintiff different in character from the class plaintiff. Stewart further states as follows:

"Today, cases that call for recognition of surrogate standing for ideological plaintiffs are likely to be comparatively infrequent, if only because a class action plaintiff’s lawyer, “a public interest” lawyer, .... will normally be able to locate a plaintiff or allege injury to an organization member, who satisfies the expanding definition of legally protected material interest. There may, however, be instances where only an ideological plaintiff, direct or surrogate will suffice to secure representation of important affected interests."50

Thus, the essential character of a representative applicant is that he or she comes to court not in order to articulate his or her own interests but, on the contrary, to represent the interests of other parties who are not before the court. If surrogate standing is to be used

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50 ibid., at p. 1746.
as a form of representative standing, then, it would result in the applicant representing a person with a personal interest in the claim. Therefore, according to Cane, unless there was some good reason why that individual should not make the claim personally (such as the individual’s age or mental condition), a court would be unlikely to accord standing to a surrogate."


In applying the rules of standing, in respect of judicial review applications, the Sri Lankan judiciary has been guided by British practice. However, in view of the fact that the constitutional structures of the two jurisdictions are different in character it is relevant to question the prudence of the Sri Lankan judiciary following British practices, particularly, with reference to the rules of standing. The Indian experience in this regard, it is submitted, would be of far greater practical utility as far as Sri Lanka is concerned.

In the United Kingdom the notion of the sovereignty of Parliament is well established, albeit, the notion has been considerably whittled down in recent times as a result of that country becoming a member of the European Union. It is also the view of some academics, therefore, that the *ultra vires* rule should still be the basis of judicial

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However, this notion of Parliamentary sovereignty appears to be difficult to sustain, even in the United Kingdom particularly after the Human Rights Act 1998 comes into operation. In any event, even prior to this Act, it has been contended by many that the *ultra vires* doctrine is not the basis of judicial review. In Sri Lanka, on the other hand, sovereignty is in the people. The Constitution is logically prior to the notion of Parliamentary sovereignty. Article 3 of the Constitution states as follows:

"3. In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise."

Article 4 of the Constitution refers to the manner in which sovereignty is to be exercised. It is to the following effect:

"4. The Sovereignty of the People shall be exercised and enjoyed in the following manner:

(a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to privileges, immunities and powers of Parliament and of its members, wherein the judicial power of the People may be exercised directly by Parliament according to law;"

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(d) the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided for; and
(e) the franchise shall be exercisable at the election of the President of the Republic and the Members of Parliament, and at every Referendum by every citizen who has attained the age of eighteen years, and who, being a qualified elector as hereinafter provided, has his name entered in the register of electors."

It is, therefore, submitted that the constitutional structure of Sri Lanka is different in character from that of the United Kingdom. As the Sri Lankan Parliament does not possess a monopoly of power, the Constitution provides for a delicate balance of power between the legislature, the executive and the judiciary. It is in these circumstances that it is imperative that the judiciary should perform its function so as to safeguard the rights of the citizen vis a vis the state.

This is in contrast to the position in the United Kingdom where, according to Forsyth, under their Constitution, "judicial review does not challenge but fulfils the intention of Parliament. By their ready acceptance of ultra vires the judges show they are

the guardians, not the subverters, of this existing constitutional order."\textsuperscript{60} It is our view, however, as discussed in chapter 2, that the \textit{ultra vires} doctrine is not the basis of judicial review even in the United Kingdom.

The rules of standing, therefore, constitute an important means by which the judiciary is afforded an opportunity to articulate rights consciousness in Sri Lanka. Unfortunately, however, it appears that the Sri Lankan judiciary was strongly influenced by the application of British practices,\textsuperscript{61} in relation to the application of the rules of standing, inevitably resulting in detrimental consequences as far as advancing individual and community rights were concerned. This has been in marked contrast to the attitude demonstrated by the Indian judiciary in flexing the rules of standing and the articulation of a greater degree of rights consciousness.\textsuperscript{62}

However, in recent years there has been a discernible trend where a more flexible attitude appears to be adopted by the Sri Lankan courts in relation to the requirement of standing. The expansion of fundamental rights jurisprudence may have, perhaps, had some influence on these developments.\textsuperscript{63} It is relevant, therefore, to examine the Sri Lankan case law relating to the rules of standing.

\textsuperscript{60} Forsyth, Christopher, `Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' \textit{[1996] C. L. J.} 122, at pp. 136 - 137.
\textsuperscript{61} See, e.g., \textit{Kandy Omnibus Co. Ltd. v. Roberts}, (1954) 56 N. L. R. 293, where a test similar to that adopted in Britain was used for the purpose of determining standing.
\textsuperscript{63} See chapter 9 for an analysis of developments as a result of the expansion of fundamental rights litigation.
In Durayappah v. Fernando, the Minister of Local Government purported to dissolve the Jaffna Municipal Council exercising the powers granted to him by the Municipal Councils Ordinance. The petitioner who was the Mayor of Jaffna sought to challenge the dissolution of the council on the ground that the Minister had failed to grant the council a right to be heard in its own defence. It was the petitioner’s contention that this was a necessary precondition that should have been fulfilled prior to the dissolution of the council. Lord Upjohn, delivering the opinion of the Privy Council, was of the view that “in the circumstances of this case the Minister should have observed the principle *audi alteram partem*.”

Drawing a distinction between a decision which was void and one which was merely voidable and, therefore, not a nullity, Lord Upjohn expressed the opinion that the Minister’s decision, in the instant case, was one which fell into the latter category. His Lordship was of the view that the decision was one which could stand unless successfully impeached:

“Being voidable it was voidable only at the instance of the person against whom the order was made, that is the council. But the council have not complained. The appellant was no doubt mayor at the time of its dissolution but that does not give him any right to complain independently of the council. He must show that he is representing the council or suing on its behalf or that by reason of certain circumstances, ... the council cannot be the plaintiff. .... That, however, is not suggested in this case. The appellant sets up the case that as mayor he is entitled to complain but as such he is plainly not. If the council is dissolved, the office of mayor is dissolved with it and he has no independent right of complaint, because he holds no office that is independent of the council.”

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65 Section 277 of the Municipal Councils Ordinance, No 29 of 1947, as amended by Act No12 of 1959.
67 *ibid.*, at p. 355.
Commenting upon the decision of Durayappah v. Fernando, Craig⁶⁸ states:

"The Privy Council clearly does not wish the mayor to be able to challenge the dissolution of the City Council. To arrive at this end the Privy Council draw a dichotomy between defects which any person having a legitimate interest can take advantage of which were nullities, and those defects which only the person affected could raise. The term voidable was used to describe errors of the latter type, and the court held that the case fell within this category."

Thus, Craig states that the distinction between a decision which was void and one which was voidable "manifested itself in the class of claimant who could raise the invalidity, in the rules of standing."⁶⁹

Cooray⁷⁰ is also critical of the decision of the Privy Council in Durayappah v. Fernando. He states that "the Privy Council adopted too strict a test with regard to legal standing in determining that the applicant was not an aggrieved person." It has also been pointed out by de Smith⁷¹ that the decision in Durayappah v. Fernando was a ‘curious’ one. It has been observed that ‘[t]he case may be criticised for taking too restrictive a view of the interests deserving of procedural safeguards."⁷²

In Premadasa v. Wijewardena⁷³ the Supreme Court was called upon, inter alia, to determine whether the rules of standing precluded the applicant from seeking a writ of certiorari. Referring to the rules of standing Tambiah, C. J., said:

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⁶⁹ ibid.
⁷² ibid., at footnote 99.
"The Law as to locus standi to apply for certiorari may be stated as follows: The writ may be applied for by an aggrieved person who has a grievance or by a member of the public, he must have a sufficient interest to make the application."\textsuperscript{74}

In \textit{Premadasa v. Wijewardena}, the petitioner sought to apply for the purchase of a house under the Ceiling on Housing Property Law,\textsuperscript{75} in terms of which a tenant was entitled to purchase such a house. However, since a prior consent decree had been entered into by the petitioner, he ceased to be a tenant of the premises and was merely enjoying the status of an occupier of the premises with the sanction of the court. Thus, Tambiah, C. J., was of the view that the petitioner was not a tenant at the time he applied to purchase the house, i.e., he was not a tenant at the relevant time. Therefore, he did not have a sufficient interest to seek a writ of \textit{certiorari} against the Commissioner of National Housing. This was because, in view of the changed circumstances, the petitioner could only apply for a house in his capacity as a member of the public; he could purchase a house only if the Commissioner of National Housing had a surplus house to sell.

It was the view of Tambiah, C. J., that the petitioner could not come within the class of a person aggrieved. Thus, to be able to seek a writ of \textit{certiorari} the petitioner should be able to demonstrate that he had a sufficient interest in the matter to which the application relates. In the instant case the petitioner had failed to demonstrate that his interest was greater than that possessed by a member of the public. The petitioner, therefore, lacked a sufficient interest necessary to institute an application for a writ of \textit{certiorari}.

\textsuperscript{74} \textit{ibid.}, at p. 343.
\textsuperscript{75} Ceiling on Housing Property Law, No 1 of 1973.
The reasoning adopted by Tambiah, C. J., in relation to the application of the rules of standing is not free from criticism. What the petitioner sought was a writ of *certiorari* and not a writ of *mandamus*. What was sought from the court was an order quashing the determination of the Commissioner of National Housing; an order directing the Commissioner to sell the house to the petitioner was never sought. Relief of the latter type would be within the province of a writ of *mandamus*. It would be reasonable, therefore, to argue that the rules of standing should be less rigid in the case of a writ of *certiorari* in comparison to the rules applicable for a writ of *mandamus.* Additionally, the claimant was not seeking to vindicate his own rights but was, in fact, challenging the validity of government action. The parallel here is the distinction between a declaration as to rights and a declaration as to validity.77

It is submitted that Tambiah, C. J., erred when his Lordship came to the conclusion that the petitioner lacked standing in this case. What was being challenged by the petitioner was the action of the Commissioner of National Housing, who purported to make a fresh determination, divesting certain houses, which were previously vested in him, consequent to a prior determination made by him. What the court was called upon to determine was the propriety of the Commissioner’s action; if the Commissioner’s action was illegal, then, a writ of *certiorari* should have been granted. The issue of

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77 See, e.g., *Gregory v. Camden London Borough Council*, [1966] 1 W. L. R. 899, where the plaintiff was denied standing to challenge a grant of planning permission on the basis that he could not succeed unless he was able to demonstrate that the statute had been passed so as to benefit a class of persons encompassing himself or, in the alternative, that other private law rights had been infringed.
whether the petitioner should have been sold a house is not, it is submitted, relevant to the issue (in view of the nature of the relief sought).

Assuming, without deciding, that the petitioner had the same rights as a member of the public in respect of the right to purchase a house from the Commissioner it is our view that he would still have standing to seek a writ of certiorari. It has not been denied that a member of the public would be entitled to apply for the purchase of a house and the Commissioner of National Housing could sell such a house - if it was so available. If the Commissioner made an illegal order, which in effect depleted his stock of houses, then it stands to reason that the number of houses available to be offered to the public would be reduced. In the circumstances if a member of the public, entitled to apply for the purchase of such a house, has no standing, then, no one would have a 'sufficient interest' for the purpose.

Assuming that the decision of the Commissioner was illegal, then, the court should have granted the petitioner a writ of certiorari. The decision would not have had the consequence of the petitioner being sold the house but would have been significant in advancing a rights culture in Sri Lanka. It is submitted that the Supreme Court erred when it dismissed the petitioners application for a writ of certiorari on the basis of the lack of standing. The application should have been dismissed on the footing that the determination made by the Commissioner, based upon the facts of the case, was legal and proper.
The decision of the Supreme Court in *Premadasa v. Wijewardena* can be productively contrasted with the decision of the court in *Wijesiri v. Siriwardene*. In the latter case the petitioner was a Member of Parliament. He took up the cause of 53 candidates, selected for appointment to a particular grade in the Sri Lanka Administrative Service (SLAS), on the basis of results obtained at an open competitive examination, whose letters of appointment were withheld by the respondent. It was the contention of the respondent that the letters were not issued because there were certain irregularities regarding the conduct of the examination. The petitioner, on the other hand, contended that the letters of appointment were withheld because certain objections were raised by a powerful trade union. The petitioner sought a writ of *mandamus* against the respondent. The court, however, refused the relief sought on the basis that *mandamus* would not issue if it will be futile.

What is of relevance, however, to our present discussion, is the position taken up by the Supreme Court in respect of the right of the petitioner to be accorded standing for the purpose of seeking a writ of *mandamus*. Wimalaratne, J., adopted a very flexible attitude towards the law of standing and cited an article by Wade so as to justify his position. His Lordship cited Wade to the effect that one of the merits of *certiorari* was that it was not subject to the narrow rules about *locus standi* but is available even to strangers as there was an element of public interest involved; as regards *mandamus* the position should be no more exacting than in the case of other prerogative remedies. It was his Lordship’s view that an interest over and above that of the community as a whole or the class of the community to which the applicant belongs can be shown if the

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78 [1982] 1 Sri L. R. 171.
applicant “comes before Court as a public spirited person concerned to see that the law is
obeyed in the interest of all, and not merely as a busybody perhaps with a view to gain
cheap publicity.”\textsuperscript{80}

In \textit{Gunaratne v. Kotakadeniya}\textsuperscript{81} the petitioner, an Attorney-at- Law, sought to
impeach a new scheme of licensing purportedly introduced by the respondent, Commissioner of Motor Traffic. What the Commissioner envisaged was to introduce a
new scheme of plastic licence cards so as to replace the existing licence books. At the
time that the decision of the Commissioner was challenged, over 100,000 licences had
already been issued. The Court of Appeal was of the view that the decision of the
Commissioner was devoid of statutory authority and was, therefore, illegal. The court
granted the petitioner writs of \textit{certiorari} and \textit{prohibition}. The right of the petitioner to be
 accorded standing was never disputed in this case. It was the petitioner’s contention,
however, that he was before court as a public interest litigant and not in his capacity as a
person directly affected (even though he could have satisfied this test quite easily). The
Court of Appeal appears to have tacitly accepted this submission.

In \textit{Bandaranaike v. de Alwis},\textsuperscript{82} the petitioner, in his capacity as a private citizen,
sought writs of \textit{prohibition} and \textit{quo warranto} against the respondent who was a member
of a Special Presidential Commission of Inquiry on the basis that he had compromised his

\textsuperscript{80} supra., note 78, at p. 175.
\textsuperscript{81} [1990] 2 Sri L. R. 14.
\textsuperscript{82} [1982] 2 Sri L. R. 664. This case deals with personal bias and this aspect of the case
is dealt with in chapter 4, part II (b).
position by entering into financial dealings with a person whose conduct was the subject matter for inquiry before the Commission.

An objection was raised that the petitioner lacked standing to maintain the application. Samarakoon, C. J., was convinced that a member of the public had standing to bring an illegality to the notice of the court. His Lordship, referring to the issue of standing, said:

"This is a matter of public importance and it is in the public interest to ensure that machinery set up by Government in the interest of good order should function properly. Accordingly the Court can award this remedy to any member of the public."83

Thus, his Lordship seemed to indicate that where the matter raised was one of public importance any member of the public had standing to bring it to the notice of the court.

It is important to note, however, that the Constitution of Sri Lanka refers to the right to be heard before the Supreme Court.84 The Attorney General has the right to be heard in certain specified circumstances85 and any party to any proceedings before the Supreme Court has a right to be heard.86 The Constitution also states that the Supreme Court may "in its discretion grant to any person or his legal representative such hearing as may appear .... to be necessary in the exercise of its jurisdiction ..."87 Article 134 (3) is a significant safeguard brought in to protect individual rights. It constitutes an extension of the rules of standing; consequently, even if a person is not a party to

83 ibid., at p. 675.
84 See, article 134.
85 See, article 134 (1) in terms of which the Attorney General has a right to be heard in proceedings before the Supreme Court in respect of the exercise of its jurisdiction under article 120, 121, 125, 126, 129 (1) and 131.
86 See, article 134 (2).
proceedings before the Supreme Court, he or she could still be heard if the court decides to exercise its discretion to do so.

V. **Locus Standi in the United Kingdom.**

In the United Kingdom an applicant for judicial review is required to demonstrate a sufficient interest in relation to the matter to which the application relates. Thus a statutory obligation is cast upon the court to refuse leave to proceed, unless the applicant can demonstrate that he or she has standing. According to de Smith, "[I]n English law no principle of general application has been, as yet, developed by the courts or laid down by legislation. The rules differ depending upon the procedure adopted." Consequently, in English law the rules of standing appear to have an open texture and the rigidity of the rules vary depending upon the type of remedy sought.

In recent years, particularly, after the introduction of the sufficient interest criterion, the English courts have greatly liberalized the rules of standing. There has also been much academic discussion about the purpose of rules of standing. In 1994,

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87 See, article 134 (3).
88 See, e.g., section 31 (3) of the Supreme Court Act 1981; O. 53, r. 3 (7).

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the English Law Commission proposed that the rules of standing should be further liberalized.\textsuperscript{93} It proposed the adoption of a two-track system of standing, similar to that adopted in Canada, so as to differentiate between personal challenges and public interest challenges. In relation to the latter type of challenge, the Law Commission recommended that “except in those cases where a statutory power or duty concerns, or is owed to, an individual or to a narrow range of individuals to which the applicant does not belong, any person who has been adversely affected by a decision should normally be given standing as a matter of course.”\textsuperscript{94}

A very powerful justification for the expansion of the rules of standing is provided by Schieman:\textsuperscript{95}

\begin{quote}
"The undesirability of putting certain actions beyond legal challenge by anyone is self evident. The politically, financially or socially strong can oppress the weak, safe in the knowledge that the courts cannot interfere. This is undesirable not only because oppression is undesirable, but also because if the law is openly flouted without redress in the courts the law is brought into contempt as being a dream without substance. Unenforceable laws are delusions which can give rise to substantial anger and justifiable frustrations subversive of a peaceful society."
\end{quote}

It should also be noted that in 1988, it was recommended that “[t]he decision to accord standing should be taken by the court. The judge should have regard to the whole circumstances of the case and ask himself whether the actions is justifiable in the public interest in the light of these circumstances.”\textsuperscript{96} It was further recommended that the relevant factors that the court ought to take into account were the importance of the legal

\textsuperscript{94} \textit{ibid.}, Part V, Para. 5.20.
\textsuperscript{95} \textit{supra.}, note 92, at p. 343.
point, the links that the plaintiff had with the subject matter of the case, the probability of
the same issue being raised in any other proceeding, and the extent to which there is a
public interest or support for the issue being raised.\footnote{ibid.}

There have been a significant number of cases, in England, which have broadened
the scope and ambit of the rules of standing which warrant some analysis. The leading
case in this area is the \textit{Fleet Street Casuals Case},\footnote{\textit{Inland Revenue Commissioners v. National Federation of Self-employed and Small Businesses, [1982] A. C. 617.}} where a federation, representing the
self-employed and small businesses, alleged that the Inland Revenue had adopted a
different attitude towards acts of tax evasion by Fleet Street casuals in contrast to the
attitude demonstrated by the Revenue when other acts of tax evasion were suspected.
The federation applied for judicial review and claimed a declaration that the Inland
Revenue acted unlawfully in granting the Fleet Street casuals an amnesty and an order for
\textit{mandamus} directing the Revenue to assess and collect the tax due. The Inland Revenue
took up the position that the federation had no \textit{locus standi} to seek the relief sought.
\textit{ibid.}, at p. 633.
\textit{ibid.}, at p. 647.
\textit{ibid.}, at p. 662 – 663.

\textit{ibid.}, at p. 662 – 663.
Lord Diplock, allowing the appeal, on the basis that the federation had completely failed to show any conduct by the board that was *ultra vires* or unlawful, made a powerful argument in favour of expanding the rules of standing. His Lordship said:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped... It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the unlawfulness of what they do, and of that the court is the only judge."\(^{102}\)

This flexible approach to standing, adopted by the English courts, is illustrated by a number of subsequent decisions.\(^{103}\) It should be noted, however, that this move towards greater flexibility, as regards standing, demonstrated by the courts, does not necessarily imply that the sufficient interest criterion is invariably relaxed. There have been a number of instances when the sufficient interest criterion has been insisted upon, and applications have failed for want of standing.\(^{104}\)

\(^{102}\) *ibid.*, at p. 644.


It is in the area of public interest challenges that the courts of the United Kingdom have significantly liberalized the rules of standing. Additionally, there has been an increasing tendency to permit representative standing. This augurs well for democracy, in terms of the exercise of checks and balances, and for the prevalence of the rule of law. It would, therefore, be of relevance to examine a few significant decisions, of the British courts, in relation to public interest challenges and situations where representative standing has been accorded.

In *R. v. Inspectorate of Pollution, ex parte Greenpeace Ltd. (No 2)*, a company (BNFL) was authorised to discharge radioactive waste from its premises. Subsequently, the company sought and obtained a variation of the authorisations to enable the testing of new plant. Greenpeace Ltd., an environmental protection organisation, concerned at the levels of radioactive discharge, applied for judicial review of the executive decision to vary authorisations. Greenpeace Ltd., was an organisation which had an international profile; additionally, it had over 2500 supporters in the area of the new plant.

BNFL contended that the applicants lacked standing as they did not have a sufficient interest in the matter under challenge. Otton, J., was of the view that when deciding whether an applicant for judicial review had a sufficient interest in the matter to which the application related, the nature of the applicant was relevant. The extent of its interest in the issues raised, the remedy sought to be achieved and the nature of the relief sought was also of relevance in according standing. In this case, even though Greenpeace

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Ltd., was granted leave to make the application, the application failed as it lacked merit.

Otton, J., explaining why Greenpeace Ltd., was accorded standing, said:

"It seems to me that if I were to deny standing to Greenpeace, those it represents might not have an effective way to bring the issues before court. There would have to be an application either by an individual employee of BNFL or a near neighbour. In this case it is unlikely that either would be able to command the expertise which is at the disposal of Greenpeace. Consequently, a less well-informed challenge might be mounted which would stretch unnecessarily the court's resources and which would not afford the court the assistance it requires in order to do justice between the parties."  

Therefore, in this case Otton, J., demonstrated a willingness to liberalize the rules of standing even though relief was denied on substantive grounds. The decision is illustrative of the expansion of the frontiers of rights consciousness in that pressure groups, such as Greenpeace, are not denied an opportunity to challenge unlawful administrative action based on an apparent lack of standing.

In *World Development Movement* the applicants sought judicial review of a decision of the Secretary of State for Foreign Affairs to grant overseas aid in connection with the Pergau Dam Scheme in Malaysia. The Foreign Secretary appeared to have taken into account political implications, when approving the grant of foreign aid, for a scheme which was economically unsound. The applicants sought to challenge the lawfulness of the grant of aid. The Secretary of State for Foreign Affairs took up the position, *inter alia*, that the applicants lacked standing to maintain the application.

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106 *ibid.*, at p. 350.

It was contended that the applicants lacked a sufficient interest in the matter and were at the “outer limits of standing”\textsuperscript{108}. Citing Wade\textsuperscript{109} to the effect that “the real question is whether the applicant can show some substantial default or abuse, and not whether personal rights or interests are involved”, Rose, L. J., pointed out that there were a number of factors which, in combination, resulted in the applicants having a sufficient interest in the matter.\textsuperscript{110} These factors were the importance of vindicating the rule of law, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief is sought, and the prominent role of these applicants in giving advice, guidance and assistance with regard to aid.\textsuperscript{111} It is of importance to note that in this case the court granted the petitioners the declaration sought.

*World Development Movement* is a case which has few parallels; it is a case that deals with pure public interest litigation. In other words, due to the public importance of the issues raised, the court was prepared to completely relax the rules of standing. This is consistent with a trend developed in some countries, such as New Zealand, where the rules of standing are dispensed with or relaxed when there is an important and significant public interest issue involved.\textsuperscript{112}

\textsuperscript{108} *ibid.*, at p. 619.
\textsuperscript{110} His Lordship also referred to the “increasingly liberal approach to standing on the part of the courts during the last 12 years” (*supra.*, note 108).
\textsuperscript{111} *supra.*, note 107, at p. 620.
\textsuperscript{112} See, e.g., the New Zealand case of *Finnigan v. New Zealand Rugby Football Union Inc.*, [1985] 2 *N. Z. L. R.* 159, where the Court of Appeal held that the sufficiency of an applicant’s interest had to judged in relation to the subject matter of his application.
In the *Equal Opportunities Commission*\(^{113}\) the Commission and a Mrs Day, a part-time worker, sought judicial review of a statement made by the Secretary of State for employment that a particular enactment\(^{114}\) was inconsistent with the European Community law on the equal treatment of men and women by providing less favourable treatment in relation to unfair dismissal and redundancy to part-time workers, who were mostly women, and full-time workers, who were mostly men.\(^{115}\) The appeal was allowed by the House of Lords. Referring to the objections raised by the Secretary of State regarding the *locus standi* of the applicant, the House of Lords expressed the view that the Equal Opportunities Commission had standing to apply for judicial review.

The above survey of the applicable case law indicates that the English courts have greatly liberalized the rules of standing in recent times so as to facilitate access to justice. This is particularly evident in public interest challenges. Thus it has been held by the courts that a parish council, which had not been named in a television programme, had a sufficiently direct interest to complain to the Broadcasting Complaints Commission about unjust or unequal treatment and had standing for the purpose (despite the fact that the application was refused on the merits of the case).\(^{116}\) It has also been held that a prisoner, detained in Scotland, at the time of filing the application, had *locus standi* to maintain an application for judicial review.\(^{117}\) In *Leech* the prisoner sought to challenge the validity

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\(^{113}\) *R. v. Secretary of State for Employment, ex parte Equal Opportunities Commission, [1995] 1 A. C. 1.*

\(^{114}\) Employment Protection (Consolidation) Act 1978.

\(^{115}\) The applications were refused by the Divisional Court, *[1992] C. O. D. 112,* and by the Court of Appeal, *[1993] C. O. D. 117.*


of prison rules which permitted prison officers to read and stop correspondence between
the prisoner and his solicitor. Standing was readily accorded due to the wider public
interest implications of the case.

It should be noted, however, that English courts are inclined to deny
representative standing to a body which lacks a corporate personality if it seeks to
maintain an application for judicial review in its own name. The Court of Appeal has
also expressed the view that the question of locus standi goes to the jurisdiction of the
court.

It must be acknowledged, however, that the English courts have demonstrated a
clear desire and willingness, in recent times, to significantly expand the rules of standing
so as to facilitate public interest challenges in respect of unlawful administrative action.
It should be noted that despite the fact that relief has been denied, in some cases, on a
review of the merits of the case, standing has been accorded due to the fact that the
sufficient interest criterion has been satisfied. This trend augurs well for democracy,
liberty and for the supremacy accorded to the rule of law. It is submitted that the
liberalization of the rules of standing is indicative of an expansion of the frontiers of
rights consciousness in that society because it seeks to vindicate the fundamental right of
access to a competent court or tribunal.

118 See, e.g., R. v. Darlington Borough Council, ex parte Association of Darlington Taxi
VI. *Locus Standi* in Australia and Canada.

(a) Australia.

The Australian judicial system has, in recent years, witnessed certain very exciting developments in relation to the rules of standing. Australia has many enactments which have their own rules of standing. Certain enactments have abolished the requirement of standing whilst others have introduced more restrictive rules. In 1996 the Australian Law Reform Commission recommended a more liberal approach towards standing. The Commission recommended a general statute investing anyone with standing except in cases where a specific statute imposes restrictions and, thereby, circumscribes standing.

Prior to that, in 1985, the Australian Law Reform Commission had proposed that any person should be allowed to commence a public interest suit if he had a personal stake in the subject matter of the litigation or in the alternative he had the ability to represent the public interest. According to Aronson and Franklin, a requirement of standing demands a connection between the plaintiff's interests and the relief sought. Standing rules, therefore, serve to ensure that plaintiffs litigate only their business. Those rules can therefore be viewed as regulating the extent to which, if at all, a person can

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litigate either third party rights or interests, or general issues of public concern with which no private person has any immediate connection.”

In recent years the High Court of Australia has greatly expanded the rules of standing so as to encompass situations where there has been a violation of a public right and the party who wishes to bring litigation has no economic interest in the matter beyond any other member of the general public. It is also an area which has been the focus of considerable academic comment.

It should be noted, however, that a variety of reasons have been advanced in favour of retaining rules of standing because, in certain contexts, standing performs certain very useful functions. Rules of standing serve “to ensure that litigants confine themselves to their own injuries or grievances, and refrain as far as possible from interfering with the interests of others.” Such rules also serve the instrumental function of improving the calibre of litigation. “The idea is that an applicant with a personal stake in a dispute will do a better job in gathering, marshalling and presenting the evidence,

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124 It should be noted that the Australian Law Reform Commission expressed the view that there was an inherent connection between the public element and standing (supra., note 122).
and in researching and presenting legal submissions.”\textsuperscript{128} The standing requirements are also said to “reduce the chances of repetitive litigation”\textsuperscript{129}

The Australian case law relating to the law of standing warrants some analysis. In \textit{Big Country Developments Pty Ltd. v. Australian Community Pharmacy Authority},\textsuperscript{130} the applicant was the owner of a shopping centre and the landlord of premises in which a pharmacy business (operated by the third respondent) was located. The first respondent authority made a decision recommending the relocation of the third respondent’s pharmacy business. The applicant sought judicial review of this decision. It was argued that the commercial effects upon the applicant, namely the loss of the pharmacy business, if the first respondent’s decision was implemented, would make the applicant “a person aggrieved” for the purpose of according standing. The applicant was, however, denied standing upon the basis that it was not a “person aggrieved”. Lindgren, J., adopted the following reasoning to justify his decision on this matter:

\begin{quote}
“The “ripples of affection” in financial or commercial terms, arising from administrative decisions extend far and wide, and it is unthinkable that Parliament intended …… to accord standing to every person who has a financial or commercial interest which is adversely affected by a decision, no matter how “remote” that interest may be from the decision making activity and no matter how minor the affection.”\textsuperscript{131}
\end{quote}

It should be noted, however, that in this case the applicant for judicial review was in fact seeking personal standing rather than seeking to launch a public interest challenge.

\textsuperscript{128} \textit{ibid.}, at p. 665.
\textsuperscript{129} \textit{ibid.}, at p. 666.
\textsuperscript{130} \textit{(1995) 132 A. L. R. 379}.
\textsuperscript{131} \textit{ibid.}, at p. 386.
Where personal standing is sought the circumference is narrower than in the case of a public interest challenge.\textsuperscript{132}

Where public interest challenges are concerned the Australian courts have demonstrated a considerable willingness to expand the scope of the rules of standing. However, even here, it is necessary for the applicant for judicial review to be in a position to demonstrate that his or her interest in the matter is over and above the interests of the general public. This was adverted to by Ellicott, J., in \textit{Tooheys Ltd. v. Minister for Business and Consumer Affairs},\textsuperscript{133} when his Honour said:

"The words "a person who is aggrieved" should not, in my view, be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary and undesirable to discuss the full import of the phrase. I am satisfied from the broad nature of the discretions which are subject to review and from the fact that the procedures are clearly intended in part to be a substitution for the more complex prerogative writ procedures that a narrow meaning was not intended. This does not mean that any member of the public can seek an order of review. I am satisfied, however, that it at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the general public."\textsuperscript{134}

In \textit{Right to Life Association (NSW) Inc. v. Secretary, Department of Human Services and Health},\textsuperscript{135} the appellant organisation whose expressed objects were, \textit{inter alia}, to (i) defend the right to life against abortion; (ii) promote community awareness in relation thereto; and (iii) influence lawmakers to defend the right to life. The appellant sought a review of the decision of the Secretary, Department of Human Services and Health, conveyed to the appellant, not to terminate three clinical trials in Australia of the drug

\textsuperscript{132} See, e.g., \textit{Australian Foremen Stevedores Association v. Crone}, (1991) 98 A. L. R. 276 at p. 281 \textit{per} Pincus, J., "[i]t now seems to be accepted that questions of degree arise, at least in standing disputes."

\textsuperscript{133} (1981) 36 A. L. R. 64.

\textsuperscript{134} \textit{ibid.}, at p. 79.
Mifepristone which was an abortifacient. A single judge of the Federal Court decided that the appellant was not "a person aggrieved" within the meaning of the Administrative Decisions (Judicial Review) Act 1977 and, therefore, lacked standing.

It was from that decision that the appellant association appealed to the General Division of the Federal Court of Australia. Adverting to the proposition that the appellant lacked standing, Lockhart, J., with Beaumont, J., agreeing, expressed the view that the meaning of "a person aggrieved" was not "encased in any technical rules" and that much depended upon the nature of the particular decision and the extent to which the interest of the applicant rises over and above that of an ordinary member of the public. Lockhart, J., was of the opinion that “[t]he applicant’s interest must not be remote, indirect or fanciful. The interest must be above that of an ordinary member of the public and must not be that of a mere intermeddler or busybody.” In order that an appellant has standing it was not necessary for it to have “a legal, financial or proprietary interest in the subject matter of the proceeding.” Lockhart, J., was of the view that the element of grievance must be special to the appellant; it must “suffer more greatly or in a different way than other members of the community.”

It is submitted, therefore, that the Australian approach gives the judiciary a substantial degree of discretion when deciding to accord standing to a particular applicant for judicial review. In the Australian context, an “aggrieved person” test is a flexible

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136 This was a substance that purported to produce an abortion.
137 supra., note 135, at p. 251.
138 ibid., at pp. 251 – 252.
139 ibid., at p. 252.
one; it is wide enough to admit of a public interest challenge; it is also narrow enough to filter out applications from intermeddlers and busybodies. It results in discretion being granted to the judiciary to perform this delicate balancing act.

(b) Canada.

"The decisions of inferior courts and administrative tribunals have for centuries been subject to review by superior courts through the prerogative writs of certiorari, prohibition, mandamus, quo warranto and habeas corpus; and in more recent times by actions for declaration or injunction; and even more recently in some jurisdictions by special statutory remedies such as an application for judicial review." In recent years the Supreme Court of Canada, as well as the other courts have, as a general norm, striven to ease the requirements of standing. The test generally adopted is that "the applicant must have some peculiar or special interest at stake beyond that of a member of the public." Cane, commenting upon the right to become a party, where public interest matters are concerned, states:

"While the courts continue to allow interest group participation in cases involving public policy, there is growing concern that such participation tends to overload the system and interfere unnecessarily with the adversarial process. Generally speaking, judges continue to be reluctant to grant party status to a group that has no legal or monetary interest in a case that may not, in any practical sense, be responsible for costs."

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140 ibid.
144 ibid., at p. 75.
Generally speaking with, perhaps, the exception of India the Canadian model appears to be the most liberal in terms of the requirements of standing in respect of public interest litigation.

Jones and de Villars,\textsuperscript{145} commenting upon the requirement of standing in Canada, state that "[a]lthough the whole world obviously had the right to make an application for a prerogative writ, the courts would only issue this first step to a person so "aggrieved" or "affected" by the government action that he had a "sufficient interest" to have standing to require the delegate to come to court to explain the legality of his actions. The courts have vacillated between a wider and a narrower concept of standing."

Some decisions of the Canadian courts, of significance, in relation to the applicability of the rules of standing, warrant analysis. \textit{Finlay v. Minister of Finance of Canada},\textsuperscript{146} involved a non-constitutional challenge, by a private individual, to the statutory authority for federal public expenditure. In this case, "a person in need" within the meaning of the Canada Assistance Plan sought a declaration that the cost-sharing payments by Canada to Manitoba, pursuant to the plan, were illegal and sought an injunction to stop the payments because of provincial non-compliance. One of the issues that arose for determination was whether the plaintiff had standing to seek declaratory and injunctive relief.


\textsuperscript{146} \textit{[1986] 2 S. C. R. 607}. 

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Le Dain, J., referring to the issue of standing, said that it could be approached by asking the following questions:

"1. Does the respondent have a sufficient personal interest in the legality of the federal cost-sharing payments to bring him within the general requirements of standing to challenge an exercise of statutory authority by an action for a declaration or injunction?
2. If not, does the Court have a discretion to recognize public interest standing in the circumstances of the present case?
3. If the Court does have such a discretion should it be exercised in favour of the respondent?"\(^{147}\)

Le Dain, J., was of the view that the court has a discretion to accord public interest standing to facilitate a challenge of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he referred to as a recognition of the public interest in maintaining respect for the limits of statutory authority.\(^{148}\) Thus, in \textit{Finlay}, standing was accorded; the expansion of the rules of standing in that case is, perhaps, illustrative of the liberal access policy pursued by the Canadian courts, particularly, where public interest challenges are concerned.

\textit{Finlay}, therefore, has been the high watermark for expanding the scope of standing, in the post-Charter era, in Canada. It followed, closely, the trilogy of cases, namely, \textit{Thorson v. Attorney General of Canada (No 2)},\(^{149}\) \textit{Nova Scotia Board of Censors v. McNeil},\(^{150}\) and \textit{Minister of Justice of Canada v. Borowski},\(^{151}\) where the rules of standing were considerably expanded. In \textit{Finlay} Le Dain, J., did, however, address the "traditional judicial concerns about the expansion of public interest standing"\(^{152}\) which

\(^{147}\) \textit{ibid.}, at p. 614.
\(^{148}\) \textit{ibid.}, at pp. 630 – 631.
\(^{152}\) supra., note 146, at p.631
his Honour summarized thus: "the concern about the scarce allocation of judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government."  

Yet, in very recent times the Canadian Supreme Court appears to have back-pedalled and attempted to constrain public interest standing.\(^{154}\) *Canadian Council of Churches v. R.*,\(^{155}\) and *Hy and Zel's Inc. v. Attorney General of Ontario*\(^{156}\) are cases illustrative of this narrower approach to standing.

In the *Canadian Council of Churches* case the issue was whether the Canadian Council of Churches should have been granted standing to proceed with an action challenging, almost in its entirety, the validity of the amended Immigration Act 1976, which came into effect on 1 January 1989. The court was of the view that the Canadian Council of Churches lacked standing to seek a public interest challenge. Cory, J., however, conceded that the "increasing recognition of the importance of public rights in our society" confirmed the need to extend the right to standing from the narrow private law tradition which "limited party status".\(^{157}\) Justifying the refusal to accord standing, in the instant case, Cory, J., said:

\(^{153}\) *ibid.*  
\(^{154}\) See, e.g., Bowal, Peter and Cranwell, Mark, 'Case Comment: Persona Non Grata: The Supreme Court of Canada Further Constrains Public Interest Standing' *(1994)* 39 Alberta L. R. 192.  
\(^{155}\) *[1992]* 1 R. C. (Const.) 610.  
\(^{157}\) *supra.*, note 155, at p. 619.
"The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that designation implies. Thus, undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner."\(^{158}\)

Cory, J., was of the view that when public interest standing is sought consideration must be given to three matters: (i) it must be considered whether there was a serious issue raised as to the validity of the legislation is question; (ii) it must be established whether the plaintiff is directly affected by the legislation or, if not, whether the plaintiff has a genuine interest in its invalidity; and (iii) it must be considered whether there is another reasonable and effective way to bring the issue before the court.\(^{159}\) In the instant case, Cory, J., was of the opinion that the first and second considerations were satisfied; yet, there appeared to be an inability, on the part of the Canadian Council of Churches, to satisfy the third requirement. Consequently, standing was denied.

In *Hey and Zel's Inc.*,\(^ {160}\) the Supreme Court of Canada adopted a restrictive approach to standing; this case followed the Canadian Council of Churches, in terms of a retreat, where extending the scope of public interest standing was concerned. The majority view\(^ {161}\) was that there was a more effective way to bring the validity of the legislation before the court and, therefore, standing was denied. L'Heureux-Dube and McLachlin, JJ., dissented.

\(^ {158}\) ibid.
\(^ {159}\) ibid.
\(^ {160}\) supra., note 156.
L’Heureux-Dube, J., in a powerful dissent outlined the rationale for extending the scope of standing in public interest litigation:

"The basic thrust of public interest standing is to provide an avenue of access to the courts to those who, because they have no cause of action under traditional rules, lack the means of bringing their concerns before the courts. The expanded rules of public interest were intended to accommodate such persons so that legislation would not be otherwise immunized from attack."  

L’Heureux-Dube, J., was of the view that the appellants, in this case, were seeking standing to argue the constitutionality of a law by which they were “directly and particularly affected.” Thus, his Honour was of the opinion that standing should have been accorded to the appellants.

It is submitted, however, that despite this recent setback, whereby the Canadian Supreme Court appears to have narrowed the scope of standing, Canada still offers one of the most liberal approaches to standing where public interest applications are concerned.

VII. Locus Standi in India.

The Indian courts have been remarkably articulate in promoting human rights; consequently, social action litigation and public interest litigation has witnessed an enormous expansion in the sub-continent. Wade, comparing the foundations of judicial review in Britain and India, states:

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161 per Major, J., Lamer, C. J. C., La Forest, Sopinka, Gonthier, Cory and Iacobucci, JJ, concurring.
162 supra., note 156, at p. 645.
163 ibid.
"In India, in particular, the courts are willing to entertain the actions brought by social workers and social action groups on behalf of backward or deprived classes of citizens who are too weak to assert their rights, for example where protective labour laws are violated by employers. This type of case appears to go well beyond judicial review, since many of the rights in questions are ordinary rights in private law. What is more, it seems that the Supreme Court and many of the High Courts have made special arrangements for public interest litigation cells which can receive informal complaints such as letters from prisoners, newspaper reports, and so forth, and list cases for hearing if they seem deserving."

A powerful justification for the expansion of the role of judicial review is provided by Krishna Iya who argues that there is a need to move towards developing a third world jurisprudence.\(^\text{165}\) Krishna Iyer, explaining the rationale for this view, states as follows:

"Third world countries share certain common characteristics. They are generally rich in natural resources but appalling in human conditions; feudal and colonial elite mentality, but urgently insistent on social, economic and political justice with an egalitarian slant ubiquitously corrupt, even despotic, in the exercise of power even while it is geared to development of human goals; wittingly imitative of the West in their legal culture and judiciary processes (as well as legislative and executive methodology) while private pressures and socialist expectations desiderate a radical, humanist, pragmatic and people-based government. We are concerned here with the legal system which is but a reflection of the economic structure and political stature. The steam can never rise above the source.\(^\text{166}\)

According to Gomez,\(^\text{167}\) it is procedurally "the metamorphosis which the concept of locus standi has undergone\(^\text{168}\) which lends public interest litigation its most salient characteristic. "The crux of this metamorphosis is the acceptance by the Indian courts of the view, that almost everyone – acting bona fide – can canvas the interests of a third party before the court.\(^\text{169}\)"

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\(^\text{166}\) ibid., at p. 133 – 134.

\(^\text{167}\) Gomez, Mario, In the Public Interest - Essays on Public Interest Litigation and Participatory Justice [Colombo: Legal Aid Centre, University of Colombo, 1993].

\(^\text{168}\) ibid., at p. 13.
Thus, the Indian courts appear to offer the most flexible approach to standing when compared with the other jurisdictions examined in this chapter. The growth of public interest litigation in India has resulted in the courts being more accessible to the vast majority of the people. Rizvi,\textsuperscript{170} referring to the importance attached to public interest litigation, makes the following observation:

"Until the emergence of Public Interest Litigation, justice was a remote reality for the mass of illiterate, underprivileged and exploited persons in the country, most of whom are unaware of the laws and their legal rights. Bonded labour, tortured persons, under-trials, contract labourers and a host of others could get no justice since no one could take up their case for lack of 'Locus Standi'."

Public interest litigation, in India, has performed a very useful function inasmuch as the courts have been able to function as a check upon the exercise of arbitrary power and, at the same time, facilitate access to justice. The judicial philosophies of Justices Bhagwati and Krishna Iyer, in particular, served, in no small measure, to steer the Indian judiciary along the path of expanding the frontiers of judicial review by relaxing the rules of standing and facilitating the development of public interest litigation (or, more appropriately described as, social action litigation). Social action litigation assures "the common man that he is a valuable and important consumer of justice and injustices inflicted on him will not remain unattended and the constitutional promises made to him will not remain unfulfilled."\textsuperscript{171}

\textsuperscript{169} \textit{ibid.}, at pp. 13 – 14.
\textsuperscript{170} Rizvi, Syed Iqbal Hadi, \textit{Public Interest Litigation Liberty and Justice for All} [Delhi: Renaissance Publishing House, 1991], at p. 3.
\textsuperscript{171} Sharma, Mool Chand, \textit{Justice P. N. Bhagwati Court Constitution and Human Rights} [Delhi: Universal Book Traders, 1995], at p. 63.
Referring to the growth of social action litigation Upendra Baxi expresses the view that the Supreme Court of India is at last becoming a Supreme Court for Indians. Tracing the growth of social action litigation, in India, he states:

"The transformation from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary. A post emergency phenomenon, the transformation is characterized chiefly by judicial populism. The court is augmenting its support base and moral authority in the nation at a time when other institutions of governance are facing a legitimate crisis. In the process, like all political institutions, the court promises more than it could deliver and is severely exposed to the dynamics of disenchantment."

It should be noted, however, that certain writers have expressed concern that the Indian Supreme Court is not performing its proper constitutional function. They argue that the court is not equipped to make decisions which impinge upon legislative and administrative functions; they make the point that the court should, therefore, confine itself to its proper sphere. Andhyarujina, for instance, justifying such a proposition, states:

"Today the question is not whether the courts should be active or restrained nor whether courts make public policy or not. Such a debate seems futile and sterile. The real question is: What should be the field of the courts' policy-making and activism and do the courts have competence in that field? It is plain that the judiciary is the least competent to function as a legislative or administrative agency. For one thing, courts lack the facilities to gather data or make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if the courts have to rely on their own knowledge and research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates. Moreover, since courts mandate for isolated cases, their decrees make no allowance for the differing and varying situations which administrators will encounter in applying

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173 *ibid.*, at p. 289.

the mandates in other cases. Courts have also no method to reverse their orders if they are found unworkable or requiring modification."

Therefore, the expansion of the frontiers of social action litigation, and the promotion of very liberal rules of standing, has resulted in calls for caution and accountability on the part of the judiciary. At the core of such apprehension lies a concern for the role of the judiciary. Yet, it is submitted that in a third world country, such as India, it is for the judiciary to step in so as to ensure that certain pressing social and moral obligations are fulfilled if notions such as the ‘rule of law’ and ‘human rights’ are not to remain empty rhetoric.¹⁷⁵

It was, perhaps, as a consequence of the realization, on the part of the Indian judiciary, that it was necessary to articulate a coherent ideology if human rights were to be made meaningful and access to justice possible. Consequently, social action litigation was developed and, as a corollary, an expansion of the rules of standing became imperative. A long and impressive array of cases resulted in an expansion of social action litigation, which was essentially a species of public interest litigation, accompanied by the necessary widening of the rules of standing.¹⁷⁶ In Sunil Batra v. Delhi Administration¹⁷⁷ the Supreme Court of India acting upon a letter, addressed to it by a prisoner, who complained that a fellow prisoner had been assaulted by a prison warden, developed what is now referred to as the court’s epistolary jurisdiction. The

Supreme Court even went to the extent of converting the letter into a writ of *habeas corpus*. This case is illustrative of the attitude demonstrated by the Indian Supreme Court, whereby, it is prepared to flex the rules of standing so as to make human rights more meaningful and access to justice possible. The prisoner who wrote the letter was neither a person aggrieved nor was he a person who was a relative of the person whose rights were violated; the court, however, was prepared to act upon a mere letter so as to fulfil its constitutional obligations and to ensure the observance of the rule of law.\textsuperscript{178}

The Supreme Court of India has favoured a very broad concept of standing so as to ensure that there is no denial of the right of access to justice. The court is also concerned that it does not permit an illegality to be perpetrated due to outdated notions of standing - deeply rooted in Anglo-Saxon jurisprudence. The court has increasingly been of the view that such notions of standing should have no place in a third world democracy, such as India, where consumers of justice might find human rights to be hollow if they cannot be vindicated due to the imposition of procedural handicaps. In *Bandhua Mukti Morcha v. Union of India*\textsuperscript{179} the Supreme Court, articulating a coherent ideology, in relation to public interest litigation, said:

"Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution."

\textsuperscript{178} See also, *Baxi v. State of U. P.*, (1986) 4 S. C. C. 471, where a letter addressed to the court by two academics, alleging that inmates in a protective home in Agra were being kept under inhuman and degrading conditions (in a manner that violated article 21 of the Constitution), was converted into a writ application.

\textsuperscript{179} *A. I. R. 1984 S. C. 802*, at p. 811.
In *Gupta v. Union of India*\(^{180}\) Bhagwati, J., justified the adoption of liberal rules of standing on the basis that it was essential for the maintenance of the rule of law. He said:

"[A]ny member of the public having sufficient interest can maintain action for judgment, redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. This is also absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objective law.\(^{181}\)

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**VIII. Conclusion.**

We have examined, in this chapter, the rules of standing with particular reference to public interest litigation. Of the jurisdictions surveyed, in our opinion, India appears to have the broadest possible rules of standing followed closely, perhaps, by Canada (despite certain retrogressive developments in the latter jurisdiction, in the recent past.).

Where personal standing is concerned, especially, in circumstances where the person aggrieved is before court, the jurisdictions surveyed appear to observe uniform principles. It is in respect of public interest litigation that there appears to be a divergence of approaches being adopted. It is also in this area that the courts have to perform a useful function in relation to the rule of law. The Sri Lankan judiciary, whilst demonstrating a healthy attitude towards liberalizing the rules of standing, has, certainly, not been as articulate in doing so as the Indian or Canadian Supreme Court. Public interest litigation in Sri Lanka is approached with an abundance of caution: this is a disappointing development and does not augur well for advancing a rights culture.

\(^{180}\) *A. I. R. 1982 S. C. 149.*
It must be acknowledged that rules of standing serve a very important function by filtering out applications which are obviously lacking in merit, or which are instituted by meddlesome busybodies and frivolous applicants. The rules of standing are important so that the courts have the necessary discretion to be able to exercise their constitutional function properly without being flooded with litigation. However, if the rules of standing in a given jurisdiction are over-rigid there is a danger that the court will fail in the performance of its constitutional duty: to ensure that the government is accountable and governs according to law. Additionally, rigid rules of standing would amount to a denial of the fundamental right of access to a court. In such a jurisdiction it would be difficult for the rule of law to prevail if access to justice is denied to public-spirited persons, merely, because of a lack of standing.

\[181\] *ibid.*, at p. 194.

I. Introduction.

'Natural justice' is a concept of great antiquity; it has even been used as a synonym for natural law. "Jus naturale or natural law was originally the Stoic philosophical conception of a universal ideal of good conduct upon which all law should be founded and which, as some asserted, ought not to be overridden by any other laws however made." Consequently, *jus naturale*, in the Roman law, was regarded as a desirable ideal to which law should conform.

The rules of natural justice, as they are presently conceived, are of comparatively recent origin. Broadly, natural justice is regarded, today, as an aspect of procedural fairness; it encompasses the twin principles *nemo judex sua causa* - no man should be a judge in his own cause, and *audi alteram partem* - no man should be condemned unheard. The modern formulation of natural justice appears to be wide enough to admit of yet another principle, i.e., a duty to give reasons for a decision. This chapter will endeavour to examine, what in our opinion constitutes, the three most important

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2 ibid., at p. 6.
4 See, e.g., Carr, Sir Cecil Thomas, *Concerning English Administrative Law* [New
principles of natural justice in terms of advancing rights consciousness.

Natural justice, as the term is presently understood, is an important tool for advancing rights consciousness: it entails the protection of certain process rights of the subject. The process rights, which the rules of natural justice seek to protect, spring from certain core values in public law. The right to due process, of which natural justice undoubtedly is an integral part, provides protection for certain public law values but does not, however, treat these values as rights. These key public law values encompass autonomy, dignity, respect, status and security.\(^5\)

The principles of natural justice, which ensure due process, in essence, spring from these public law values. The value 'autonomy' refers to the ability to live under one's own laws,\(^6\) or self-regulation. In essence, it refers to one's capacity to have a certain measure of freedom within one's sphere or zone of influence. The rules of natural justice, particularly the right to a hearing before one is deprived of a right, interest or legitimate expectation can be said to be rooted to this value.

'Dignity' as a value refers to a person's honour or reputation. The fact that, for instance, a person should be given a fair hearing prior to a prejudicial decision being made, which affects his rights, interests or legitimate expectations, is consonant with this important value of dignity. This value ensures that a person must be given an opportunity

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of protecting his honour and reputation.

'Respect' for the person is a measure of individual worth. According to Birks, "[a] society which holds out to its members the promise that they do all have equal worth must allow them to vindicate that interest against those who treat them as having little worth and flout the restraints which allow each life an equal chance to fulfill itself." The emerging rule of natural justice, which appears to encompass a duty to give reasons for a decision, may spring from this value.

'Status' as a value relates to a person's position or standing in society. Here too, the rules of natural justice are aimed to protect this value. A person should not be allowed to suffer a loss of standing in society without due process: standing in society is in essence, therefore, a value which must be preserved.

'Security' as a value is a condition of being protected from or not exposed to danger. The rules of natural justice ensure that an individual is protected from unwarranted intrusions into his personal liberty or sphere of influence without due process. Thus, the public law value of 'security' is also linked with the rules of natural justice in a very significant manner. It is submitted that the requirements of natural justice or procedural fairness could be considered to be an aspect of practical reasonableness.

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6 ibid., at p. 225.
"that one is to favour and foster the common good of one's communities." According to Finnis, the concept of justice refers to situations where three elements are found together.\(^9\) The first element is "other-directedness". "[J]ustice has to do with one's relations and dealings with other persons; it is 'inter-subjective' or inter-personal. There is a question of justice and injustice only where there is a plurality of individuals and some practical question concerning their situation and/or interactions vis-a-vis each other."\(^10\) The second element of the concept of justice is that of duty. The term duty refers to what is owed or due to another and "correspondingly of what that other person has a right to".\(^11\) The third element in the relevant concept of justice is that of equality which, to avoid misunderstandings, could more appropriately be thought of as 'proportionality', or even 'equilibrium or balance'.\(^12\)

The principles of natural justice, as developed by the judiciary, very clearly encompass all the elements of Finis's formulation of justice. Thus, the right to due process is just as important as substantive rights to achieve the objectives of justice. A society which denies or substantially curtails the process rights of its subjects would fail to satisfy the ideals of justice. Dworkin,\(^13\) referring to process rights in the criminal law, states:

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\(^9\) \textit{ibid.}, at p. 161.

\(^10\) \textit{ibid.}

\(^11\) \textit{ibid.}, at p. 162.

\(^12\) \textit{ibid.}, at p. 162 - 163.

"People have a profound right not to be convicted of crimes of which they are innocent. If a prosecutor were to pursue a person he knew to be innocent, it would be no justification or defense that convicting that person would spare the community some expense or in some other way improve the general welfare. But in some cases it is uncertain whether someone is guilty or innocent of some crime. Does it follow, from the fact that each citizen has a right not to be convicted if innocent, that he has a right to the most accurate procedures possible to test his guilt or innocence, no matter how expensive these procedures might be to the community as a whole?"

Dworkin's reference, to the importance of protecting process rights in the criminal law, is also relevant to our present discussion in relation to process rights in administrative law. The foundation of the rules of natural justice, as we know them today, is deeply rooted to notions of due process in the criminal law. Thus, whilst it is undoubtedly important that due process is followed in criminal trials it is equally important that administrative action also satisfies the requirements of due process, albeit, at a lower level.

The right to due process, where criminal trials are concerned, has received constitutional protection, as a fundamental right, in Sri Lanka. However, the Sri Lankan constitution does not accord fundamental right status to process rights where civil rights and obligations are determined. The European Convention on Human Rights (ECHR), in contrast, protects the procedural right to a fair trial in relation to the determination of a person's civil rights and obligations or any criminal charge against him or her. The ECHR is, therefore, wider in scope than article 13 (3) of the Sri Lankan Constitution.

\[14\] See, e.g., article 13 (3) of the Constitution of the Democratic Socialist Republic of Sri Lanka: 'Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.'
It should be noted, however, that even though process rights may be given constitutional protection or convention status they are often qualified. Yet, article 6 of the ECHR has been subjected to less controversy than other articles. Article 6 of the ECHR has, therefore, helped in advancing rights consciousness, in administrative law, by facilitating the adoption of common standards in evaluating administrative action in terms of whether such action satisfies the requirements of procedural fairness of which natural justice is an important component. Additionally, article 13 of the ECHR ensures that everyone whose rights and freedoms, as set forth in the Convention, are infringed has the right to an effective national remedy. This Convention right is also important for the advancement of rights consciousness in society.

It is of relevance to observe that the Universal Declaration on Human Rights (UDHR) provides a sound rubric for the advancement of rights consciousness in society. For instance article 10 of the UDHR provides as follows:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

Thus, article 10 of the UDHR explicitly spells out the need for procedural fairness in the determination of a person’s rights and obligations and in circumstances when there is a criminal charge against that person.

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15 See, e.g., article 6 of the European Convention of Human Rights.

16 See, for e.g., article 15 of the Constitution of the Democratic Socialist Republic of Sri Lanka; see also articles 15-18 of the ECHR which place certain restrictions upon the rights protected by the Convention.

Additionally, article 12 of the UDHR\(^{18}\) seems to implicitly recognize that intrusions into a person's sphere of autonomy, which encompasses privacy, family, home, correspondence, honour and reputation, can only be condoned if it is in accordance with standards of fairness. It is submitted, therefore, that principles of natural justice have a very important role to play in the protection of such fundamental rights. The failure by a decision-maker to comply with standards of procedural fairness can, it is submitted, result in arbitrary action which may fall short of the requirements posited by article 12 of the UDHR.

Article 14 of the International Covenant on Civil and Political Rights also accords fundamental right status to process rights. Similarly, article 8 of the American Convention on Human Rights\(^{19}\) explicitly accords fundamental rights status to the right to a fair trial. In addition the right to privacy,\(^{20}\) rights of the family,\(^{21}\) the right to property\(^{22}\) and equal protection\(^{23}\) are also recognized as fundamental human rights. The recognition of such rights as fundamental rights necessarily implies that a person is not to be deprived of such rights without adequate procedural safeguards. Consequently, process rights are in built into the fundamental rights that have been explicitly spelt out.

In this chapter we argue that the right to due process should be protected not because it enjoys constitutional protection, protection which is invariably qualified; not

\(^{18}\) "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

\(^{19}\) American Convention on Human Rights, 1969.

\(^{20}\) Article 11.

\(^{21}\) Article 17.

\(^{22}\) Article 21.
because it enjoys convention status, because derogation is permissible: the right to due process transcends such constitutional or convention rights. It deals with an issue which is much more fundamental. Lying at the core of our submission is our view that the protection of process rights is necessary for the common good of mankind. It is a sign that our civilization has come of age.

It is now apposite to examine certain incidents of natural justice so as to consider how they help to advance rights consciousness. For the purpose of our present discussion we will examine the rule against bias, the right to a fair hearing and the newly evolving principle of the duty to give reasons.

II. The Rule Against Bias.

(a) The Need for Impartiality in the Process of Decision-making.

The term bias is wide enough to encompass an operative prejudice whether conscious or unconscious.\textsuperscript{24} According to de Smith,\textsuperscript{25} procedural fairness requires "that the decision-maker should not be biased or prejudiced in a way that precludes fair and genuine consideration being given to the arguments advanced by the parties. Although perfect objectivity may be an unrealisable objective, the rule against bias thus aims at

\begin{itemize}
  \item Article 24.
\end{itemize}
preventing a hearing from being a sham or ritual or a mere exercise in "symbolic reassurance", due to the fact that the decision-maker was not in practice persuadable. The rule against bias is concerned, however, not only to prevent the distorting influence of actual bias, but also to protect the integrity of the decision-making process by ensuring that, however disinterested the decision-maker is in fact, the circumstances should not give rise to the appearance or risk of bias."

The requirement that the decision-maker should act impartially when making decisions is often said to be one of the most elementary requirements of fair treatment.\(^{26}\) It is also recognized as a fundamental human right.\(^{27}\) It is quite possible that a decision-maker may be biased for good reasons, bad reasons or no reasons. Yet, bias or prejudice in the process of decision-making militates against the requisites of fairness. The rule against bias is wide enough to accommodate two broad species, i.e., (i) bias in a strict sense, encompassing personal bias, systemic bias and cognitive bias, and (ii) the loss of independence due to, perhaps, reasons such as bribery or duress. Each of these different types of bias warrant some analysis.

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\(^{27}\) See, e.g., *Locabail (UK) Ltd. v. Bayfield Properties Ltd.*, [2000] All E. R. 65, at p. 69, where the Court of Appeal observed: "In the determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights and
(b) Personal Bias.

Personal bias "emphasizes factors personal to the official. It includes personal preferences or feelings; a personal interest, whether financial or emotional; or a personal connection to the matter through the interests of family or friends. This list is illustrative rather than comprehensive, and the guiding test should be whether, because of some factor, the judge or other official has prejudged or is rendered incapable of properly judging or deciding the issue."\(^{28}\) Personal bias is, perhaps, the most common type of bias encountered and has been the subject of much litigation in the Commonwealth. It essentially militates against fair treatment and results in a denial of process rights. A decision infected by personal bias is a decision arrived at based on irrelevant considerations and, therefore, constitutes an abuse of power. Operative bias, on the part of a decision-maker affects one's faith in the system and does not augur well for confidence to be reposed in the process of decision-making. As Lord Denning\(^{29}\) observed:

"Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased"."

What is, fundamentally, at issue is the retention of public confidence in the system, and maintaining the independence of the process of decision-making. "The reason for the strictness of the rule [against bias] can be traced more to considerations of public policy than to the actuality of the bias affecting the judge.\(^{30}\)

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Personal bias can infect a decision, and thereby render it amenable to challenge, if a decision-maker has a pecuniary interest in the matter,\textsuperscript{31} professional\textsuperscript{32} or family\textsuperscript{33} links with the parties, intermingles functions such as where the same person hears the case at first instance and in appeal\textsuperscript{34} or functions as investigator and prosecutor,\textsuperscript{35} or is prejudiced because of his political views or prejudices.\textsuperscript{36} The rule against bias is rather absolute in its operation. A decision is either vitiated by bias or it is not.

The English courts tend to be more willing to hold that a decision-maker's decision is vitiated by bias more readily in circumstances where a pecuniary interest is involved. The leading authority in this area is the case of \textit{Dimes v. Grand Junction Canal Proprietors.}\textsuperscript{37} In this case the Lord Chancellor, Lord Cottenham, had affirmed decrees made by the Vice-Chancellor in litigation between Dimes and the canal proprietors. Dimes subsequently discovered that the Lord Chancellor had for a long period held shares in the canal company in his own right and as a trustee. Dimes appealed to the House of Lords against all the decrees made by the Lord Chancellor on the ground that he was disqualified by interest. Lord Campbell, setting aside the decrees made by the


\textsuperscript{37} (1852) 3 H. L. Cas. 759.
Lord Chancellor, said:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred." 38

Thus, where a decision-maker has a pecuniary interest in the subject matter of the dispute his decision is likely to be infected by bias and is liable to be set aside.

Where other factors were concerned, for a long period of time, the courts grappled with two tests for bias. One test was the reasonable suspicion of bias and the other was the real likelihood of bias. The former test was more easily satisfied than the latter. It was based on the premise that nothing was to be done which created even a suspicion that there had been an improper interference with the course of justice. 39 The latter test looks at the decision from the point of view of the reasonable man. 40 If a reasonable man would think that it was likely or probable that the decision-maker was biased, then the decision would be vitiated by bias. Here the court substitutes itself for the reasonable man to arrive at the conclusion that the decision was infected by bias and should therefore be set aside.

The House of Lords has, in R. v. Gough, 41 clarified the law relating to bias. The House of Lords held that in all cases of apparent bias the test to be applied was the same,

38 ibid., at p. 793.


i.e., whether in the circumstances of the case there appeared to be an apparent danger of bias concerning the decision-maker so that the requirements of justice militated against allowing the decision to stand.

In Gough the appellant was indicted on a single count of conspiring to commit robbery. His brother had been discharged at the committal hearing on an application made by the prosecution. At the trial the brother was referred to by name and a photograph of him and the appellant was shown to the jury and a statement which contained the name and address of the brother was read to the jury. Subsequent to the conviction of the appellant, his brother, who was present in court, started shouting. At this point one of the jurors recognized him as her next door neighbour. When this matter was brought to the notice of the trial judge he took the view that he was functus officio. The juror, who was subsequently interviewed by the police, tendered an affidavit to the effect that she was unaware of the connection until after the jury had delivered its verdict. On appeal by the appellant on the basis that there had been a serious procedural irregularity, the Court of Appeal held that the proper test to be applied was whether there was a real danger of the appellant being denied a fair trial and upon being satisfied that there was no denial of such a fair trial proceeded to dismiss the appeal.

When the case went up in appeal, to the House of Lords, the House of Lords took the opportunity to review the law concerning the proper test to be applied in all cases of bias. Dismissing the appeal, the House of Lords held that the proper test to be applied in all cases of apparent bias was the same. The test was whether there was a 'real danger of bias', concerning the member of the tribunal in question, so that justice required that
the decision should not stand. Lord Goff of Chieveley said that, for the avoidance of doubt, he preferred "to state the test in terms of real danger of rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias." The House of Lords was also of the view that there was only one established special category of situation where bias was imputed and that was where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings.

The decision in Gough is salutary due to the fact that it brings a measure of certainty in relation to circumstances under which it is possible to challenge a decision as being infected by bias. Doubt has, however, been expressed as to whether the ratio in Gough is wide enough to encompass all types of decision making bodies or whether it is limited to only those specified.

In R. v. Inner West London Coroner, ex parte Dallaglio the test adopted in Gough was followed by the Court of Appeal. In this case the coroner had refused to resume inquests into the deaths of certain victims of the 1989 Marchioness disaster after the adjournment of those inquests pending the outcome of criminal proceedings. In a meeting with journalists the coroner had described one of the applicants for judicial review, the mother of a victim, as 'unhinged'. This statement was clearly inappropriate. The applicants sought, inter alia, to impeach the decision of the coroner on the ground of bias. The Court of Appeal granted the application for judicial review. Simon Brown,

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42 ibid., at p. 670.


L. J., after an analysis of the reasoning in *Gough*, derived a number of propositions from it. Referring to the test for bias adopted in *Gough* he said:

"The question upon which the court must reach its own factual conclusion is this; is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility."

In *R. v. Secretary of State for the Environment, ex parte Kirkstall Valley Campaign Ltd.*,[46] the applicant, a community action group concerned with the interests of the local residents, sought to challenge the grant of outline planning permission by an urban development corporation (as local planning authority) for retail development on part of a rugby club's property. The applicant alleged that the decision of the corporation was vitiated by bias inasmuch as three members and an officer of the corporation who had participated in the process of decision-making had disqualifying pecuniary or personal interests amounting to apparent bias. The question that arose for determination was whether the test for bias was only limited to cases concerning judicial and quasi-judicial bodies or whether it also applied to bodies such as a local planning authority.

Sedley, J., had no doubt that the test for bias was not so confined. The application for judicial review was, however, dismissed on other grounds. Referring to the test for bias laid down in *Gough* his Honour observed that there was "nothing in the jurisprudence of *R. v. Gough* which necessarily limits to judicial or quasi-judicial tribunals the rule against the participation of a person with a personal interest in the

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[45] *ibid.*, at p. 151.
In Pinochet (No 2) the House of Lords took the opportunity to further clarify the Gough principle. In this case, Amnesty International had sought, and was allowed, to intervene in a case where Senator Pinochet, the former Chilean leader, had sought judicial review of a decision, made by a metropolitan stipendiary magistrate, to issue two provisional warrants for his arrest. The High Court granted judicial review of the decision and quashed one warrant but stayed the quashing of the second warrant to enable an appeal to the House of Lords on the question of the immunity extended to a former head of state in respect of extradition proceedings. The House of Lords, by a majority of three to two, allowed the appeal and restored the second warrant.

It was subsequently discovered that Lord Hoffman, one of the Law Lords that delivered judgment for the majority, had connections with Amnesty International. Lord Hoffman was both a director and the chairperson of the Amnesty International Charity Ltd., which was set up to carry out the purposes of Amnesty International which were of a charitable character. Additionally, it was alleged that Lord Hoffman’s wife, Lady Hoffman, worked at Amnesty International in an administrative capacity. These facts had not been disclosed to the parties to the litigation because it was Lord Hoffman’s view that

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47 ibid., at p. 321.
50 Amnesty International Charity Ltd., was a company, limited by guarantee and was set up consequent to the judgment of Slade, J., in McGovern v. Attorney General, [1982] Ch. 321, where a trust, set up by Amnesty International, to promote some of its objectives, was refused charitable status.
his connection with Amnesty International was a matter of public record. In fact Senator Pinochet’s lawyers had even contributed towards certain charitable causes espoused by Amnesty International Charity Ltd., consequent to an appeal made by Lord Hoffman.

When this matter, relating to Lord Hoffman’s connections with Amnesty International, was brought to the notice of the House of Lords by Senator Pinochet, in Pinochet (No 2), their Lordships were unanimously of the view that, in the circumstances, the disqualification attaching to Lord Hoffman was automatic and operated as a matter of law.

Lord Browne-Wilkinson, explaining the rationale underpinning this proposition, said:

"If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to a suit. There is no room for fine distinctions if Lord Hewart CJ’s famous dictum is to be observed: it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’ (see R. v. Sussex Justices, ex p. McCarthy [1924] 1 KB 256 at 259, [1923] All E R Rep 233 at 234).”

Lord Browne-Wilkinson was also of the view that the fact that Lady Hoffman was employed by Amnesty International and the fact that Lord Hoffman had solicited funds on behalf of Amnesty International’s charitable activities was irrelevant to the present application. His Lordship was of the view that these matters were relevant only if Senator Pinochet was required to show, as in Gough, that there was a real danger of bias. Here the disqualification was automatic and did not, in any way, depend upon the

\[supra.,\] note 48, at p. 588.

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implication of bias.\(^{52}\)

Lord Nolan expressed the view that “where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.”\(^{53}\) Lord Hope of Craighead was of the view that a judge was obliged to disclose any interest that he had in a particular case and that “if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand.”\(^{54}\) His Lordship explained that “[t]he purpose of the disqualification was to preserve the administration of justice from any suspicion of impartiality.”\(^{55}\)

The rule against bias is so well established that it is universally accepted as a fundamental of good administration. Consequently, it is axiomatic that most Commonwealth countries adopt this important constituent component of natural justice and procedural fairness. It is also an important tool for vindicating the fundamental human right to impartiality in the process of decision-making. Assailing decisions that are vitiated by bias makes it possible for judicial review to be used as a tool for vindicating fundamental human rights and to, thereby, advance rights consciousness and the rule of law in a country. Thus, judicial hostility towards decisions that are infected by bias is fairly well entrenched in the Commonwealth.

In Canada, for instance, the courts have held that the decision of a decision-maker

\(^{52}\) ibid., at p. 589.
\(^{53}\) ibid., at p. 592.
\(^{54}\) ibid., at p. 593.
\(^{55}\) ibid.
could be set aside if it is infected by personal bias. Personal bias can arise if there is an apparent advantage to the other party. The manner in which a decision can be infected by bias, when there is an apparent advantage to another party, is illustrated by the case of Chipman Wood Products where the Workplace, Health, Safety and Compensation Commission terminated the workers compensation benefits of an injured employee. The employee, being aggrieved by the said order, appealed to the appeals tribunal, submitting that he was unable to work. A government Minister, in whose constituency the employee resided, represented the said employee at the hearing but the employer did not appear. An award was made by the tribunal which favoured the employee. The employer appealed against this determination arguing that the Minister's appearance before the tribunal created a reasonable apprehension of bias. The New Brunswick Court of Appeal took the view that the appeal should be allowed, but that the court should, in the circumstances, substitute its own order for that of the tribunal. Consequently, the outcome would remain the same due to the fact that a review of the evidence supported the decision of the appeals tribunal. Thus, the Chipman Wood Products case indicates that the Canadian courts are prepared to set aside a decision, on the basis that it is infected by bias, if such a decision is to the apparent advantage of the other party.


58 supra., note 57.
The Canadian courts have also set aside decisions which, because of the conduct of a member, led to an inference of bias. In the \textit{Newfoundland Telephone Co.} case, Cory, J., delivering the judgment of the Supreme Court of Canada, said:

"Everyone appearing before administrative boards is entitled to be treated fairly. It is an independent and unqualified right. [It] is impossible to have a fair hearing or to have procedural fairness if a reasonable apprehension of bias has been established. If there has been a denial of a right to a fair hearing it cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. Procedural fairness is a necessary aspect of any hearing before a tribunal. The damage created by the apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it is void."

Yet, when bias is alleged on the footing that the decision-maker has participated in the previous decision the Canadian courts have been more reluctant to render such a decision invalid. This is because the mere fact that there has been a second hearing before the same adjudicator, without the presence of any other factor, would not create a reasonable apprehension of bias. What is of pivotal importance is, however, that a reasonable apprehension of bias must be established. Once a reasonable apprehension of bias is affirmatively established, then, it would militate against the requisites of a fair hearing rendering the resulting decision open to attack.

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The right to a fair hearing has, therefore, been held to be an unqualified right; consequently, a decision arrived at by a process of the denial of the right to a fair hearing (as a result of bias) would be rendered void. As Le Dain, J., observed, "[t]he right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for the court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."\(^{62}\)

In Sri Lanka a decision which is infected by personal bias will be rendered invalid and our courts have shown a willingness to be guided by the vast jurisprudence developed in the Commonwealth in relation to this area. Thus, in *Karavita v. Abeyratne*\(^{63}\) the Court of Appeal set aside the decision of an Agricultural Tribunal due to the reason that the brother of the respondent was a member of the Tribunal.\(^{64}\) de Alwis, J., said that "whether or not the particular member of the Tribunal was actually biased or not against the appellant is immaterial. Reasonable and right-minded people would think that he was biased."\(^{65}\)


\(^{63}\) [1983] 2 Sri L. R. 306.

\(^{64}\) The decision of the Court of Appeal was also influenced by the fact that the tribunal had not given any reasons for its determination. This aspect of the judgment will be examined in part IV.

\(^{65}\) *supra.*, note 63, at p. 309.
In Re Ratnagopa\textsuperscript{66} the respondent was summoned to give evidence before a Commission of Inquiry. He refused to do so. When asked to show cause as to why he should not be punished for contempt, the respondent argued that that he had cause to show inasmuch as he had a reasonable apprehension that the Commissioner would be biased against him in his consideration of the evidence. T. S. Fernando, J., pointed out that the proper test to be applied would be an objective one: "would a reasonable man, in all the circumstances of the case, believe that there is a real likelihood of the Commissioner being biased against him?"\textsuperscript{67} In Bandaranaike \textit{v.} de Alwis,\textsuperscript{68} the Supreme Court issued a writ of prohibition on a member of a Special Presidential Commission of Inquiry because he had financial dealings with the wife of a person whose conduct was the subject matter of the inquiry. Samarakoon, C. J., said that there was "both a real likelihood and a reasonable suspicion that his judgment was warped by favouritism though ..... there [was] no proof of it."\textsuperscript{69} It appears, therefore, that the Sri Lankan courts favour an objective test, for personal bias, based on the real likelihood of bias.\textsuperscript{70}

It is submitted, however, that where personal bias is concerned what is most important is the recognition of the principle that a person should be entitled to an impartial decision. It is the entitlement to an impartial decision that must be vindicated by judicial review. The actual test adopted, whether it be "the real likelihood",

\textsuperscript{66} (1968) 70 \textit{N. L. R.} 409.

\textsuperscript{67} \textit{ibid.}, at p. 435.

\textsuperscript{68} [1982] 2 \textit{Sri L. R.} 664.

\textsuperscript{69} \textit{ibid.}, at p. 675.

\textsuperscript{70} See, e.g., \textit{Simon v. Commissioner of National Housing}, (1972) 75 \textit{N. L. R.} 471.
'reasonable suspicion' or 'real danger' test, is not so relevant provided that public confidence can be maintained in the process of decision-making. Thus, judicial review must be used to protect the integrity of the decision-making process and, thereby, help to vindicate the right to impartiality in the process of decision-making which is of pivotal importance if the rule of law is to be advanced.

(c) Systemic Bias.

According to Galligan, the term systemic bias is used to refer to "those inclinations and pre-dispositions which each person has, not because of a personal interest or by a deliberately adopted attitude or stance, but as a result of belonging to a social class or coming from a certain kind of background or working within a particular organizational context. The idea is that, within any such milieu, certain distinctive attitudes will prevail and will influence the actions and views of anyone within it." The effect of such systemic bias is the same as that of personal bias. "[I]t distorts legal and administrative processes by introducing illegitimate reasons. Its very insidiousness, however, makes it an even more serious threat than more blatant forms of bias to the fair treatment of those affected."

Where decision-makers are influenced by institutional opinion, resulting in a loss of impartiality and objectivity, it would be prudent to describe such bias as being of a systemic character. There is, in a sense, an institutional opinion, which would have a

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direct impact upon the decision-maker, influencing his judgment in a significant manner. Unlike personal bias, however, systemic bias is difficult to establish. The difficulties encountered when seeking to establish systemic bias is clearly illustrated by the Sri Lankan case of Dissanayake v. Kaleel.

In Dissanayake v. Kaleel eight members of the United National Party (UNP), who were also Members of Parliament, sought to challenge their expulsion from the party. Two of the petitioners were also members of the cabinet of the then President, Ranasinghe Premadasa, prior to their expulsion from the party. It was the position of the UNP that the petitioners were expelled because they had participated in taking certain steps to impeach the then President (who was also the leader of the UNP).

The resolution relating to the impeachment of the President alleged that the President was guilty of intentional violation of the Constitution, treason, bribery, misconduct, corruption, abuse of power, moral turpitude, and a host of other offences - some of which were quite frivolous and unsubstantiated. The resolution also alleged that the President was incapable of discharging the functions of his office by reason of mental or physical infirmity. The resolution for the impeachment of the President was hatched

72 ibid., at p. 439.
in secrecy and was signed by a large number of UNP members together with parliamentarians from opposition parties. Subsequently, a large number of UNP parliamentarians, who had previously signed the notice of the resolution for the impeachment of the President, informed the Speaker, in writing, that they no longer supported the resolution; they claimed that their signatures had been obtained by misrepresentation and/or they had signed by mistake. Consequently, the Speaker ceased to entertain the impeachment resolution.

The petitioners, anticipating disciplinary action by the UNP unsuccessfully sought declarations and injunctions, from the District Court of Colombo, to prevent such steps being taken against them. The District Court of Colombo refused the petitioners relief. However, before the petitioners could appeal against the judgment of the District Court the Disciplinary Committee of the party met, the same evening, and recommended that the petitioners be expelled from the party; the Working Committee of the UNP which met, immediately, thereafter, resolved to expel the petitioners from the party. (The National Executive Committee, which had the power to expel the petitioners and consisted of about 2500 members, had, by a previous resolution, delegated most of its powers to the Working Committee.) The National Executive Committee subsequently ratified the decision to expel the petitioners. However, the letters sent out to the petitioners informing them of their expulsion from the party did not indicate that the decision of the Working Committee had been ratified by the National Executive Committee.

According to the Constitution of Sri Lanka, if a Member of Parliament was
expelled from the political party, to which he belonged, he would forfeit his right to a seat in Parliament. What the petitioners sought to do was to challenge their expulsion from the UNP in terms of article 99 (13) (a) of the Constitution of Sri Lanka. The petitioners alleged, *inter alia*, that there had been a breach of the *audi alteram partem* rule, that the decision of the Working Committee was infected by bias and actuated by *mala fides*. It is the argument based on bias that is relevant to our present discussion.

The petitioners alleged that the order of the Working Committee was vitiated by bias inasmuch as (i) the President was present and presided at the meetings of the Disciplinary Committee although he did not participate in the discussions, recommendation and decision; (ii) members of the Disciplinary Committee were present and participated in the decision of the Working Committee to expel the petitioners; (iii) the Secretary of the party, who was a respondent in the District Court proceedings, instituted by the petitioners, had actively participated in the proceedings of the Disciplinary Committee.

The Supreme Court was of the view that the decision of the Working Committee was not infected by bias. Whilst the court was convinced that there was no personal bias, it appears that the court was not prepared to go as far as to hold that the decision was vitiated in view of evidence of systemic bias. Refusing to hold that the decision of the Working Committee was vitiated by bias, Fernando, J., said that "the test for bias cannot be applied as strictly as in judicial proceedings, for here all members of the tribunal would inevitably have had views, and possibly strong views. [Had] the "dissidents" been in a majority, if the question of disciplinary action against the "orthodox" minority had
arisen, I doubt whether the tribunal could be regarded as biased simply because it consisted of the "dissident" majority. Although the principle against bias does apply, this serves to illustrate the difficulty of applying that principle to a situation in which there is no *lis* between two contesting parties."\(^{75}\) Relying on de Smith\(^{76}\) to support his contention, Kulathunga, J., pointed out that decision-makers could "hardly insulate themselves from the general ethos of their organisation; they are likely to have firm views about their affairs and will often be familiar with the issues before they enter upon adjudication."\(^{77}\)

It is submitted, with respect, that the reasoning adopted by the Supreme Court on the question of bias in *Dissanayake v. Kaleel* does not augur well for advancing rights consciousness in Sri Lanka. While a review of the facts of the case indicate that the elements of personal bias were undoubtedly present, there also appears to be clear evidence of systemic bias. To state that the test for bias is different, where internal discipline is concerned, is an affront to fair procedure. It is submitted that the Supreme Court could have arrived at the same conclusion had they held that both personal and systemic bias was present, but that the rule of necessity outflanked any prejudice that may have been caused by such bias.\(^{78}\)

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\(^{77}\) *supra.*, note 75, at p. 245.

It must be acknowledged, however, that establishing systemic bias, in a manner that is sufficient in law to have a decision vitiated, is a very difficult task. Thus, the Federal Court of Australia was of the view, in Laws v. Australian Broadcasting Tribunal,\(^79\) that there was no institutional bias in general on the part of the Tribunal. In *Laws* the respondent, the Australian Broadcasting Tribunal, decided that a broadcast made by the applicant warranted an inquiry in terms of the relevant statute\(^80\) in view of the fact that the programme was likely to incite racial hatred. The Tribunal decided to hold the inquiry so as to determine whether it should exercise its substantive powers under the Act. While the inquiry was in progress an officer of the Tribunal made statements on a radio programme regarding the inquiry. The applicant instituted action for defamation against the relevant officer for making the said statements. While the action was pending the Tribunal decided at the inquiry that it should exercise its substantive powers under the Act. The Federal Court had to consider, *inter alia*, whether the Tribunal's decision was infected by institutional bias. The court was of the view that even though the Tribunal members may have been concerned by the defamation proceedings, it could be safely assumed that "all members of the Tribunal [were] aware of the importance of approaching any inquiry with complete integrity."\(^81\) There was, therefore, no systemic bias as such on the part of the Tribunal.

In *Gullapalli Nageswara Rao v. A. P. State Road Transport Corporation*\(^82\) the

\(^79\) *(1989)* *A. L. D.* 522.

\(^80\) Broadcasting Act 1942.

\(^81\) *supra.*, note 79, at p. 528.

\(^82\) *A. I. R.* 1959 *S. C.* 308.
Supreme Court of India upheld a plea of official bias. In *Rao* the petitioners were carrying on a motor transport business in the State of Andhra Pradesh. The State Government published a scheme to nationalise motor transport in the State from a date to be notified by the State Government prior to which objections to the scheme were invited. The petitioners, amongst others, intimated their objections to the scheme. The Secretary of the Transport Department gave a personal hearing to the objectors and heard representations from the State Transport Undertaking. All material gathered by him were placed before the Chief Minister, who approved the scheme. The constitutional validity of this scheme was challenged by the petitioners when it was subsequently published. One of the grounds upon which the scheme was assailed was that the person who heard objections against the scheme was the same person who initiated the scheme and was, therefore, biased in favour of the scheme. The Supreme Court held that the hearing given by the Secretary clearly offended against the principles of natural justice and was, therefore, void.

Since *Rao* the Supreme Court of India has taken great pains to qualify the circumstances under which a decision infected by official bias can be set aside. Consequently, a court would be prepared to set aside a decision on the basis that it has been infected by official bias only in circumstances where the evidence of such bias is overwhelming. It must, however, be conceded that the Indian Supreme Court has, more than any other Commonwealth jurisdiction, been responsible for expanding the frontiers of judicial review by permitting challenges based on systemic bias. This trend, therefore,

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supports the conclusion that systemic bias is indeed a threat to impartial decision-making and is not conducive towards advancing rights consciousness in society.

(d) Cognitive Bias.

Cognitive bias is an evolving species of bias which is influenced by social psychology. According to Galligan, cognitive bias arises, within the process of decision-making, when "certain assumptions are made, certain steps are taken, which are unjustified and which have the effect of leading to false conclusions. The work of social psychologists into the complexities of decision-making provides the background. Their researches show that, although decision-making is inherently complex, we develop ways of simplifying the task. Time, knowledge, and costs, are all reasons for 'pruning the tree - or in other words, of cutting the number of alterations considered'." Consequently, it is possible that the decision-making process can be infected by the introduction of cognitive bias. This is due to the fact that "we tend to conclude rather too readily that our own view of an issue is widely shared; and when we believe variables to be related to each other, we will hold them to be related even when they are not."

Cognitive bias can infect the impartiality of the process of decision-making, thereby, undermining public confidence in the process. This does not augur well for advancing individual rights nor is it conducive for the protection of the rule of law. However, the manner in which individual rights are threatened is much more insidious

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and it is, therefore, submitted that it is of vital importance that the judiciary exercises more vigilance to ensure that public confidence in the integrity of the decision-making process is not eroded.

(e) Loss of Independence.

The loss of independence can be occasioned by a decision-maker surrendering his independence of thought and judgment in such a manner that he is no longer capable of dealing with a case on its merits. This type of situation could arise when an official acts in compliance with a superiors directions, in circumstances where he has a statutory power to act, resulting in the official acting under dictation; where he is influenced by corrupt motives; when he has fettered his own discretion in advance or when he acts under duress.  

When a decision-maker has a lack of independence, it causes a failure of fair treatment. It results in the decision being amenable to challenge. According to Galligan, "[o]nce the link is made between loss of impartiality and the process of reasoning which an official is required to follow, the relationship between bias and fairness can be seen. For the official who acts for improper reasons fails to apply authoritative standards correctly or to exercise discretion properly; as a consequence, the person affected is not treated in accordance with those standards and, therefore, is treated

85 ibid., at p. 440.
86 ibid.
87 ibid., at p. 441.
unfairly.”

The loss of impartiality is commonly encountered in many circumstances where official decisions are made. In third world countries such as Sri Lanka and India this can be a serious issue. It is therefore nothing but right that a decision which is infected by a loss of independence is treated in the same way as a decision which is affected by personal bias.

It must be noted, however, that an aggrieved party has an evidential burden, which is difficult to satisfy, when attempting to establish that a decision is vitiated as a result of the decision-maker suffering from a loss of independence.

(f) The Significance of Impartial Treatment.

When a decision-maker is actuated by bias, the inevitable consequence is that there is a failure of fair treatment. As a result there can be no degrees of bias: a decision is either vitiated by bias or it is not.

It is imperative that if the rule of law is to prevail, decision-makers must act in a manner that is free from bias: it is only then will there be public confidence in the decision-making process. Thus, impartiality in the process of decision-making is a fundamental of good administration and an invaluable tool for ensuring the advancement of rights consciousness in society. It is also consonant with the fundamental human right to a fair trial.
III. The Right to a Fair Hearing.

(a) The Rights and Values Protected.

The rule of natural justice that no man should be condemned unheard - *audire alteram partem* - is universally acknowledged as a fundamental of good administration and a requisite of fair procedure. The right to a fair hearing is based on the public law value of autonomy and could essentially be regarded as a negative right. Sir John Laws, \(^{88}\) referring to the importance of protecting negative rights, states:

"The ideal of negative rights may be called the principle of minimal interference. It is the means by which man's individual sovereignty is translated into law. In the good constitution the principle of minimal interference is compulsory, because its refusal would cripple or destroy the autonomy of every individual. It means at least that the good constitution must vouchsafe legal arrangements to secure that no one's freedom of action is curtailed, save on grounds justified by the need to protect the rights and freedoms of others. One of its imperatives is the rule of equal treatment before the law, without which one man or class of men may lawfully be set above another, thereby denying the equal sovereignty of everyone. It underpins our public law rules of reasonableness and fairness, without which the individual's autonomy is at risk of capricious interference."

Negative rights tend to have a character which is compulsory in nature; these rights provide the philosophical justification for a democratic constitution based upon the rule of law. \(^{89}\) The right to be heard, like the wider right of procedural fairness, of which the former is an important constituent, is widely recognized as a fundamental right which warrants protection. It is clearly a negative right because the right is necessary to protect the autonomy of the individual. It essentially protects the individual's right not to have his autonomy interfered with, without his being given the benefit of procedural fairness.


\(^{89}\) *ibid.*, at p. 629.
Article 6(3) of the European Convention on Human Rights (ECHR) lays down important minimum process rights that must be protected if a person charged with a criminal offence is to receive a fair trial. It includes the right to be informed promptly and in detail of the nature of the accusation, the right to have adequate time for the preparation of one’s defence, the right to legal assistance and cross examination, and the right to have access to an interpreter if necessary. Where administrative decisions are concerned, it is necessary that contracting states conform to article 6 (1) of the ECHR. Harris, O'Boyle and Warbrick, referring to the application of article 6 (1) in the context of administrative decisions, state:

"Many decisions that are determinative of an individual’s civil rights and obligations are taken by the executive or some other body that is not a tribunal in the sense of Article 6. Where this is so, Article 6 requires, in accordance with the right of access to a court, that the state provide a right to challenge the decision before a tribunal that offers the guarantees in Article 6 (1).”

It should also be noted that the content of the right to a fair hearing, spelt out in article

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90 Article 6 (3) (a).
91 Article 6 (3) (b).
92 Article 6 (3) (c).
93 Article 6 (3) (d).
94 Article 6 (3) (e).
95 Article 6 (1) states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
6 (3), is relevant even where administrative decisions are concerned. While article 6 (3) does, no doubt, deal with a fair hearing in a criminal trial, it is illustrative of the various process rights that are protected. It is submitted that administrative decision-makers must also safeguard such process rights - albeit, the threshold at which the obligation is discharged may be lower and the process rights matrix may inevitably be subject to variation.

It should also be noted that the right to a fair hearing is also recognized as a fundamental right by the Universal Declaration on Human Rights\(^{97}\) and the International Covenant on Civil and Political Rights.\(^{98}\) The emphasis placed upon this right underscores its importance.

We will now examine the content of this right, albeit to the extent that it is protected in administrative law, in order to evaluate the manner in which it has helped advance rights consciousness in society. We will examine, in the discussion to follow, the nature of the right to: (a) notice; (b) make representations; (c) cross-examine; (d) legal representation, and the circumstances under which the right to a hearing could be circumscribed.

(b) The Right to Notice.

 Having prior notice is often regarded as the minimum content of natural justice

\(^{97}\) See, article 10.

\(^{98}\) See, article 14.
and procedural fairness. The idea of notice is deeply rooted to the notion of notice in criminal law and is emphasised most strongly in circumstances where specific charges have to be met. The fundamental principle is that a party who is required to meet a specific charge must have sufficient notice of the contents of the charge and be given adequate time to prepare his response. A hearing devoid of such notice falls short of the requirements of procedural fairness and would be a futile exercise. Therefore, "[t]he idea that a person should be given notice of an impending decision is a fundamental element of the hearing principle." However, the circumstances of the case would determine the content and duration of notice. In criminal law, however, the requirements of notice are strict and a conviction will not be upheld if it has been arrived at by disregarding such procedural requirements.

According to Aronson and Dyer,100 "[s]ince the purpose of notice is to enable participation, the content of the notice must be such as to allow its recipient to participate fully and effectively in whatever manner is found appropriate in the circumstances of the particular case." The right to notice is one based on common sense, justice and fairness and will not be jettisoned unless there are overriding considerations that justify such conduct.101

A decision may be assailed on the basis that the individual concerned has not

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100 Aronson, Mark, and Dyer, Bruce, Judicial Review of Administrative Action [Sydney: The Law Book Company, 1996], at p. 525.

received sufficient information to prepare adequately for his case. Inadequate time to prepare for the case will also militate against the requisites of fair procedure. In *Willis v Childe* it was held that a school master had been given inadequate notice in circumstances where he was informed, a few hours before a meeting of the trustees was due to take place, that they would be taking into consideration any representations made by him, in relation to their decision to dismiss him.

In the Sri Lankan case of *Nanayakkara v. University of Peradeniya* the petitioner, who was a student of the University of Peradeniya, was found guilty, by a committee of inquiry, of participating in attacks on certain halls of residence of the university and committing acts of mischief. The petitioner alleged, *inter alia*, that the decision of the committee of inquiry was invalid as he had been deprived of a fair hearing. He complained that he had inadequate notice of the fact that the committee was inquiring into allegations of breach of discipline against him. The petitioner was returning from a lecture when he was suddenly informed that he should present himself before the committee. The Court of Appeal held that the petitioner had been deprived of a fair hearing because, amongst other grounds, he had not been informed of the nature of the allegations against him prior to his appearance before the committee of inquiry. Stressing the importance of a fair hearing, Seneviratne, J., with whom de Silva, J., agreed, said that "[t]he right to a fair hearing is a rule of universal application and in [the] case

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102 See, e.g., *Cooper v. Wandsworth Board of Works*, (1863) 14 CB NS 180, where the plaintiff succeeded in an action for trespass, instituted against the Board, on the grounds that the Board failed to notify him of their decision and take into account any representations that he may have made.

103 (1851) 13 Beav. 117.

of administrative acts or decisions affecting [rights] the duty to afford it is a duty lying upon everyone who decides anything." 105

The Canadian courts have treated statutory procedural requirements dealing with notice as mandatory requirements of law. In *Yorkton Restaurant Venture Capital Corp. v. Saskatchewan (Minister of Economic Development)*, 106 Gunn, J., delivering judgment for the Saskatchewan Court of Queen's Bench, said:

"Some procedural requirements, however, are considered to be so important that they will nearly always be held to be mandatory. Examples include prior notice, holding a hearing and making due inquiry." 107

In *Gage v. Ontario (Attorney - General)* 108 the applicant police officer sought a review of the decision by the Public Complaints Commission because the Commission had not given the applicant notice of the legal steps taken against him as required by the relevant statute. The General Division of the Ontario Divisional Court held that the failure to comply with the relevant statutory provision in relation to notice was a denial of natural justice resulting in a loss of jurisdiction. The court observed that "[n]otice is an essential component of natural justice. It is a question of mixed fact and law in each case whether or not notice is sufficient to meet the standard of procedural fairness." 109

It is submitted, therefore, that the right to notice is an essential prerequisite of

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105 *ibid.*, at p. 196.


107 *ibid.*, at p. 746.


109 *ibid.*, at p. 552.
procedural fairness and constitutes a manifestation of fair play in action. The protection afforded to this right stems from the fundamental right to a fair trial. Thus, unless there are very compelling reasons for derogation, it is crucial that this right be protected.

(c) The Right to Make Representations.

The right to make representations lies at the heart of the *audi alteram partem* rule. It is a right which springs from the fundamental right to a fair trial. It is an elementary principle of good administration.

The right to make representations ensures that the party affected can put forward his side of the story so that the decision-maker can take it into consideration when arriving at his determination. However, the right to make representations does not necessarily imply that it encompasses a right to make oral representations. Certain circumstances may justify admitting only written representations - such as when the individual concerned admits of wrongdoing, but seeks to make representations so as to mitigate the sanction.

In *General Medical Council v. Spackman*, Viscount Simon, L.C., made the observation that "[w]hat matters is that the accused should not be condemned without

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being first given a fair chance of exculpation." The right to make representations is, therefore, an important aspect of fair treatment which cannot easily be jettisoned.\footnote{See, e.g., Ridge v. Baldwin, [1964] A.C. 40.}

Thus, in 
\textit{Dissanayake v. Kaleel}\footnote{[1993] 2 Sri L. R. 135.} the argument was advanced that the urgency of the matter required that the United National Party take prompt action to expel the petitioners from the party. Yet, this submission did not find favour with Fernando, J., who, referring to the case of Socrates,\footnote{"I cannot convince you, the time has been too short; if there were a law at Athens as there is in other cities, that a capital cause should not be decided in one day, then I believe that I should have convinced you. But I cannot in a moment ......." (\textit{ibid.}, at p. 191).} said:

\begin{quote}
"Surely the petitioners could have been given one day, in a capital cause? Time till Sunday to show cause, may be in writing, thus enabling the Working Committee to take a decision on Sunday evening or early Monday morning. Greater urgency than that has not been established."\footnote{\textit{ibid.}}
\end{quote}


In \textit{Forsythe v. Alberta (Administrator, Private Investigators & Security Guards Act)}\footnote{(1993) 14 Alta. L. R. (3d) 293.} a private investigator and two investigative agencies which he operated had their licences suspended after he was charged with conspiracy and aggravated assault. He was not afforded an opportunity to make representations before the decision to suspend him was communicated. He applied to have the suspension quashed and to have the licences reinstated. His application was allowed. Lewis, J.,
equating the denial of a hearing with the denial of a fundamental right, said:

"In this case, the applicants' fundamental rights were violated when a hearing was not held and a suspension of its licences granted by the administrator based only on the charges against Forsythe. In my view, this is a violation of the principles of fundamental justice or the applicant's right to natural justice."\textsuperscript{120}

In Australia, the Federal Court has held, in a case involving persons to be extradited,\textsuperscript{121} that the rules of natural justice required the Attorney General to give the applicants an opportunity to be heard on issues that were material to the exercise of his discretion. That requirement was sufficiently met by the receipt and consideration of the written submissions tendered by the applicant's solicitors.\textsuperscript{122} The Federal Court has also held that the rules of natural justice would be applicable to any decision to terminate the appointment of a special magistrate, and that this would require a substantial oral hearing of an adversarial nature.\textsuperscript{123}

(d) The Right to Cross-examine.

The right to cross-examine is considered to be a minimum right which must be satisfied in order to ensure fairness in a criminal trial.\textsuperscript{124} Cross-examination performs the valuable function of testing the evidence and assisting in the determination of the weight

\textsuperscript{120} ibid., at p. 297.


\textsuperscript{124} See, e.g., article 6 (3) (d) of the European Convention on Human Rights; see also, article 14 (3) (e) of the International Covenant on Civil and Political Rights.
to be attached to a particular piece of evidence. In an administrative law context the right to cross-examine is not regarded as an indispensable: the seriousness of the matter would determine whether the right should be made available. The denial of this right, in contexts where it is not intrinsically proper, results in a failure of natural justice, occasioning a decision which is devoid of legal effect. Thus, where a decision affects a person's rights or interests in a significant manner, then, it would be necessary to ensure that the right to cross-examination be provided. This would help to promote principles of good administration and would also ensure that there is fairness in the process of decision-making.

What is of fundamental importance, however, is that the right to cross-examine must be available even though it may not have been exercised. Thus, in _University of Ceylon v. Fernando_, a science student of the University of Ceylon, was accused of having prior knowledge of the contents of a Zoology paper. The Vice-Chancellor, acting on the information supplied by a Miss Balasingham, set up a commission of inquiry and, consequent to the findings of the said committee, suspended Fernando from the university upon being "satisfied" that Fernando had acquired prior knowledge of certain parts of the question paper. Fernando sought a declaration, which was granted by the Supreme Court of Ceylon, that the suspension was null and void inasmuch as he had been denied a fair hearing because he had not been afforded an opportunity to cross-examine Miss Balasingham. On appeal to the Privy Council, where Fernando was unrepresented, it was held that the Vice-Chancellor had sufficiently complied with the requirements of natural

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justice. The Privy Council was of the view that the right to cross-examine was available to Fernando if he had requested such a right. The committee of inquiry was under no obligation to provide such a right if it was not sought.

The decision of the Privy Council, in Fernando can be cogently criticized as falling short of the standard of fair treatment and principles of good administration. In the first place Fernando was not represented at the appeal to the Privy Council, perhaps for financial reasons; secondly, he was not afforded an opportunity to cross-examine Miss Balasingham who was a vital witness for the case against him and whose credibility was in issue; thirdly, the relevant passage carried only ten marks, out of which he had been awarded eight, and he had performed extremely well in respect of the other sections of the paper; fourthly, no weight was attached to the fact that the ability to predict a passage is not an uncommon occurrence, particularly, where a student can legitimately predict certain passages (when the textbook from which the passage is drawn is known, if it is on the reading list); fifthly, Fernando was a very clever student who had fared extremely well in his other papers and even if he had been deprived of the eight marks for the Zoology paper, he would have done sufficiently well to have earned a first class; finally, there was evidence to indicate that Miss Balasingham could have been motivated by academic jealousy when she made her complaint against Fernando.

Whilst, we do not seek to argue that the Privy Council should have considered the merits of the case, we do feel that the procedural irregularities in the case were sufficiently serious to have warranted the granting of the declaration sought. The

\[127\] per Lord Jenkins, (1960) 61 N. L. R. 505, at p. 506.
sufficient compliance criterion, in respect of the requirements of natural justice, adopted by the Privy Council, falls short of the standards of procedural fairness and due process, particularly, when the charge is so serious and the consequences so grave.

In *Nanayakkara v. University of Peradeniya*, 128 where an inquiry was being held to determine whether a student had been guilty of breaches of discipline, Seneviratne, J., delivering the judgment of the Court of Appeal of Sri Lanka, said that "this was an instance in which the Committee should have volunteered the suggestion that the plaintiff might wish to question the witnesses or in other words [tender] the witnesses unasked, for cross-examination by this petitioner. The failure to do so has caused irreparable prejudice to the petitioner at this inquiry."129 It is submitted, therefore, that the reasoning adopted by Seneviratne, J., in *Nanayakkara*, is superior, in terms of advancing rights consciousness in Sri Lanka, to that adopted by the Privy Council in *Fernando*.

In *Harrison v. Pattison*, 130 the plaintiff, who was an officer of the Department of Technical and Further Education, lodged a complaint against the principal of a particular college with the Anti-discrimination Board. Certain members of the college set up an *ad hoc* committee in support of the principal. The plaintiff was charged with breaches of discipline under the Education Commission Act 1980. At the inquiry, which was commenced by the Director-General, under and in terms of the Act, counsel for the plaintiff sought to cross-examine the witnesses on matters relating to their credibility in

129 ibid., at p. 195.

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order to establish that their evidence was tainted with bias, malice or ill-feeling towards the plaintiff. The objection was raised that the witnesses were respectable people and that their testimony and demeanour indicated that they were telling the truth. The chairman of the inquiry upheld the objection made, regarding cross-examination, and ruled that the topics of cross-examination did not relate directly to the incidents into which he was inquiring. Bryson, J., delivering the judgment of the Supreme Court of New South Wales, granted a declaration to the effect that the restriction of the right to cross examination was a procedural impropriety that vitiated the decision of the committee of inquiry. Bryson, J., observed:

"However, when I have regard to the nature of the defendant's case and to the particulars before the plaintiff to answer, it does seem to me that the credibility of witnesses is of basal importance, both for a decision whether the events were as reported and also for an assessment of the colour and importance of events." \(^{131}\)

It is submitted, therefore, that the right to cross-examine should be regarded as an important human right, which must not be jettisoned if good administration is to be achieved. The right is an important process right, which must be protected in all situations where witnesses are examined. This process right is invaluable in advancing the frontiers of rights consciousness and is conducive towards developing the principles of good administration. The right to cross-examination permits an aggrieved party to test the evidence against him or her. Consequently, it affords the decision-maker or administrative agency, that has to adjudicate upon a matter, an opportunity to decide upon the appropriate weight that should be attached to the evidence before it. This would facilitate better quality decisions and, thereby, help develop principles of good

\(^{131}\) *ibid.*, at p. 572.
administration.

(e) The Right to Legal Representation.

The right to legal representation is widely acknowledged as an aspect of fair procedure and as a fundamental human right, particularly, where criminal trials are concerned.\(^{132}\) There has also been an increased willingness for tribunals to permit legal representation. It is important, however, to draw a distinction between situations where legal representation has been denied and situations where the right exists, but has not been availed of. The latter type of situation is clearly illustrated by the appeal to the Privy Council in *University of Ceylon v Fernando*.\(^{133}\) The former type of situation can, however, occasion a failure of natural justice resulting in a decision being amenable to challenge.

The right to legal representation can be denied by statute\(^ {134}\) and by private associations which may exclude the right to legal representation before disciplinary committees.\(^ {135}\) However, where a serious charge, affecting a person’s reputation or livelihood, is made, then, the refusal to allow legal representation could result in a fatal

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\(^{132}\) See, e.g., article 6 (3) (c) of the European Convention on Human Rights; article 14 (3) (d) of the International Covenant on Civil and Political Rights; article 10 of the Universal Declaration of Human Rights.

\(^{133}\) (1960) 61 N. L. R. 505; [1960] 1 W. L. R. 223.


\(^{135}\) See, e.g., *Enderby Town Football Club v. Football Association Ltd.*, [1971] Ch. 591, where the Court of Appeal upheld the validity of the Football Association’s decision to prohibit legal representation in cases before it.
procedural impropriety vitiating the decision reached. Fundamentally, the right to legal representation, unless protected by statute or necessary in view of the interests at stake for the individual concerned, is a discretionary right which can be denied in appropriate circumstances. Thus, a prisoner appearing before a prison board of visitors, on disciplinary charges, does not have a right to legal representation, but the board has a discretionary right to allow such representation in appropriate circumstances.

The purpose of legal representation is to facilitate fair procedure; to ensure that a party is able to put forward his defence as effectively as possible. According to Hotop,

"[T]he question of legal representation before administrative and domestic tribunals does raise a difficult problem of reconciling two conflicting policies. On the one hand, persons who are likely to be seriously affected by the decision of a tribunal can cogently argue that they have received less than justice if they are not permitted to have their case presented to the tribunal by an expert who can ensure that the case is properly presented and considered. On the other hand, if expert legal representation is permitted to a party, it will be necessary to permit other parties, if any, to be similarly represented; and the tribunal itself will then require legal assistance or a legally-trained member - in the result, the whole process will become more protracted, more formal, more technical, and more costly. In any given case, these conflicting interests should be balanced against each other with a view to deciding what fairness requires in the particular circumstances. It would, however, serve the interests of natural justice if there were, at least, a presumption that legal representation be permitted in any case, the onus being on the person or body opposing this to demonstrate that fairness did not require it."

Thus, if the facts of the case clearly indicate that a party was handicapped by the lack of

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137 See, e.g., Fraser v. Mudge, [1975] 3 All E. R. 78.
legal representation, then, it stands to reason that the decision reached would be devoid of jurisdiction and, therefore, amenable to review. The protection of the right to legal representation, in circumstances where the existence of such a right is appropriate, is an invaluable safeguard that must be provided so as to ensure procedural fairness and due process.

(f) Restrictions Imposed Upon the Entitlement to a Hearing.

The right to a hearing is not an absolute right: it can be circumscribed in appropriate circumstances. Thus, the right has been denied: (i) where disclosure would be prejudicial to national security; (ii) in cases of emergencies; (iii) where it would be administratively impractical; (iv) where there has been a preliminary decision; (v) where the error made no difference; and (vi) where there has been an express or implied statutory exclusion.

However, the exclusion of procedural fairness will not be easily presumed. In effect, the court is weighing different competing interests. Individual cases of procedural unfairness are said to be justified if it results in a greater benefit to the community; alternatively, it may be justified on the basis that no prejudice is caused to the party concerned. Yet, from a rights perspective, it may sometimes be difficult to countenance such an analysis. Thus, there is a failure, from a rights conception of the rule of law, when a state declines "to enforce rights against itself, for example, though it concedes [that] citizens have such rights."¹⁴⁰

The requirements of national security have often been regarded by the courts as one of the strongest justifications for the restriction of the field of application of the *audire alteram partem* rule and the courts have been content to leave it to the executive to determine the requirements of national security. In *The Zamora* case, which concerned the powers of the Prize Court, Lord Parker said:

"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public."  

In the *CCSU* case the Council of Civil Service Unions and six members of staff at Government Communications Headquarters (GCHQ) sought judicial review of an instruction made by the Minister for the Civil Service which prevented GCHQ staff from belonging to national trade unions. The applicants for judicial review contended that the Minister had a duty to consult those concerned, before exercising her power under article 4 of the Civil Service Order in Council, 1982. It was contended, on behalf of the Minister, that the instructions were issued under prerogative powers and were, hence, not amenable to challenge, and in any event the requirements of national security militated against judicial review being granted. The House of Lords was not impressed by the first argument and expressed the view that even prerogative power was subject to judicial review. The court was attracted, however, by the national security argument. Lord Fraser

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142 [1916] 2 A. C. 77 [P. C.].

143 *ibid.*, at p. 107.

of Tullybelton was emphatic when he stated that it was the Government's prerogative to decide what was in the interest of national security. His Lordship said:

"The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the Courts; the Government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security."\(^{145}\)

Lord Scarman pointed out that there was "no abdication of the judicial function, but that there is a common sense limitation recognized by the judges as to what is justiciable, and the limitation is entirely consistent with the general development of modern case law of judicial review."\(^{146}\)

Thus, national security considerations are a strong ground for restricting the scope of the *audi alteram partem* principle unless there is sufficient evidence to indicate that the decision-maker has been unreasonable in the *Wednesbury*\(^{147}\) sense, thereby, justifying judicial review.

It should be noted, however, that where the fundamental rights of an individual are at stake the courts are more circumspect in accepting national security considerations as a ground to preclude judicial review. In *Chahal v. United Kingdom*\(^{148}\) a Sikh separatist was detained for deportation to India for national security reasons.\(^{149}\) Chahal

\(^{145}\) *ibid.*, at p. 944.

\(^{146}\) *ibid.*, at p. 948.


\(^{149}\) Given the claim of national security by the Government no right of appeal was available against the decision to deport. However, the matter was considered by an
complained that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment; furthermore, he complained that the period of detention, pending deportation, was too excessive. Finally, he complained that he did not have an effective domestic remedy. The European Court of Human Rights, in a landmark judgment expressed the view that,

"Article 3 [of the ECHR] enshrines one of the most fundamental values of democratic society. The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct."

The court did recognize that the use of confidential material may be unavoidable where national security considerations were applicable. This did not, however, mean "that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved."

In Chahal, the European Court of Human Rights was of the unanimous view that there had been a violation of article 13 of the Convention. The Court said:

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advisory panel. The applicant was not informed of the basis of the Home Secretary's views regarding him; he was denied legal representation and was not informed about the advice given to the Home Secretary by the panel.

He relied on articles 3, 5 and 13 of the European Convention on Human Rights for the purpose of his application to the European Court of Human Rights.

The court held, by a majority, that there could be a violation of article 3 if the Home Secretary's decision was implemented; that there was no violation of article 5(1) and that it was not necessary to consider violation of article 8 in view of the conclusion regarding article 3. The court was unanimously of the view that there had been a violation of article 5 (4) and article 13.

supra., note 148, at pp. 456 - 457.

ibid., at p. 469.
"...Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision."  

Chahal, therefore, stands for the proposition, at least as far as the European Court of Human Rights is concerned, that where a complaint relates to the violation of a fundamental right, national security considerations may not, necessarily, militate against the right to an effective domestic remedy. The reviewing court may not be favourably disposed to the denial of a hearing, on national security grounds, where a fundamental right is at stake.

Emergency situations demand prompt action, and may warrant decisions being taken without granting the affected parties a hearing. Whilst there is no doubt that the affected parties who were deprived of a hearing are prejudiced, overriding public interest considerations may demand such prompt action. Thus, in the Pegasus Holdings\(^\text{155}\) case, a charter company sought judicial review of a Minister's decision, suspending a Romanian airlines travel permit on grounds of safety. It was held that, in the circumstances, the decision was not unfair as it was provisional in character and had to be made in an emergency situation. A similar principle was applicable in Dissanayake v. Kaleel,\(^\text{156}\) where the need to expel the petitioners, who were Members of Parliament,

\(^{154}\) ibid., at p. 472.


\(^{156}\) [1993] 2 Sri L. R. 135.
from the United National Party (UNP) was justified on the basis of the need to take prompt action in the interests of party unity and cohesion. Kulatunga, J., with whose opinion Wadugodapitiya, J., agreed, said that the "UNP Working Committee, acting in the interests of the party, had no choice but to act with speed and take disciplinary action against the petitioners without giving them a hearing."\(^{157}\) Yet, in *Jayatillake v. Kaleel*,\(^{158}\) where the issue related to the expulsion of a Member of Parliament from the party, without a prior hearing, his Lordship pointed out that an oral hearing would be indispensable, "unless there [were] overwhelming reasons for denying it."\(^{159}\)

Administrative impracticality has often been used as a ground for justifying the denial of a right to a hearing.\(^{160}\) Where the determination involves an administrative function, a right to a hearing at that stage may be denied or postponed. This is because if public bodies were enjoined from making administrative decisions which affect the rights of subjects, without granting the said subjects a right to a hearing, then the administrative system was likely to come to a standstill.\(^{161}\)

The denial of a right to a hearing is sometimes not considered to be fatal to a decision if a defective decision can be cured by a subsequent appeal.\(^{162}\) However, this

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\(^{157}\) *ibid.*, at p. 242.


\(^{159}\) *ibid.*, at p. 394.


principle is not always acknowledged. Thus, in *Leary*, Megarry, J., expressed the view that "[i]f the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal?"\(^{164}\)

Where a decision is preliminary in character, it is often the case that the affected party is not afforded a hearing. It is sufficient if he or she is afforded a hearing at the substantive stage.\(^{165}\) This principle is clearly illustrated by the New Zealand case of *Furnell v. Whangarei High Schools Board*\(^{166}\) where the Privy Council held that the respondent board had not acted unfairly in deciding to suspend a teacher pending the determination of the charges against him.

The courts have also held that where there has been a denial of the right to a hearing, and if it has had no impact upon the outcome of the decision, the action of the decision-maker may survive challenge. Thus, in *Glynn v. Keele University*,\(^{167}\) an undergraduate had been fined by the Vice-Chancellor for being found naked on the university premises. He was also excluded from residence for the remainder of the academic year. He issued a writ against the university and the Vice-Chancellor and sought an injunction against their decision to exclude him from residence. Although the


\(^{164}\) *ibid.*, at p. 720.


\(^{166}\) [1973] 1 All E. R. 400.

\(^{167}\) [1971] 1 W. L. R. 487.
court was of the view that there had been a breach of natural justice it declined to grant relief as a matter of discretion. This was because, in the words of Pennycuick, V.C., the decision was one “which was intrinsically a perfectly proper one.”

In *Cinnamond*, certain minicab drivers sought to argue that there was a breach of the principles of natural justice, in view of the fact that they were banned from the airport land without a prior hearing. The Court of Appeal was of the view that the substance of the complaint was known; they "had put themselves so far outside the limits of tolerable conduct so as to disentitle themselves to expect that any further representations on their part could have any influence or relevance." It is possible to argue, therefore, that where the reason for a particular decision is known a hearing can be dispensed with on the basis that it is a useless formality. This view is taken by the courts in situations where nothing that the petitioner could have said could have made any difference. In other words if the outcome is obvious and inevitable, then, the denial of the requirements of natural justice may be countenanced by the courts. It is difficult, however, to justify this approach from a rights based analysis. It is rarely that cases fall into a watertight compartment where the outcome is obvious from the very start. It is submitted, therefore, that the restriction of the right to a hearing in such circumstances cannot be justified.

The express or implied statutory exclusion of the right to a hearing is also

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168 *ibid.*, at p. 496.


170 *per* Shaw, L.J., *ibid.*, at p. 592.
judicially recognized. Thus, where Parliament has made its intention clear,\textsuperscript{171} by excluding a right to a hearing, it is not possible for the courts to introduce such a right through the back-door. In Sachs \textit{v. Minister of Justice}\textsuperscript{172} Stratford, A.C.J., referring to the statutory exclusion of the \textit{audi alteram partem} rule, said:

"Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the true interpretation of the Act, the implication is excluded, there is an end of the matter."\textsuperscript{173}

It is submitted, however, that the circumscribing of the right to a hearing by statute is not desirable and inconsistent with the principles of good administration and the rule of law.

Yet, the restriction has been imposed as a matter of legislative policy and the unfairness of the rule may properly be addressed by the legislature rather than the judiciary: it appears to be a matter that falls within the political arena rather than in the judicial sphere.\textsuperscript{174} Restrictions on procedural rights in this manner, which are rarely justified, do not augur well for the advancement of rights consciousness in society.

\textbf{IV. \hspace{1em} The Duty to Give Reasons.}

\textbf{(a) The Justification for the Giving of Reasons for a Decision.}

The giving of reasons is often regarded, with justification, as an aspect of due process

\textsuperscript{171} See e.g., Kadawatta Meda Korale Multi-purpose Co-operative Societies Union \textit{v. Ratnavale}, (1965) 66 N. L. R. 220.

\textsuperscript{172} 1934 \textit{A. D. 11}, at p. 38.

\textsuperscript{173} \textit{ibid.}, at p. 38.
and procedural fairness, and a corollary of natural justice. The duty to give reasons is contingent upon the right to receive reasons for a decision. It is because of our view that this right is an important aspect of fundamental justice, that we regard the duty to give reasons as one of the pillars of natural justice and not merely as an aspect of the right to a hearing. The duty to give reasons for a decision is postponed until the hearing has been completed. It cannot, therefore, be considered as an aspect of the right to a hearing; it is, however, an important process right, which warrants protection if a given society is to forcefully articulate a rights based model of administrative law.

The duty to give reasons for a decision is universally acknowledged as an aspect of a fair trial: it would also ensure fairness in a civil hearing. English administrative law has, however, been slow to acknowledge a general duty to give reasons, even though there have been some currents in this direction. Yet, Commonwealth countries, such as Australia for instance, have statutorily recognized that a decision-maker should be under an obligation to give reasons when requested to do so. This type of obligation

174 See, e.g., Mears, Martin, 'In safe hands?' (1997) 147 N. L. J. 1380.


176 See, e.g., article 6 (1) of the European Convention on Human Rights; see also article 14 (1) of the International Covenant on Civil and Political Rights.


179 See, e.g., s. 28 (1) of the Administrative Appeals Tribunal Act 1975 which provides: "Where a person makes a decision in respect of which an application may be made to the
is intrinsically desirable and helps to advance rights consciousness in society. The absence of a general duty to give reasons, in English administrative law, is a disappointing development, and this has had the unfortunate side effect of stultifying the advancement of rights consciousness in Sri Lanka.

The right to due process, of which the right to reasons is an integral part, provides protection for certain public law values. The right to reasons is inherently interwoven with the public law values of 'dignity' and 'respect'. The public law value of dignity of *dignus* means, *inter alia*, honour and reputation; respect or *reverentia* encompasses the twin principles of regard and consideration. Upholding the right to reasons, in effect, results in an acknowledgement of the significance and importance of these values.

In 1989, Sir Harry Woolf, the present Master of the Rolls, in his Hamlyn Lectures, indicated that, in his opinion, he considered the introduction of a general requirement that reasons should normally be available, at least on request, for all administrative actions, would be "the most beneficial improvement which could be made

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180 See, discussion in part I supra.


182 *ibid.*, at p. 225.
to English administrative law."183 Prior to that, in 1977, the Council of Europe, in a resolution, to which the United Kingdom was a party, strongly recommended that reasons be given for administrative acts which adversely affected the rights, liberties or interests of the person concerned. In 1994, the English Law Commission184 in its report, Administrative Law: Judicial Review and Statutory Appeals, observed as follows:

"[T]he absence of a general duty to give reasons does, however, affect procedural matters. Because in judicial review proceedings "the vast majority of the cards will start on the authority's hands". The absence of a general duty leads to pressure for greater discovery in judicial review proceedings and makes it more difficult to justify a restrictive approach to discovery. The absence of a general duty may also affect consideration of what form of appeal should lie from a decision. ...We therefore welcome the increased willingness by the courts to imply a duty to give reasons as part of the duty to act fairly."185

In R. v. Secretary of State for the Home Department, ex parte Doody,186 Lord Mustill expressed the view that there was no general duty to give reasons in English law. He did, however, strongly suggest that the giving of reasons was desirable. His Lordship observed that "the law does not at present recognise a general duty to give reasons for an administrative decision."187 His Lordship took pains to point out, however, that "it [was] equally beyond question that such a decision may in appropriate circumstances be [implied].188 The view has, however, been taken that, in English law, there is, at present,
no general duty to give reasons for a decision.

The *Franks Report*, referring to ministerial decisions taken after the holding of an inquiry, gave a powerful justification for providing reasons for a decision. The report stated:

"*It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere."

According to Jones and Thompson, "[t]he significance of a reasoned decision as distinct from one which is unreasoned is its potential assistance in allowing an intending applicant for judicial review to make an early assessment as regards the likelihood of a challenge being successful." Foulkes argues that "[t]o be acting lawfully, the administrator must have reasons for his decision. To have to give them is some assurance that those reasons will be good in law, for having made them known, his decision must be open to scrutiny. To give reasons is to invite accountability and to expose oneself to criticism; it helps to ensure that power is not arbitrarily exercised."

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Giving a powerful theoretical justification, in favour of the right to reasons for a decision, Rabin\textsuperscript{193} states:

"Fundamental to the concept of procedural due process is the right to a reasoned explanation of government conduct that is contrary to the expectations the government has created by conferring a special status upon an individual. The very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so. It is crucial that this value be seen as distinct from the concern about administrative accuracy - the interest in correcting wrong decisions. Obviously, the two are related since a reasoned explanation is a means of assuring the individual that the facts in his case are correctly perceived. But I would insist that the respect for individual autonomy that is at the foundation of procedural due process imposes a distinct obligation upon the government to explain fully its adverse status decision."

The giving of reasons is, therefore, an important aspect of good administration. It promotes consistency in decision-making and acts as a safeguard on the exercise of arbitrary power. The giving of reasons is, therefore, a very valuable process right. It ensures that there is fairness and transparency in the process of decision-making. Ensuring that decision-makers have supportable reasons for their decisions is invaluable for ensuring a rights culture.

(b) Arguments in Favour of Giving Reasons for a Decision.

Fundamentally, the arguments in favour of the giving of reasons for a decision are influenced by a perception that the role of the state should be circumscribed.\(^\text{194}\) It is an approach that favours a sharper focus on the courts rather than on the government; in this approach the state is often regarded as an intruder. It has been pointed out that the articulation of "the bases of a decision may improve the quality of [decision-making]."\(^\text{195}\) This is illustrated by the fact that "[f]ormalizing reasons for a decision requires the decision-maker to identify the relevant issues, to marshal and weigh the evidence and arguments systematically, and to state and explain the conclusions. This exercise can help to ensure that the decision-maker does not overlook some relevant matter and to avoid other kinds of mistakes."\(^\text{196}\) In addition to this, "[t]he publication of reasons may increase the confidence of members of the public, particularly those adversely affected by a decision, in the administrative process, by offering some assurance that decisions are not made arbitrarily, and that the relevant arguments and evidence have been understood and properly taken into account."\(^\text{197}\) It should also be noted that "[i]n the absence of reasons, it will often be very difficult for a court to review the legality of a decision."\(^\text{198}\)

\(^{194}\) See, e.g., Harlow, Carol, and Rawlings, Richard, *Law and Administration* [London: Butterworths, 2\(^{\text{nd}}\) edn., 1997], especially chapter 2, 'Red light theories'.


\(^{196}\) *ibid.*

\(^{197}\) *ibid.*

\(^{198}\) *ibid.*
The *All Souls Review of Administrative Law in the United Kingdom* grouped, under four convenient headings, the arguments in favour of giving reasons for a decision. Firstly, from the point of view of the functioning of the machinery of government the requirement that reasons be given imposes a healthy discipline on the decision-maker. As a result the quality of a reasoned decision is likely to be much better than one for which reasons were not required. Additionally, the requirement to give reasons acts as a check upon the exercise of arbitrary power and is a fundamental of good administration.

Secondly, the giving of reasons is of relevance from the point of view of the parties affected by the decision. This is because the giving of reasons helps to satisfy a basic need for fair play. Furthermore, it enables a person affected by a decision to know whether the decision itself can be challenged. It should also be noted that, even if the decision is adverse, the person affected may be convinced, as a result of the reasons adduced, that the decision is a rational one beyond the pale of challenge - an unbiased exercise of discretionary power.

Thirdly, the giving of reasons will be beneficial to the reviewing authority. It will expose the thinking of the decision-maker, with the inevitable outcome that it will result in the reviewing authority being in a better position to understand the decision and to

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200 ibid., at p. 69.

201 ibid., at p. 70.
exercise any appellate, reviewing or investigatory powers. Advancing proper reasons would expose the possible grounds for judicial review.\textsuperscript{202}

Finally, the public at large benefits because if reasons are given it would result in enhancing public confidence in the process of decision-making. Thus, supportable reasons are expected, by the public, from those who exercise administrative power.\textsuperscript{203} This is perhaps the cost one must bear for administration according to law. The absence of a requirement that reasons should be given for a decision is not conducive to the advancement of the rule of law. The giving of reasons is, therefore, a fundamental of good administration.

(c) Arguments Against Giving Reasons for a Decision.

The theoretical justification for the denial of reasons is influenced by the model of government. It favours the use of administrative power for the benefit of the community.\textsuperscript{204} The \textit{All Souls Review of Administrative Law in the United Kingdom}\textsuperscript{205} has summarised the arguments, commonly advanced, against the duty to give reasons. It has been pointed out that “[e]fficient administration requires free and uninhibited discussion among decision-makers, unimpeded by considerations of what can or cannot be made

\textsuperscript{202} \textit{ibid.}
\textsuperscript{203} \textit{ibid.}
\textsuperscript{204} See, e.g., Harlow, Carol, and Rawlings, Richard, \textit{Law and Administration} [London: Butterworths, 2\textsuperscript{nd} edn., 1997], especially chapter 3 - ‘Green light theories’.
\textsuperscript{205} \textit{supra.}, note 199.
Concern has also been expressed that a general requirement that reasons be given for a decision "would impose an intolerable burden on the machinery of government." There are also reservations that the duty to give reasons will result in delays being experienced in the process of decision-making, a "judicialization of affairs" and a lack of candour on the part of the decision-maker.

It is submitted, however, that the arguments advanced against the duty to give reasons are weak and do not stand the test of scrutiny. They are wholly inconsistent with a rights based model of administrative law, and have no place in a democratic society where transparency and accountability are fundamental for government according to law. A decision-making process clothed in secrecy can rarely be justified and is not conducive for advancing rights consciousness in society.

(d) The Duty to Give Reasons and Natural Justice.

The duty to give reasons is acknowledged as a requirement of natural justice. It is "the analogue in administrative law of the common law's requirement that justice should not only be done, but also be seen to be done." Referring to the duty to give reasons, in the context of a withdrawal of a benefit, Lord Diplock, in Council of Civil

\[^{206}\] ibid., at p. 70.

\[^{207}\] ibid.

\[^{208}\] ibid., at pp. 70 -71.

Service Unions v. Minister for the Civil Service,\textsuperscript{210} said that "the prima facie rule of procedural propriety in public law, applicable to a case of legitimate expectations that a benefit ought not to be withdrawn until the reason for its proposed withdrawal has been communicated to the person who has therefore enjoyed that benefit and that person has been given an opportunity to comment on the reason."

According to Wade and Forsyth\textsuperscript{211} the principles of natural justice have not, in the past, encompassed any rule of general application that reasons for a decision should be given. Yet, Wade points out that "[u]nless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."\textsuperscript{212} According to Craig,\textsuperscript{213} "the provision of reasons can increase public confidence in, and the legitimacy of, the administrative process. A duty to provide reasons can, therefore, help to attain both the instrumental and non-instrumental objectives which [underlie] process rights more generally."

\textsuperscript{210} [1985] A. C. 374, at p. 413.


\textsuperscript{212} ibid., at p. 542.

\textsuperscript{213} Craig, P. P., Administrative Law [London: Sweet & Maxwell, 3\textsuperscript{rd} edn., 1994], at p. 311.
Referring to the nexus between the requisites of natural justice and the duty to give reasons, Fernando, J., in *Karunadasa v. Unique Gemstones Ltd.*\(^{214}\) said:

"To say that natural justice entitles a party to a hearing does not mean merely that his evidence and submissions must be heard and recorded: it necessarily means that he is entitled to a reasoned consideration of the case which he presents. And whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision "may be condemned as arbitrary and unreasonable"; certainly, the court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion. The 2nd Respondent's failure to produce the 3rd Respondent's recommendation thus justified the conclusion that there were no valid reasons, and that natural justice had not been observed."

(e) The Duty to Give reasons in the Absence of a Statutory Requirement.

The duty to give reasons, even in the absence of a statutory requirement to do so, can easily be regarded as a fundamental of good administration. The exercise of discretionary power is never unfettered;\(^{215}\) discretion must always be exercised reasonably. Galligan\(^{216}\) is of the view that "[d]iscretionary power is often characterized in terms of authority to choose amongst alternative courses of action." He, therefore, observes as follows:

"So the paradigm of discretion is the power-holder faced with a choice between actions X, Y, and Z; his discretion is said to be freedom of choice amongst those actions. This is true but oversimplified if the above claims regarding the requirements regarding rational decision-making are accepted: on the assumption that one's choices must be reasoned, discretion consists not in the authority to choose amongst different actions, but to choose amongst different courses of action for good reasons. The course of action cannot be separated from the reasons, and therefore the standards on which it is based. If indeed the standards are settled in advance (and there are often good reasons why they

\(^{214}\) *[1997] 1 Sri L. R.* 256, at p. 263.


should be), the decision must be made according to their terms and an appropriate course of action will follow. Once this has been done there is no further element of choice as to whether to adopt that course of action. To adopt standards that point to action X and then choose action Y is irrational, and therefore illegitimate. One could of course adopt different standards that lead to action Y, but that only shows that discretion pertains not just to final actions but also to standards of decision-making. If the Minister has discretion to deport or not deport A, he must first decide what are good reasons for deporting anyone, and then determine whether A falls within them. If A does, it would be rational to deport him and irrational not to."^{217}

Thus, the rationality of the decision can only be evaluated if reasons for a decision are given. Reasons, therefore, provide a measurement against which the conduct of the decision-maker can be evaluated. It indicates how the decision-maker acted in the light of competing choices; reasons for a decision are indicative of the excluded alternatives that could have been substituted for the course of action adopted.

In England, as discussed earlier,^{218} the courts have been slow to recognize a common law duty to give reasons for a decision.^^{219} In Doody^{220} Lord Mustill indicated that he acknowledged without any hesitation that "the law does not at present recognise a general duty to give reasons for an administrative decision." Yet, his Lordship stated that he was inclined to agree with the decision, of the Court of Appeal, in Cunningham^{221} that there may be circumstances where such a duty may be implied.

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^{217} ibid., at pp. 7 - 8.
^{218} Refer discussion, supra., part IV (a).
In *Karawita v. Abeyratne* the Court of Appeal of Sri Lanka quashed the order of the Agricultural Tribunal because, amongst other things, it had failed to give reasons as to why it had determined that the respondent was a tenant cultivator. de Alwis, J., reasoned that in terms of the relevant statute an appeal was available to the Court of Appeal on a question of law. His Lordship pointed out that if a decision was unsupported by the evidence or if wrong inferences were drawn from such evidence, then, it was liable to be quashed. “The absence of reasons, entitles a Court to assume that the Tribunal had no good reason to give and was acting arbitrarily.”

The decisions of the Sri Lankan Supreme Court in the cases of *Samalanka* and *Karunadasa* require some analysis, in relation to the duty to give reasons in the absence of a statutory requirement to do so. In *Samalanka*, production of the appellant company came to a standstill consequent to a disagreement between the foreign collaborator and the local investors. On an application made by the company, the Commissioner of Labour granted permission for the company to terminate the services of the workmen under the relevant statute, subject to the requirement that compensation should be paid. The appellant sought a writ of certiorari to quash the decision of the Commissioner of Labour on the ground that the award of 15 months gross salary was unjustified because it was arbitrary and that no reasons had been given to

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223 ibid., at p. 310.


justify the decision. Kulathunga, J., with whom de Silva, C. J., and Ramanathan, J., agreed, delivering the judgment of the Supreme Court dismissing the appeal, articulated the broad proposition that in the absence of a statutory requirement there was no general principle of administrative law that natural justice required the decision-maker to adduce reasons, provided that the decision was made after holding a fair inquiry.  

In essence *Samalanka* does not appear to recognize that a party affected by a decision has an inherent right to reasons for such a decision. This approach, which cannot be justified as being intrinsically proper, does not contribute towards the advancement of individual liberty and autonomy. This approach to administrative law appears to favour a model of strong government and can be evaluated, most appropriately, in the context of the green light theories of administrative law.

However, in *Karunadasa*, Fernando, J., expressly disagreed with the reasoning adopted by Kulathunga, J., in the *Samalanka* case. His Lordship observed that “Article 12 (1) of the Constitution now guarantees the equal protection of the law. In the context of the machinery for appeals, revision, judicial review, and the enforcement of fundamental rights, giving reasons is becoming, increasingly, an important ‘protection of the law’ … for if a party is not told the reasons for an adverse decision his ability to seek review will be impaired.”

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227 *supra.*, note 224, at p. 407.


229 [*1997] 1 Sri L. R. 256.

230 *ibid.*, at p. 262.
Rebutting the view articulated by Kulathunga, J., that there was no duty to give reasons (in the absence of a statutory requirement) provided a fair inquiry was held, Fernando, J., expressed the view that there was no correlation between the duty to give reasons and the holding of a fair inquiry. His Lordship stated that it was

"difficult to understand why the court held that there was no duty to give reasons "provided" - and that means if, and only if - "the decision is made after holding a fair inquiry?". What if there had been no fair inquiry? Then would there have been a duty to give reasons? But if there had been no fair inquiry, the order would have to be quashed in any event - and so the failure to give reasons would not have been so important in that situation."\(^{231}\)

Fernando, J., quite correctly pointed out that "the question whether there is a duty to give reasons is a matter wholly unrelated to the fairness (or otherwise) of the antecedent inquiry."\(^{232}\) It appears, therefore, that Fernando, J., favoured an approach to administrative law which is based on notions of the rule of law and the good constitution.\(^{233}\) In a sense, it is an approach which is consonant with the red light theory of administrative law.\(^{234}\)

It is submitted that the issue of fairness and the duty to give reasons are closely connected. The giving of reasons for a decision is part and parcel of due process. If a person does not know the reasoning of the decision-maker, he will not know whether the decision could be challenged by judicial review. It is not conducive for good administration if the process of decision-making is clothed in secrecy. It is in this context

\(^{231}\) *ibid.*

\(^{232}\) *ibid.*


\(^{234}\) See, e.g., Harlow and Rawlings, *op. cit.*, note 228, chapter 2.
that the judgment of the Court of Appeal, in England, in the *Fayed*\(^{235}\) case is of outstanding significance in the light of a statutory exclusion of the duty to give reasons.

The case marks an important turning point in the progression towards the recognition of a common law duty to give reasons for a decision.

In the *Fayed* case the applicants for judicial review were two brothers born in Egypt but who lived and worked in the United Kingdom. The brothers, who had substantial business interests in the United Kingdom, maintained a high public profile. They had been granted leave to remain indefinitely in the United Kingdom. However, when the brothers applied for naturalisation as British citizens under s 6(1) and (2) of the British Nationality Act 1981, their applications were refused without any reasons being adduced for the decision. It was the position of the Home Secretary that there was no duty to give reasons for his decision in view of section 44 (2) of the 1981 Act. The Court of Appeal held, by a majority, that where the decision involved an exercise of discretion, the Home Secretary was required to exercise that discretion reasonably and was, therefore, not relieved of the obligation to be fair in arriving at his decision. During the process of reaching a decision, the Home Secretary was required to give the applicant sufficient information regarding the subject matter of his concern so that he may be able to make representations regarding such matters. The court also pointed out that where disclosure was not in the public interest, the applicants had a right to know that that was the position so that they could, if they wished, challenge the justification for the refusal

before the courts. The court took the view that since the applicants had not enjoyed the fairness to which they were entitled, justice had not been seen to be done.

It is submitted that the *Fayed* case represents a high watermark in English administrative law in relation to the duty to give reasons. What is of significance is that in this case the Court of Appeal granted the application for judicial review despite a statutory exclusion of the duty to give reasons. The court was clearly influenced by the overriding importance of the fairness issue. The court took great pains to stress the importance of the fact that the applicants should have known the case they had to meet. In a nutshell, it encompassed an obligation to give information relating to the matters which the Home Secretary had taken into consideration in arriving at his decision.

Referring to the duty to give reasons, Phillips, L.J., said:

> "Whether or not the requirements of natural justice impart an obligation to give reasons is often a difficult question of administrative law, the more so because the courts have been increasingly ready to find that such a duty [exists]. In this case, when considering procedural fairness, the extent of the duty of disclosure and the duty to give reasons are interrelated."236

Phillips, L. J., also observed that “absent s 44(2), the minister would be under a duty to give reasons for refusing an application for naturalisation under s 6 of the 1981 Act.”

It should also be noted that in *R. v. Secretary of State for the Home Department, ex parte Moon*237 the applicant, who was the founder and leader of the Unification Church and who was allowed entry clearance previously, was refused entry clearance to the United Kingdom. Sedley, J., was of the view that there was a want of fairness as a result

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236 *ibid.*, at p. 251.

of the failure of the Home Secretary to let the applicant know why it was considered contrary to the public good to let him enter the United Kingdom. His Honour pointed out that "it is precisely the unpopular applicant for whom the safeguards of due process are most relevant in a society which acknowledges the rule of law."^238

It submitted, therefore, that the reasoning adopted by the Supreme Court of Sri Lanka, in relation to the duty to give reasons, in the *Samalanka* case is wholly at variance with contemporary developments in Commonwealth administrative law.^239 Reasons for a decision and fair procedure in an inquiry are two sides of the same coin. It is quite impossible to have a fair inquiry if the person who is the subject of the inquiry is left in the dark about important aspects of the case against him. The decision of Fernando, J., in *Karunadasa* is, therefore, a salutary development for administrative law in Sri Lanka, and is consistent with a global trend towards the advancement of human rights, particularly, in contexts where administrative decisions are made.

(f) The Duty to Give Reasons in the Light of a Statutory Duty to do so.

Where a statutory burden is cast upon a decision-maker to give reasons for a decision, a failure to furnish reasons would result in the decision being vitiated and

^238 *ibid.*, at p. 485.

consequently ultra vires. Thus, in Desai v. Brantford General Hospital the Ontario Court (General Division) held that any member of a hospital medical staff who is aggrieved by a decision revoking or suspending his appointment or altering his privileges is entitled to written reasons for the decision. The courts of Sri Lanka have held, on may occasions, that where there is a statutory duty to give reasons, the failure to adduce proper reasons for a decision would vitiate the decision made. It would necessarily result in a procedural impropriety with the consequent effect that the administrative action would be amenable to judicial review.

In Fernando v. Ismail the respondent was a taxpayer who furnished a return which was rejected by the Assessor. Prior to rejecting the return, the Assessor had a number of interviews with the taxpayer; the taxpayer was warned that his return would be rejected and an estimated assessment issued in view of the large sum of money received by him as gross income. Consequently, the Assessor proceeded to issue an estimated assessment drastically reducing the amount claimed as expenses. The taxpayer, whilst appealing against the assessment made by the Assessor, sought a writ of certiorari from the Court of Appeal to quash the assessment on the grounds that the Assessor had

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242 This is by virtue of section 38 of the Public Hospitals Act, R. S. O. 1980, c. 410.


244 [1982] 1 Sri L. R. 222.
not given his reasons in writing for rejecting the return. The Court of Appeal granted
the writ sought, but the Inland Revenue appealed to the Supreme Court. The Supreme
Court bench, which comprised five judges, decided by a majority that the duty to give
reasons in writing, for rejecting a return, was a mandatory provision of law and the failure
to do so was fatal; it rendered invalid the decision of the Assessor to reject the return.

In *Fernando* the state contended that the taxpayer had furnished a false return;
that the reason for the rejection of the return was patent. Yet, Samarakoon, C. J., was of
the view that falsity was a conclusion arrived at by the Assessor. It was a conclusion
arrived at by a process of reasoning based on the data that is available to the Assessor.
"The section requires those reasons to be stated and not the conclusion which he arrived
at, though he may if he so chooses give his conclusions too. Furthermore, the section
requires reasons for non-acceptance of a return which is an act of the Assessor. It is his
thinking that has to be disclosed to the Assessee. No doubt there may be cases where the
reasons for non-acceptance may be obvious but one must bear in mind the fact that the
legislature has made no exception to the general rule and the duty cast on the Assessor
must be carried out even though the Assessee himself accepts the obvious."

Thus, Samarakoon, C. J., was of the view that the duty to give reasons was a
mandatory provision of law and the failure to furnish reasons for rejecting the return
vitiated the decision of the Assessor. The failure to observe a statutory requirement,

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245 In terms of section 93 (2) of the Inland Revenue Act, No. 4 of 1963, as amended, the
Assessor was bound to give his reasons in writing for rejecting a return. A similar
requirement is found in section 115 (3) of the Inland Revenue Act, No. 28 of 1979.

246 *supra.*, note 244, at p. 226.
which was considered to be a mandatory provision of law, resulted in the decision to reject the return being *ultra vires*.

Sharvananda, J., delivering a dissenting judgment, was of the view that the failure to give reasons did not cause the respondent any prejudice. His Lordship, therefore, took the view that the failure to give reasons, in such a context, did not render the decision of the Assessor invalid. His Lordship observed thus:

"In my view, failure to comply with the direction as to communication of reasons, unless it results in injury or prejudice to the substantial rights of the taxpayer, will not affect the validity of the assessment. Disregard by the Assessor of the direction to him to communicate in the end, after his assessment, the reasons for not accepting the taxpayer's return does not, ipso facto, render void or nullify the antecedent assessment made under section 93(2)(b). It only makes the assessment voidable if the taxpayer is substantially prejudiced by such disobedience. The taxpayer, however, has the right to call for reasons at any time."

It is submitted, however, that this view of Sharvananda, J., does not help to advance individual rights nor facilitate good administration; it is inconsistent with the rule of law. It can never be too strongly emphasised that procedural requirements laid down in a statute should not be jettisoned, unless to do so would facilitate good administration. The objection to the 'no prejudice' argument is one of principle. To disregard or make exceptions to a procedural requirement, such as the duty to give reasons, facilitates the exercise of arbitrary power. The issue of 'no prejudice' may only be obvious to the reviewing court; it may not be so clear to the decision-maker. Additionally, cases can rarely be seen in clear black and white terms; there are often many shades of grey in between. It is for this reason that it is imperative that public officials honour statutory

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247 *ibid.*, at p. 246. Wimalaratne, J., who also dissented, appears to favour the approach adopted by Sharvananda, J., (see Wimalaratne, J., at p. 255).
safeguards which are essential elements of good administration and are vital for promoting a rights culture so as to promote the rule of law.

The majority decision of the Supreme Court in the *Fernando* case was followed by the Court of Appeal in *New Portman Ltd. v. Jayawardena*. In the latter case, the Assessor rejected the return on the grounds that the statement of accounts, which accompanied the return, was false. Thambiah, J., was of the view that the Assessor's letter which communicated the decision to reject the return "only stated a conclusion and not the reasons for the conclusion." Thus, the Court of Appeal took the view that the Assessor's decision to reject the return, without communicating his reasons for doing so, had resulted in a failure to satisfy the requirements laid down in the Inland Revenue Act.

The case law, therefore, clearly indicates that where a duty to give reasons is imposed by legislative fiat, then, a failure to give reasons for a decision, necessarily, renders that decision a nullity inasmuch as it is devoid of jurisdiction.

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249 *ibid.*, at p. 317.

250 Section 115(3) of the Inland Revenue Act, No 28 of 1979 lays down the requirement that when a return is rejected the Assessor must communicate to the Assessee, in writing, his reason for rejecting the return.
V. Conclusion.

This chapter has examined how natural justice has contributed towards the advancement of rights consciousness. The concept of natural justice, although of great antiquity, suffered a decline in fortunes during the post World War I period.\textsuperscript{251} The concept was revived in \textit{Ridge v. Baldwin}\textsuperscript{252} and other cases.\textsuperscript{253} We have not attempted to trace the history of natural justice here as a task of such a magnitude is beyond the scope of a work of this nature.

Our interest in natural justice has been, primarily, from the point of view of advancing rights consciousness in society. Natural Justice provides a very useful rubric for expanding the frontiers of rights consciousness in society. The principles of natural justice are also conducive for the advancement of good administration and for the protection of the rule of law.

The process rights which are protected - such as the right to an impartial tribunal, the right to a fair hearing and the right to be informed of the reasons for a decision - and commonly referred to as natural justice, cannot be considered to be rights of an individual


\textsuperscript{252} [1964] A. C. 40.

which are positive in nature. This is because the rights by themselves come into focus only in contexts where there appears to be an interference, by a decision-maker, in the autonomy of an individual. The process rights which are, therefore, protected are negative in character. The right does not cast a positive obligation upon the decision-maker; what it does is, in fact, to impose an obligation upon the decision-maker to act in a certain manner if he desires to interfere with the autonomy and zone of freedom of the individual.

It is submitted, therefore, that the rules of natural justice recognize that the role of the state should be narrowly defined, if individual autonomy is to be protected and the rule of law upheld. The increasing emphasis upon process rights in Sri Lanka, England and other Commonwealth jurisdictions indicates that the era of strong government has entered the decline stage of its life cycle. This is intrinsically salutary and a necessary concomitant for the advancement of rights consciousness in society.

I. Introduction.

The evolution of the doctrine of legitimate expectations has resulted in a significant expansion of the scope of judicial review by advancing rights consciousness. This has been a very exciting development in the Commonwealth. The modern state increasingly regulates many areas of activity; this is, inevitably, the cost we have to pay for living in an organised society.

"We nod approvingly today when someone tells us that, whereas the State used to be merely policeman, judge, and protector, it has now become schoolmaster, doctor, house-builder, road-maker, town-planner, public utility supplier, and all the rest of it. De Tocqueville observed in 1866 that the State everywhere interferes more than it did; it regulates more undertakings, and undertakings of a lesser kind; and it gains a firmer footing every day, about, around and above all private persons, to assist, to advise and to coerce them."

It has been pointed out that the increasing involvement of the state in the activities of

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private individuals has resulted in a curtailment of individual liberty.\(^4\) The modern trend, however, has been for the state to play a reduced role in economic, business and social activity as a direct participant but, on the contrary, to play a new and increasingly important role as regulator and facilitator of these activities.\(^5\) It is the view of the 'green light' theorists that the state is the protector or guarantor of many benefits, rights and liberties that the individual could not enjoy without the patronage of the state.\(^6\) They point out that the increasing involvement of the state in various activities is justified so as to facilitate the attainment of these broad objectives.

It may be noted that the judiciary, by means of judicial review, performs a very important function in vindicating individual rights. Judicial review is one of the most effective tools to articulate, advance and protect fundamental human rights. It is in this context that the concept of legitimate expectations assumes much importance in advancing a culture of rights consciousness.

We have examined, in the preceding chapter, the impact of the orthodox grounds of natural justice on the expansion of rights consciousness. Yet, the concept of fairness transcends these orthodox requirements of natural justice and may be treated as an

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\(^6\) See, e.g., Harlow, Carol and Rawlings, Richard, *Law and Administration*, [London:
extension to or alternative version of it. It is in this context that the doctrine of legitimate expectations is an important safeguard for the protection of individual rights. Originally, the doctrine concerned procedural fairness; it was, in essence, a corollary of natural justice. Today, however, the doctrine has been extended so as to admit of a substantive content. Central to the idea of legitimate expectations are the notions of fairness and legal certainty that are essential requisites for advancing rights consciousness and preserving the rule of law.

Broadly, legitimate expectations deal with process rights and/or with substantive rights. Legitimate expectations dealing with process rights can, like natural justice, be linked with the fundamental human rights involving due process. For instance article 6 of the European Convention on Human Rights protects the right to due process in the determination of a person's civil rights and obligations and in respect of any criminal charges against a person. Article 10 of the Universal Declaration of Human Rights is also to the same effect. Additionally, article 14 of the International Covenant on Civil and Political Rights also recognizes the fundamental right to due process. In Canada article 2 of the Bill of Rights is to the effect that, unless expressly declared to the contrary, an Act of Parliament should be construed so as to give effect to the Bill of Rights. In addition to protecting process rights in criminal proceedings, article 2 of the Canadian Bill of Rights also provides that an Act of Parliament should not be construed so as to "deprive a person of the right to a fair hearing in accordance with the principles

Butterworths, 2nd edn., 1997], pp. 67 - 90

7 See discussion in part VI infra.
of fundamental justice for the determination of his civil rights and obligations."

Thus, it is submitted that legitimate expectations which give rise to process rights are explicitly protected as fundamental human rights. It is the role of the judiciary to recognize situations which give rise to such legitimate expectations, which may result in an entitlement to process rights, so as to advance rights consciousness and to, thereby, promote the rule of law.

The recognition of substantive legitimate expectations, on the other hand, serves to promote the value of legal certainty. Legal certainty is clearly linked to the right against retroactivity. Thus, the disappointment of a substantive legitimate expectation may lead to a failure to accord protection to this fundamental right. In Sri Lanka, for instance, the Constitution accords fundamental rights status to the right against retroactivity where criminal proceedings are concerned. The presumption against retroactivity is a well-known principle of interpretation and has, repeatedly, been judicially recognized. It is also an important aspect of the rule of law. In Pierson v.

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8 Article 2 (d).


10 Article 13 (6).


Secretary of State for the Home Department, where the main issue that arose for determination was whether the Home Secretary had a general power to increase a tariff which he, or a predecessor in office, had communicated to a prisoner, Lord Steyn said:

"The critical factor is that a general power to increase tariffs duly fixed is in disharmony with the deep rooted principle of not retrospectively increasing lawfully pronounced sentences. In the absence of contrary indications it must be presumed that Parliament entrusted the wide power to make decisions on the release of mandatory life sentence prisoners on the supposition that the Home Secretary would not act contrary to such a fundamental principle of our law."  

Lord Steyn also noted that "[t]he rule of law in its wider sense has procedural and substantive effect." It is, therefore, clear that the rule against retroactivity is a fundamental principle of law and is an important safeguard to advance a rights culture.

European Community jurisprudence has, for a considerable period, accorded recognition to the rule against retroactivity. It is in this context that it is possible to justify the protection of substantive legitimate expectations on the basis of a rights analysis. Craig and de Burca are of the view that the arguments against retroactivity are "simple and compelling". They state:

"A basic tenet of the rule of law is that people ought to be able to plan their lives, secure in the knowledge of the legal consequences of their actions. This fundamental aspect of the rule of law is violated by the application of measures which were not in force at the time that the actual events took place. Our concern about retrospective norms are particularly marked in the context of

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14 ibid., at p. 606.
15 ibid.
criminal penalties, where the effect of the application of the norm may be to
criminalize activity which was lawful when it was undertaken. The application
of retrospective rules may also be extremely damaging to the individual in
commercial circumstances, upsetting the presuppositions on which important
transactions may have been based."

It is in this context that it is possible to advance the proposition that substantive
legitimate expectations are worthy subjects of protection, not only in the European
Community but in other jurisdictions as well, in order to promote rights consciousness
and to, thereby, advance the rule of law.

The rule of law which lies at the core of legitimate expectations, is an
amorphous concept. According to Dworkin\(^\text{18}\) there are "two very distinct conceptions of
the rule of law."\(^\text{19}\) He refers to the first conception as the rule book conception in that the
power of the state, as far as is possible, should never be exercised against individual
citizens except in accordance with rules which are public and freely available. Dworkin
argues that the rule book conception is very narrow because it says nothing about the
content of the rules. It is not his contention that persons who favour this approach lack
concern for the content of the rules. On the contrary, it is their position that the content
of the rule is a matter for substantive justice, which is a separate ideal, and is not, in any
sense, a part of the ideal of the rule of law.\(^\text{20}\)

\(^{17}\) ibid., at p. 349 - 350.


\(^{19}\) ibid., at p. 11.

The second conception of the rule of law, alluded to by Dworkin, is the "rights conception". This conception assumes that citizens have moral rights and duties, inter se, and political rights against the state as a whole. "It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of the individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable." This conception does not distinguish between the rule of law and substantive justice. This wider conception of the rule of law, it is submitted, provides the justification for judicial review on the footing that there has been a breach of legitimate expectations.

Finnis, on the other hand, refers to the rule of law as being among the "requirements of justice or fairness." According to Finnis a legal system embodies the rule of law according to the extent of the presence of the following eight desiderata: 

(i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent one with another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable, and relatively general; and that (viii) those people who have authority to make,

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21 supra note 18, at p. 11.

22 ibid., at p. 12.

administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules applicable to their performance and (b) do actually administer the law consistently and in accordance with its tenor.\textsuperscript{24}

The concept of legal certainty can be gleaned in Finnis's sixth and eighth desideratam. Legal certainty is an important justification for protecting legitimate expectations. According to Finnis's formulation of the rule of law, legal certainty is subsumed under the overriding concept of the rule of law. Additionally, the concept of legitimate expectations requires that certain rights and interests are afforded protection. The overriding concept here is that of fairness. It has been pointed out that legitimate expectations add to the concepts of right and interest in different ways.\textsuperscript{25} According to Craig, the term right "covers instances in which the challenged action affects a recognized proprietary or personal right of the applicant."\textsuperscript{26} The term interest " has been used as the basis for the application of some type of hearing even where the individual would not be regarded in law as having any actual substantive entitlement or right."\textsuperscript{27} However, the action or decision must affect the relevant individual to his or her detriment.

It is, therefore, submitted that the protection of legitimate expectations is a very

\textsuperscript{24} \textit{ibid.}, at pp. 270 - 271.

\textsuperscript{25} See, e.g., Craig, P.P. \textit{Administrative Law} [London: Sweet & Maxwell, 3\textsuperscript{rd} edn., 1994], at p. 294.

\textsuperscript{26} \textit{ibid.}, at p. 293.

\textsuperscript{27} \textit{ibid.}
important ground for the exercise of judicial review. The recognition of legitimate expectations is, therefore, of pivotal importance in the protection of individual rights and interests in a society that is highly regulated.

This chapter will examine the rationale for the protection of legitimate expectations, and the nature of the different types of legitimate expectations, in order to ascertain how the protection of such expectations can expand the frontiers of judicial review, and strengthen individual liberty by advancing rights consciousness.

II. The Rationale for the Protection of Legitimate Expectations.

As a ground for judicial review, legitimate expectations were originally regarded, in terms of the Diplock classification, as an aspect of procedural propriety; today, however, the doctrine seems to have evolved significantly so as to admit of a substantive content.

Commenting on the nature of legitimate expectations, particularly in relation to natural justice and fairness, Dawson, J., in Attorney General for the State of New South


Wales v. Quin,\(^{30}\) said:

"It is when the expectation is of a fair procedure itself that the concept of a legitimate expectation is superfluous and confusing. That is not to say that where the legitimate expectation is of an ultimate benefit the concept is not a useful one to assist in establishing whether a particular procedure is in fairness required. But whenever a duty is imposed to accord a particular procedure, it is because the circumstances make it fair to do so and for no other reason. No doubt people expect fairness in their dealings with those who make decisions affecting their interests, but it is to my mind quite artificial to say that this is the reason why, if the expectation is legitimate in the sense of well founded, the law imposes a duty to observe procedural fairness. Such a duty arises, if at all, because the circumstances call for a fair procedure and it adds nothing to say that they also are such as to lead to a legitimate expectation that a fair procedure will be adopted."

Thus Dawson, J., sought to draw a distinction between a situation where there was a legitimate expectation of an ultimate benefit, thereby, requiring that a fair procedure be adopted and one where a person had the right to a fair hearing as a free standing process right (independent of any legitimate expectation). It was his Honour's view that in the latter situation the right to seek judicial review was not derived from a legitimate expectation but, on the contrary, was warranted because the circumstances called for the adoption of fair procedure. In such a situation it added nothing to a person's entitlement to a hearing to have recourse to the concept of a legitimate expectation. The view of Dawson, J., is logical in terms of his Honour's reasoning. However, as we shall see in part IV of this chapter, the legitimate expectation giving rise to a right to be heard is derived in a situation where a person does not have an automatic right to a hearing but is given such a right due to the fact that the failure to do so would disappoint his or her well founded expectations.

\(^{30}\) (1990) 170 C. L. R. 1, at p. 55.
It is submitted that the importance attached to the concept of legitimate expectations lies in its usefulness as a tool for articulating rights consciousness. This is an area of increasing relevance and seminal importance for countries, such as Sri Lanka, where there is a discernible trend in this direction. Recent developments in the area of legitimate expectations, particularly in relation to the expectation of a substantive right or benefit, pose a challenge to the traditional basis of judicial review. It helps to reinforce the proposition that the basis of judicial review is not the *ultra vires* doctrine but the rule of law and the development of principles of good administration.\(^{31}\)

Elias,\(^{32}\) referring to two separate elements of the concept of legitimate expectations, developed by the courts, states:

"In some cases the legitimate expectation will be an expectation that a substantial benefit, privilege or other advantage will be conferred or continued. In other cases it will be the more limited expectation that no adverse decision affecting an individual will be taken without first affording that person the opportunity to make representations about it: the legitimate expectation is not that the benefit or advantage itself will ultimately be conferred."


In *Council of Civil Service Unions v. Minister for the Civil Service*\(^\text{33}\) (CCSU) Lord Diplock referring, *inter alia*, to legitimate expectations in relation to the scope of judicial review said that to qualify as a subject for judicial review the decision must have consequences which affect some person or body of persons other than the decision maker, although it is quite possible that it may affect him too. He stated that it must affect such other person "by depriving him of some benefit or advantage which (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."\(^\text{34}\)

In the *CCSU* case Lord Fraser said that "even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law."\(^\text{35}\) Commenting upon the nature of legitimate expectations, in *R. v. Secretary of State for the Home Department, ex parte Ruddock*,\(^\text{36}\) Taylor, J., said:

"The doctrine of legitimate expectation imposes a duty to act fairly. Whilst most


\(^{34}\) *ibid.*, at pp. 408 – 409.

\(^{35}\) *ibid.*, at p. 401.

\(^{36}\) [1987] 1 W.L.R. 1482.
of the cases are concerned ....... with a right to be heard, I do not think the doctrine is so confined. Indeed, in a case where ex hypothesi there is no right to be heard, it may be thought the more important to fair dealing that a promise or undertaking [given should be kept].

Aronson and Dyer observe that "[t]he concept of legitimate expectation was initially used to lessen the degree to which individuals needed to be affected before it could be said that procedural fairness applied. It should have become superfluous by now, but instead has undergone a metamorphosis to become a means of giving a particular content to the requirements of procedural fairness."

As a concept, legitimate expectations is used for a number of different purposes. It was initially used "as a means of expanding the presumptive application of natural justice beyond decisions affecting "rights" and legal interests." The concept has also been used "to lessen the unfairness which results from the courts' reluctance to uphold arguments of estoppel based on the undertakings and representations of public officials. Undertakings, which might otherwise have given rise to estoppel, have been treated as establishing legitimate expectations and thus rights to be heard where such undertakings are not observed." More recently, the concept of legitimate expectations has been used, "not to impose a duty to observe procedural fairness, but rather to give that duty some

37 ibid., at p. 1497.

38 Aronson, Mark and Dyer, Bruce, Judicial Review of Administrative Action [Sydney: The Law Book Company, 1996], at p. 413.

39 ibid., at p. 414.

40 ibid., at pp. 414 - 415.
specific content."^{41}

Wade and Forsyth,^{42} analysing a number of decisions relating to legitimate expectations, state that "[t]hey show that the courts now expect government departments to honour their statements of policy or intention or else to treat the citizen with the fullest personal consideration. Unfairness in the form of unreasonableness is clearly allied to unfairness by violation of natural justice. It was in the latter context that the doctrine of legitimate expectation was invented, but it is now proving to be a source of substantive as well as procedural rights."

It should be noted, however, that the view has been expressed that the courts may be ill equipped to perform a review of a policy-making function.^{43} They are not inherently suited to consider issues of a polycentric nature.^{44} This is because the courts are neither representative of nor responsible to the electorate. They should not, therefore, determine the reasonableness of decisions which involve issues of 'high policy'.^{45} It should also be noted that the forensic process is not capable of analysing and determining

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41 ibid., at p. 415.
complex policy issues. Additionally, judges are not trained in multi-disciplinary studies and are ill equipped to deal with such policy issues.

Despite certain reservations having been expressed regarding the prudence of a review of merits, which is essentially what the doctrine of legitimate expectations may amount to, it is submitted that such review is both necessary and essential for the purpose of controlling the exercise of arbitrary power and advancing a rights culture.

In the ensuing section we will attempt to identify the different situations which may give rise to legitimate expectations.

III. Situations Which Give Rise to Legitimate Expectations.

In *R. v. Devon County Council, ex parte Baker* 46 Simon Brown, L.J., identified four categories of legitimate expectations. 47 These types of legitimate expectations can, broadly, be classified into three distinct species: 48 (i) where there is no legal right being taken away but a legitimate expectation that a certain state of affairs will continue and does not, there may still be a right to be heard before that decision is taken; 49 (ii) where

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47 *ibid.*, at pp. 88 - 89.
49 *ibid.*
there would not normally be a free-standing right to be heard under (i) above, because no legitimate expectation is being taken away, but a legitimate expectation of being heard is created by a promise or a practice of being heard;\(^{50}\) (iii) where there is a legitimate expectation which does not give rise to a right to be heard but generates a right to substantive fairness rather than procedural fairness.\(^{51}\)

The first two categories of legitimate expectations are concerned with procedural fairness; to that extent they can be classified as corollaries of natural justice. The third category is concerned with substantive fairness. It is here that the concept of legal certainty is of pivotal importance. It is in this context that the distinction between an appeal and an application for judicial review becomes blurred. An application for judicial review based on substantive legitimate expectations challenges the premise that the doctrine of *ultra vires* is the basis of judicial review.

A general complaint of unfairness is often covered by the phrase "legitimate expectation". However, it is not every expectation that would result in public law consequences.\(^{52}\) A legitimate expectation, in public law, could only arise in circumstances where there was a public law obligation owed to the applicant,\(^{53}\) and it was

\(^{50}\) *ibid.*

\(^{51}\) *ibid.*


\(^{53}\) *R. v. London Borough of Camden, ex parte Hughes*, [1994] C.O.D.253, per Latham,
possible to make out an arguable case, based on the said expectation.\(^5\)

In *R. v. Jockey Club, ex parte R. A. M. Racecourses Limited*\(^5\) Stuart-Smith, L.J., identified a number of attributes that must be affirmatively established before the existence of a legitimate expectation could be recognized in law. These requisites were that: (i) there must be a clear and unambiguous representation; (ii) the person relying upon the legitimate expectation was within the class of persons who was entitled to rely upon it; (iii) they did rely upon the said representation; (iv) they did so to their detriment; (v) there was no overriding interest arising from their duties and responsibilities.\(^6\)

There has also been a recent development, particularly in Australia and New Zealand, where the mere ratification of an international human rights treaty has been held to give rise to the legitimate expectation that the treaty will be taken into consideration by a decision-maker as a relevant consideration. If, however, the decision-maker proposes to disregard the treaty obligation then he or she must first accord the affected parties adequate notice and an opportunity to make representations in this regard. The ratification of a treaty could also give rise to substantive rights. This evolving aspect of the doctrine of legitimate expectations will be discussed in part VII of this chapter.


\(^6\) *ibid.*, at pp. 280 - 281.
It would now be prudent to examine, in some detail, the different situations which give rise to a legitimate expectation.

IV. A Legitimate Expectation that a Certain State of Affairs Will Continue.

This type of legitimate expectation springs from the expectation of procedural fairness. It arises in a context where an applicant for judicial review has the expectation that a certain state of affairs will continue. If there is to be a change, in such a state of affairs, there is an expectation that a hearing will be granted before such a change is effected. An important prerequisite, for the existence of this type of legitimate expectation, is that the applicant must be legally entitled to expect that the state of affairs will continue. If the applicant's expectation is devoid of any firm legal foundation, then, he can have no legitimate expectation of a hearing.

*Schmidt v. Secretary of State for Home Affairs*\(^{57}\) was one of the earliest English cases where the expression 'legitimate expectation' occurred. In this case two Scientology students were refused an extension of their permission to remain in the United Kingdom when their right to be there had expired. It was the students' complaint that they had been refused an extension of their right to remain in the United Kingdom without their being granted a hearing. They claimed that they had a legitimate

\(^{57}\) [1969] 2 Ch. 149.
expectation of such a hearing. Lord Denning, M. R., expressed the view that the students had no right to remain in the country; they could not, therefore, have had any legitimate expectation of a hearing. However, if a person's entry permit was revoked before its expiry he would have "a legitimate expectation of being allowed to stay for the permitted time." This type of situation covers both types of legitimate expectations - procedural and substantive.

Central to the reasoning, adopted by Lord Denning, was that the legitimate expectation must spring from a firm legal foundation. It appears, therefore, that it is a mandatory prerequisite, for this type of expectation to exist, that a right possessed by the applicant for judicial review must be infringed. If the applicant's belief, that he possesses such a right, is devoid of any legal basis, then, his claim, that his legitimate expectations have been denied, cannot be sustained.

It is important to appreciate the fact that the right alluded to by Lord Denning, in a Schmidt type of situation, is, essentially, a process right. The legitimate expectations of the applicant for judicial review is only that he or she will be treated fairly inasmuch as a decision adverse to his or her interests and/or rights will only be taken after such a person has been accorded a prior hearing. There is no legitimate expectation of anything over and above that of receiving a fair hearing.

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58 ibid., at p. 171.
In *Mclnnes v. Onslow-Fane*, Megarry, V.C., referring to situations where the right to be heard existed, stated that there was a category of persons such as a licence holder, who had held a licence for many years and, when the licence had expired, sought to renew that licence. In such a case the individual concerned had a legitimate expectation of being granted a hearing before the licence was denied. It should be noted, however, that the type of expectation, Megarry, V.C., was alluding to, was an expectation of a hearing; it was not an expectation of a particular outcome. To that extent this type of legitimate expectation is, essentially, concerned with procedural fairness; it is not concerned with substantive justice.

In the Sri Lankan case of *Laub v. Attorney General*, the petitioner, who was a German national, holding a German passport, arrived in Sri Lanka on a one month visa. This visa was subsequently extended. His application for a further extension of the visa was refused by the Controller of Immigration and Emigration. Ismail, J., in the Court of Appeal was clearly influenced by the *dicta* of Lord Denning, M.R., in *Schmidt v. Secretary of State for Home Affairs*. Quoting Lord Denning with approval, he said: "a foreign alien has no right, - and I could add, no legitimate expectation of being allowed to stay. He can be refused, without reasons given and without a hearing once his time has expired, he has to go."
Whilst it is difficult to disagree with the conclusion reached by Ismail, J., in *Laub*, it is submitted that his Lordship's reasoning, in relation to the issue of a legitimate expectation, appears to be unduly restrictive. It represents an unwillingness to expand the frontiers of judicial review, as is the current trend in the United Kingdom, so as to admit more rights based challenges. The excessive reliance placed upon *Schmidt*, which was a 1969 decision, is regrettable. It is submitted that what is at issue is the fundamental question whether a foreign alien has a legitimate expectation that his visa extension will not be refused without a prior hearing. It is conceded that a foreign alien does not have a statutory right to be heard prior to a decision being made to deny him an extension of his visa. It is submitted, however, that if a statutory right to be heard existed, then, the notion of a legitimate expectation of a hearing, in that context, would be superfluous. The denial of a statutory right to be heard would cause the resulting decision to be unlawful and, therefore, amenable to judicial review.

The redundancy of the concept of legitimate expectation, in a situation where a person has a statutory right to be heard, was adverted to by Silva, J., P.C.A, in *Gooneratne v. Premachandra*. In this case, the petitioners who were members of a recognized political party - the Democratic United National Front (DUNF)- and members of the Western Provincial Council refused to sign a motion of no confidence against the

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63 This is because the applicant had suppressed material facts, resulting in a failure to act with *uberrima fides*.


Chief Minister. The executive committee of the party purported to expel the petitioners from the party as a result of a recommendation made by the disciplinary committee. The petitioners were not given a hearing prior to their expulsion. The party constitution, on the other hand, provided for such a hearing. The respondents contended that such a hearing was inapplicable to the petitioners. The respondents submission was based upon the premise that the petitioners were aware of the consequences of non-compliance with the directions given in the covering letter which accompanied the resolution of no confidence. The petitioners, it was contended, had no legitimate expectation of a hearing; a hearing in the circumstances of the case was a useless formality; in any event no real prejudice was caused to the petitioners by the absence of such a hearing.

Silva, J., P.C.A., however, was clearly unimpressed by this argument. His Lordship adverted to the view that "[t]he "legitimate expectation" principle has no application where the petitioners already enjoy the protection provided by the Constitution to a due inquiry. That principle has relevance only if the petitioners had no right of hearing. The same condition applies to the contention that an inquiry would be a useless formality."  

It is submitted that the view articulated by Silva, J., P.C.A., represents a correct evaluation of the scope of the principle of legitimate expectation when there is a free standing right to be heard. Where there is a statutory right to be heard, the denial of a hearing in such circumstances would result in a vitiation of the subsequent

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ibid., at p. 154.
In Laub v. Attorney General\textsuperscript{67} Ismail, J., failed to recognize and appreciate the distinction between the statutory right to be heard and the creation of a legitimate expectation of being heard. The statutory discretion given to the Controller of Immigration and Emigration for issuing visas and considering applications for extensions is not unfettered; the discretion must be exercised reasonably. However, principles of good administration might require that, before the Controller makes a decision to deny an extension of a visa, he must consider all relevant matters; he must act fairly and reasonably. The applicant had a legitimate expectation of being heard because his visa had been extended before. If the Controller had good and sufficient reasons for his decision, the granting of a hearing would not militate against his determination. It should be noted, however, that the conclusion arrived at by Ismail, J., in Laub v. Attorney General is justified in view of the particular circumstances of that case.

It would be of relevance, by way of comparison, to examine certain Commonwealth decisions where the relevance of the doctrine of legitimate expectation has been examined in circumstances where there exists a free standing right to a hearing.

The Canadian courts have adopted the position that the doctrine of legitimate

\footnote{\textsuperscript{67} See, e.g., the dicta of Pulle, J., in Thahrew v. Yatawara (1952) 54 N. L. R. 117, at p. 119, in relation to a right to an oral hearing when there was a statutory right to be heard.

\textsuperscript{68} supra., note 60.}
expectation is solely concerned with procedural rights. In *Edmonton Telephones Corporation v. Stephenson*, Ritter, J., stated that the doctrine of legitimate expectation cannot create substantive rights. He was of the view that where applicable the doctrine can create a right to make representations or to be consulted, but it cannot fetter a decision following the representations or consultations. Ritter, J., adopting a very narrow approach towards the doctrine, was of the view that the rules relating to procedural fairness and legitimate expectations did not apply to a body exercising legislative functions. Central to the court's reasoning was the view that the doctrine of legitimate expectation did not create substantive rights. It was, in essence, an extension of the rules of natural justice. As the majority observed in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*:

"The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords the party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation."

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[^71]: supra., note 69 at p. 122.

The view taken in Canada appears to be that the doctrine of legitimate expectations "can create a right to make representations or to be consulted. It does not fetter the decision following the representations or consultations."\(^{73}\)

In Australia the courts have developed the doctrine of legitimate expectation so that it admits of a substantive content. In this section, however, we will examine certain Australian cases which are concerned with the doctrine of legitimate expectation, where there is a free standing right to be heard.

In *State of South Australia v. O'Shea\(^{74}\)* the Parole Board recommended to the Governor that O'Shea, who had previously been convicted of two offences of indecent assault against children, be released on licence subject to the imposition of certain conditions. The Governor in Council resolved to take no action on that recommendation. Prior to the Parole Board making its recommendation O'Shea had been released by the Governor, on licence, for a period of three months. After the licence had lapsed, O'Shea had remained at liberty for over one year prior to being returned to custody, pursuant to a warrant issued under the relevant enactment.\(^{75}\) The State of South Australia's appeal to the High Court of Australia turned on the issue of whether the decision of the Governor in Council not to release O'Shea, despite a Parole Board recommendation to

\(^{73}\) per Sopinka, J., in *Reference re Canada Assistance Plan (Canada) (Canada) (1991) 1 Admin. L. R. (2d) 1*, at p. 32.

\(^{74}\) (1987) 73 A. L. R. 1. This appeal was taken up with a related case, *O'Shea v. Parole Board of South Australia*.

\(^{75}\) Criminal Law Consolidation Act 1935.
the contrary, was subject to a duty to act fairly. Mason, C.J., Wilson, Brennan and Toohey, J.J., held, with Deane, J., dissenting, that the appeal by South Australia should be allowed. Mason, C.J., expressed the view that merely because the Governor's decision was one which involved some aspects of political or policy judgment, it should not stand apart from the requirements of procedural fairness. He said:

"the courts do not substitute their view of policy for that prescribed by the Executive, but this does not mean that policy issues stand apart from procedural fairness. Although it is unrealistic and impractical to insist on a person having the opportunity to present submissions on matters of high level general policy, the same considerations do not apply to the impact of policy on the individual and to those aspects of policy which are closely related to the circumstances of the particular case and that is the case here."^6

However, the court was of the view that the requirements of procedural fairness had been satisfied. Consequently, O'Shea's appeal was dismissed.

In his dissenting judgment, Deane, J., said that "the common law requirements of procedural fairness cannot, in any event, properly be confined, in a case involving the exercise of government power or authority, by reference to some formula framed in terms of "rights" or of some rigid view of "legitimate expectation." The question which matters in such a case is not whether the claimant who asserts a denial of procedural fairness had some legal right or "legitimate expectation" in the sense of the benefit of some new type of administrative estoppel, but whether the relevant government power or authority was being exercised to his individual disadvantage."^7

^6 supra., note 74, at p. 7.

^7 ibid., at p. 29.
In *Kioa v. West* Mason, J., referring to the doctrine of legitimate expectation said that "[t]he law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect the rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."  

It is submitted, therefore, that the doctrine of legitimate expectation extends procedural fairness to a person whose rights, interests or legitimate expectations, are to be affected as a result of administrative action. A common law duty is imposed, upon the decision-maker, to accord a hearing to the affected party, based upon the latter's legitimate expectations. It is relevant to note however that this type of procedural fairness is applicable only where the affected party has a free standing right to a hearing.

V. Where No Free Standing Right Exists, but a Legitimate Expectation is Created Because of a Promise, Previous Practice, Policy or Conduct.

In this type of situation the legitimate expectation springs from a promise, previous practice, policy or conduct. The expectation is that procedural protection

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78 *(1985) 159 C. L. R. 550.*

79 *ibid.*, at p. 584.

would be afforded, in the form of a right to a hearing, in a situation where no free standing right to a hearing exists. Detrimental reliance is not a necessary condition when an application for judicial review is founded on this basis. What is of seminal importance is that a representation must be made (either expressly or by implication) that others, in a similar situation, will be heard.\textsuperscript{81}

\textbf{In Attorney General of Hong Kong v. Ng Yuen Shiu,}\textsuperscript{82} the Hong Kong government had made public its changed policy towards illegal immigrants. The government stated that if such an illegal immigrant came forward, he or she would be interviewed, and, although, no guarantee would be given that the said illegal immigrant would not be subsequently removed, each case would be considered on its merits. The respondent, who was an illegal immigrant, was interviewed by an immigration officer and subsequently detained pending the making of a removal order. The respondent's appeal to the Immigration Appeal Tribunal was dismissed without a hearing. The Court of Appeal of Hong Kong granted an order of prohibition preventing his removal, pending a proper hearing of his case. The Attorney General of Hong Kong appealed to the Privy Council, which dismissed the appeal and substituted an order of \textit{certiorari} for the order of prohibition.

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\textsuperscript{81} See, e.g., Singh, Rabinder. 'Making Legitimate Use of Legitimate Expectation' (1994) 144 N. L. J. 1215.

\textsuperscript{82} [1983] 2 A. C. 629.

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Adverting to the requirements of fair procedure, in *Ng Yuen Shiu*, Lord Fraser said that "[t]he expectations may be based upon some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry."\(^{83}\)

In *R. v. Brent London Borough Council, ex parte MacDonagh*,\(^{84}\) the applicants sought judicial review of the decision of the local authority to evict the gypsies from a site without first giving them a hearing. In accordance with its statutory duty, under and in terms of the Caravan Sites Act 1968, Brent LBC had provided a site for gypsies but, on a number of occasions, had evicted them from the said site in order to repair services and to ensure that it was sanitary. In March 1987, 33 gypsies on the site were each served a letter the terms of which indicated that they would not be evicted from the site unless the local authority provided them with suitable alternative accommodation. In 1988, the local authority proceeded to evict the gypsies without any prior consultation on the footing that the conditions of the site had deteriorated. The gypsies sought judicial review of the decision of the local authority. It was held, by the Divisional Court, that the letters sent to the 33 gypsies, and the previous conduct of the local authority, gave rise to a legitimate expectation that they would not be evicted without some alternative accommodation being made available. Thus, the local authority could only resile from its undertaking after having consulted the affected gypsies.

\(^{83}\) *ibid.*, at p. 637.

\(^{84}\) *The Times 22 March 1989.*
A legitimate expectation, where there is no free standing right to a hearing, can be created as a result of the adoption of a published policy. The published policy could give rise to a legitimate expectation that the criteria laid down in the policy will be followed; if there is to be any departure from such a policy, it is imperative that those who are likely to be affected by such a change are given sufficient notice of this fact. Additionally, they may have a legitimate expectation of a hearing or a right to make representations, prior to changes being effected to the policy.

In R. v. Secretary of State for the Home Department, ex parte Khan, the Home Office published a circular which indicated the criteria that would be applied when a person in the United Kingdom wished to adopt a child from abroad. The applicant wished to adopt a relative's child; the child lived in Pakistan. The applicant made an application for an entry clearance certificate for the child, which was refused by the Secretary of State. The Secretary of State proceeded to refuse the certificate by the application of criteria that was at variance with the criteria laid down in a previously published circular. The applicant applied for judicial review, on the basis that he had a legitimate expectation, arising from the circular, that the criteria laid down in the circular will be followed. The Secretary of State, on the other hand, claimed that his discretion in such matters was unfettered.

The court held that the Secretary of State was under a duty to apply the criteria stated in the circular, provided it did not conflict with his statutory duty. He could only

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resile from the circular if it was in the overriding public interest that he should do so, and interested persons were first afforded a hearing.

The decision of the High Court of Australia, in Quin, is of relevance in this regard. In Quin, consequent to the reconstitution of the courts, all but five of the one hundred former stipendiary magistrates, who had applied, were appointed to the new courts in accordance with a policy under which they would be appointed unless they were considered to be unfit for judicial office. One former stipendiary magistrate who had not been appointed obtained from the Supreme Court of New South Wales a declaration that the Attorney General's decision, not to recommend his appointment, was void as he had been provided with no opportunity to respond to the allegations made against him. The Attorney General then indicated that he was prepared to consider Quin's application, with those of other applicants, on merit without reference to the allegations made against him. It was Quin's contention that he was entitled to have his application considered without reference to the other applications made in the meantime. The majority of the court, comprising Mason, C.J., Brennan and Dawson, J.J., were of the view that the Attorney General was not obliged to treat the respondent's application in this manner. Mason, C.J., was of the view that to do so would compel the Attorney General to depart from the method of appointment which conformed to the relevant statute. He said:

"It is the presence of a legitimate expectation which conditions the existence of a claimant's right to procedural fairness and the corresponding duty of the decision-maker to observe procedural fairness in the treatment of the claimant's case. The content of that duty is dependent upon the circumstances of the particular case, but its existence is determined by reference to legal principle.

So, a legitimate expectation may be created by the giving of assurances ..., the existence of a regular practice ..., the consequences of a denial of a benefit to which the expectation relates ..., or the satisfaction of statutory conditions .... The list is not exhaustive, but provides indications of the kinds of factors which a court will take into account in deciding whether or not an expectation is legitimate.  

Mason, C.J., also said that the duty to accord procedural fairness in connection with a claimant's legitimate expectation is referable to a general duty of good administration. He pointed out, however, that the content of that broader duty is still defined by reference to the claimant's legitimate expectation. In Quin there was an absence of such an expectation as the appointments were made in conformity with the relevant statute. Mason, C.J., was, therefore, of the view that there was "no corresponding duty to accord fairness." Consequently, "the presence of a legitimate expectation conditions the existence of a person's right to procedural fairness and the corresponding duty of the decision-maker to observe procedural fairness in the treatment of the person's claim or case."  

In Minister of State for Immigration and Ethnic Affairs v. Teoh Mason, C.J., and Deane, J., drew a distinction between a legitimate expectation and a binding rule of law. They said that “[t]he existence of a legitimate expectation that a decision-maker will act ...  

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87 ibid., at p. 20.
88 ibid.
89 ibid., at pp. 20 - 21.
in a particular way does not necessarily compel him or her to act in that way. In a particular way does not necessarily compel him or her to act in that way. Their Honours also said that "if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course."93

In Fang v. Minister for Immigration and Ethnic Affairs94 the applicants, who were ethnic Chinese (the older ones having been expelled from Vietnam and resettled in China), came to Australia aboard a ship which was intercepted. As a result of amendments made to the Immigration Act, if a non-citizen is covered by an agreement between Australia and a safe third country, that person was disqualified from applying for a protection visa. China was regarded as a safe third country for the purpose. None of the applicants completed application forms for a protection visa. The applicants argued that they had engaged Australia's protection obligations, and that they had been denied procedural fairness in the circumstances. The Federal Court of Australia, by a majority, dismissed the appeal. Carr, J., in a dissenting judgment said that "by denying the appellants procedural fairness, the respondents have denied them a chance to establish that they were refugees."95

92 ibid., at p. 365.
93 ibid.
95 ibid., at p. 611.
It has been pointed out that "[r]egardless of whether one can identify a right in the
strict sense or a legitimate expectation, the requirements of procedural fairness must be
observed in any case where, by reference to 'the particular statutory framework' .... it is
proper to discern a legislative intent that the donee of governmental executive power or
authority should be bound by them. There is a strong presumption of such a legislative
intent in any case where a statute confers on one person a power or authority adversely
and directly to affect the rights, interests, status or legitimate expectations of a real or
artificial person or entity in any individual capacity (as distinct from merely as a member
of a section of the general public). The rationale of that strong presumption is to be
found not so much in sophisticated principle as in ordinary notions of what is fair and
just."^6

It should also be noted that for a promise or policy to be binding on the decision­
maker, it is not an essential prerequisite that the applicant for judicial review must show
that he acted to his detriment or prejudice. Detrimental or prejudicial reliance is not an
essential element for there to be a legitimate expectation of a hearing.\(^7\)

A previous pattern of conduct can also give rise to a legitimate expectation of
being heard. The decision of the House of Lords, in the CCSU Case,\(^8\) is of outstanding

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R. C. (Const.) 819, at p. 823.

^7 See, e.g., Stuart-Smith, J., in R. v. Jockey Club, ex parte, R. A. M Racecourses Limited,

significance in this regard. In the *CCSU Case* the Prime Minister, acting under prerogative powers, had issued a directive prohibiting membership of trade unions at the government's communication headquarters at Cheltenham. The unions sought a declaration that the directive was in breach of the requirements of natural justice, because the unions had not been consulted prior to the said directive being issued. The House of Lords was clearly of the view that the previous practice of regular consultations between the union and the Minister in relation to the conditions of service gave rise to a legitimate expectation that the unions would be consulted, in this instance, as well. However, the declaration was refused on the grounds of overriding national security considerations. Lord Roskill, referring to the concept of legitimate expectation said:

"The principle [of legitimate expectation] may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of a prior consultation. Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."  

It is submitted, therefore, that where a person has no free standing right to expect procedural fairness, he or she can still have a legitimate expectation consequent to an express promise, the adoption of a policy or the previous conduct of the decision-maker, giving rise to such an expectation of procedural fairness. The promise, previous practice or conduct of the decision-maker could give rise to the legitimate expectation that procedural fairness would be accorded; consequently, it would result in a person, who

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99 *ibid.*, at p. 415.
had no free standing right to expect procedural fairness, being included within the zone of protected interests as a direct result of the action of the decision-maker. The extension of procedural fairness in the form of a legitimate expectation, in situations where no free standing right as such exists, resulting from an administration action, is important from the point of view of safeguarding individual rights. The expansion of the zone of interests where procedural fairness will be accorded is of significance for articulating rights consciousness. It helps advance the important ideals of fairness and legal certainty, thereby, promoting the rule of law by contributing towards the development of a rights culture.

VI. Substantive Legitimate Expectations.

The recent recognition of a species of legitimate expectations, which result in the protection of substantive rights, has resulted in a virtual eclipse of estoppel as a basis for judicial review. Central to the protection of substantive legitimate expectations is the need to advance the important ideal of legal certainty which is a vital component of the rule of law. Where a person seeks the protection of a substantive legitimate expectation, he or she is not seeking procedural fairness; the complaint is about the merits of a decision. It is essentially concerned with the outcome of a decision. The recognition of a substantive legitimate expectation is a recognition that legal certainty is an important postulate that requires protection; it is a recognition that a citizen is entitled to regulate his or her affairs on the basis of an assurance, previous practice, conduct or policy adopted by a decision-maker. Additionally, the recognition of substantive legitimate
expectations threatens the orthodox view that the *ultra vires* doctrine is the basis of judicial review. The view that the *ultra vires* doctrine is not the basis of judicial review has now gained currency, and this important development may help advance, to a significant degree, a rights culture.

The recognition of substantive legitimate expectations, whilst ensuring fairness in the process of decision-making, will also ensure that expectations are not disappointed without just cause. In *Preston v. Inland Revenue Commissioners*, the House of Lords took the view that the court would intervene to direct the commissioners to refrain from performing their statutory duties if it would amount to such unfairness that it would be tantamount to an abuse of power. It is our view that such an approach would help promote legal certainty and, consequently, protect the fundamental principle of law relating to the rule against retroactivity. Thus, it would appear that the recognition of substantive legitimate expectations would result in whittling down the *ultra vires*

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101 It has, however, been observed that the doctrine of substantive legitimate expectations is linked more with the idea of discretion than with that of fairness. See, e.g., Wright, David, 'Rethinking the Doctrine of Legitimate Expectations in Canadian Administrative Law' (1997) 35 Osgoode Hall L. J. 139, at p. 156.


103 See discussion at part I, *supra.*, relating to the manner in which the rule against retroactivity helps to advance rights consciousness and, thereby, the rule of law.
doctrine. In this context the concept of unfairness, and the compelling need to protect the
different rights at stake, appears to outtop the *ultra vires* doctrine. It is submitted,
therefore, that this is an important development for the purpose of advancing rights
consciousness in society.

Substantive legitimate expectations do not deal with process rights. They are
concerned with issues of fairness of outcome. The recognition of this species of
legitimate expectations focuses attention on the role of judicial review, particularly, in
situations where an *ultra vires* representation has been made. Central to the issue is
whether the judges should be substituting their own value judgements for that of the
decision-maker or whether they should be concerned, solely, with the procedure through
which a decision was derived. As Craig\textsuperscript{104} observes: "[t]he decision as to whether
legitimate expectations can or should ever have a substantive as opposed to a procedural
impact is therefore simply another way of asking .......... whether an *ultra vires*
representation should ever be held to bind, and whether an individual should be able to
rely on a policy previously declared by a public body." He further points out that "even
if one does on occasion allow such substantive effects, this is not equivalent to a
wholesale substitution of judgment on the merits as the phrase is normally understood.
The normal understanding of the idea that the judiciary should not intervene on the
merits is that if the agency has decided to exercise its discretion in a particular manner,
it is constitutionally inappropriate for the court to interfere simply by substituting its own

opinion as to how the discretion should be exercised."105

Where an express assurance or promise has been made by a public body or official, if legal certainty is an ideal that must be pursued, it stands to reason that such a public body or official must be bound by the promise or undertaking. As McMullin, V-P., observed, in *Chu Piu-wing v. Attorney General*,106 "there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain."

According to Craig,107 the phrase substantive legitimate expectations is used "to refer to the situation in which the applicant seeks a particular benefit or commodity, whether this takes the form of a welfare benefit, a licence or one of the myriad other forms which such claims can assume; once again the claim to such a benefit will be founded upon some governmental action which is said to justify the existence of the relevant expectation." In *Attorney General for the State of New South Wales v. Quin*,108 Dawson, J., said:

"It adds nothing to say that there was a legitimate expectation, engendered by a promise made to follow a particular procedure, that the promise would be fulfilled. It is sufficient to say that, the promise to follow a certain procedure having been made, it was fair that the public authority should be held to it."

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105 ibid., at pp. 94 - 95.
108 (1990) 170 C. L. R. 1, at p.56.
It is relevant to note, however, that it may be harder to establish the existence of a substantive legitimate expectation rather than one which is merely procedural in character.\textsuperscript{109} It is a fundamental requirement, for the existence of a substantive legitimate expectation, that where a representation is made, by a governmental body, the representation should be unqualified and unambiguous: it cannot be unwittingly given.\textsuperscript{110}

Despite the fact that the concept of a substantive legitimate expectation is well accepted in the Commonwealth, and in the European Community, there appears, however, to be a certain degree of ambiguity regarding its role, particularly, in England.

In \textit{R. v. Secretary of State for Transport, ex parte Richmond-Upon-Thames L.B.C.},\textsuperscript{111} the applicants, who were local authorities, sought judicial review of the Secretary of State's decision which resulted in the introduction of a new system of night flying restrictions at airports. Laws, J., of the Queen's Bench Division, granted the applicants judicial review. The applicants also contended that they had a legitimate expectation, which was of a substantive character, that the policy would not be shifted so as to increase noise levels. It is important to note that the applicants had been previously consulted and, therefore, the procedural aspect of any legitimate expectation that would arise had been satisfied. Laws, J., was not prepared to concede that, in addition to the requirement of procedural fairness, which had been satisfied, the applicants had a


\textsuperscript{111} \textit{[1994] 1 W. L. R. 74}. 

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substantive legitimate expectation of a particular outcome. His Honour was of the view that the notion of a substantive legitimate expectation was "an antithesis which [was] liable to cause confusion".\textsuperscript{112} After a survey of the English decisions, which were cited in support of the acceptance of a substantive legitimate expectation, Laws, J., trenchantly observed:

"I consider that the putative distinction between procedural and substantive rights in this context has little, if any, utility; the question is always whether the discipline of fairness, imposed by the common law, ought to prevent the public authority respondent from acting as it proposes.\textsuperscript{113}"

Laws, J., therefore, refused to accept that the doctrine of legitimate expectations could be extended to protect a substantive legitimate expectation,\textsuperscript{114} despite academic authority cited to the contrary.\textsuperscript{115}

However, in the \textit{Hamble Fisheries}\textsuperscript{116} case Sedley, J., expressed the view that there could be a legitimate expectation of a substantive benefit or advantage.\textsuperscript{117} He disagreed with "significant elements"\textsuperscript{118} of the reasoning adopted by Laws, J., in the

\textsuperscript{112} \textit{ibid.}, at p. 92.
\textsuperscript{113} \textit{ibid.}, at p. 93.
\textsuperscript{114} \textit{ibid.}, at p. 94.
\textsuperscript{116} \textit{R. v. Ministry of Agriculture, Fisheries and Food, ex parte Hamble (Offshore) Fisheries Ltd.}, [1995] 2 \textit{All E. R.} 714.
\textsuperscript{117} \textit{ibid.}, at p. 723.
\textsuperscript{118} \textit{ibid.}. 233
Richmond case. Referring to the conceptual understanding of what makes an expectation legitimate, Sedley, J., said:

"Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must in the first instance be for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy-maker's conclusion. While policy is for the policy-maker alone, the fairness of his or her decision not to accommodate reasonable expectations which the policy will thwart remains the court's concern (as of course does the lawfulness of the policy). To postulate this is not to place the judge in the seat of the minister. [It is the court's task to reformulate policy; but it is equally the court's duty to protect the interests of those individuals whose expectation of different treatment has a legitimacy which in fairness outtops the policy choice which threatens to frustrate it.]{119}"

It is, therefore, submitted that the view articulated by Sedley, J., is preferable to that adopted by Laws, J., in relation to the recognition of substantive legitimate expectations as a ground of judicial review. It is our view, that the case law indicates that substantive legitimate expectations have been afforded protection, by the decisions of the English courts, for a considerable period of time; it is now too late in the day, despite certain recent contradictory decisions of the Court of Appeal,\textsuperscript{120} to back-peddle on this issue. These decisions warrant some analysis.

In \textit{R. v. Secretary of State for the Home Department ex parte Ruddock},\textsuperscript{121} an allegation was made that the Secretary of State had not followed the required procedures before authorising the tapping of the applicant's telephone. Taylor, J., expressed the view

\textsuperscript{119} \textit{ibid.}, at p. 731.

\textsuperscript{120} This aspect will be considered in the ensuing discussion.

\textsuperscript{121} [1987] 2 All E. R. 518.
that the doctrine of legitimate expectation was not limited to those cases involving a
legitimate expectation of a hearing before some right was affected. It extended to
situations where no right to be heard existed, but fairness required a public body to act
in compliance with its public undertakings and assurances.\textsuperscript{122}

\begin{quotation}
In \textit{R. v. Inland Revenue Commissioners, ex parte M. F. K. Underwriting Agents Ltd.},\textsuperscript{123} Bingham, L.J., referring to the doctrine of legitimate expectations as a "valuable" and "developing" doctrine, said:

"If a public authority so conducts itself as to create a legitimate expectation that
a certain course will be followed it would often be unfair if the authority were
permitted to follow a different course to the detriment of one who entertained the
expectation, particularly if he acted on it. If in private law a body would be in
breach of contract in so acting or estopped from so acting a public authority
should generally be in no better position. The doctrine of legitimate expectation
is rooted in fairness. But fairness is not a one way street. It imports the notion
of equitableness, of fair and open dealing, to which the authority is as much
entitled as the citizen. The revenue's discretion, while it exists, is limited.
Fairness requires that its exercise should be on a basis of full disclosure.\textsuperscript{124}"
\end{quotation}

Thus, Bingham, L.J., did not, in the \textit{M. F. K. Underwriting} case, appear to have any
reservations regarding the extension of the doctrine of legitimate expectations so as to
encompass substantive rights. His Lordship's reference to a possible legitimate
expectation that could have arisen in this case was in respect of a substantive right. He
was, essentially, referring to fair dealing on the part of the administrative agency. The
reference was not in respect of a possible legitimate expectation in terms of conferring

\textsuperscript{122} \textit{ibid.}, at p. 531.

\textsuperscript{123} \textit{[1990]} \textit{1 W. L. R.} 1545.

\textsuperscript{124} \textit{ibid.}, at pp. 1569 - 1570.
a process right. This, it is submitted, demonstrates a willingness on the part of Bingham, L.J., to expand the frontiers of judicial review so as to advance rights consciousness.

In *R. v. Secretary of State for Health, ex parte United States Tobacco International Inc.* the appellants complained that the government, after encouraging them to manufacture oral snuff in the United Kingdom, banned its supply and sale by regulation. The appellants sought to challenge the validity of the regulations by way of an application for judicial review. They claimed, *inter alia*, that the action of the government was in breach of their legitimate expectations. It was their contention that, provided they continued to perform their obligations under the voluntary agreement, in the absence of stronger evidence as to the risk to health, they had a legitimate expectation that they would be allowed to continue operations. Allowing the application for judicial review on the basis that there was a want of fairness, Taylor, L.J., was not, however, prepared to concede that there was a breach of any legitimate expectation. His Lordship observed:

"In the present case, if the Secretary of State concluded on rational grounds that a policy change was required and oral snuff should be banned in the public interest, his discretion could not be fettered by moral obligations to the applicants deriving from his earlier favourable treatment of them. It would be absurd to suggest that some moral commitment to a single company should prevail over the public interest. Accordingly, although it is regrettable that the applicants were kept in the dark for so long about the recommendation of a ban, I do not consider their plea of legitimate expectation can be upheld."  

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126 *ibid.*, at p. 369.
It should be noted, however, that Taylor, L.J., did not exclude the possibility of a legitimate expectation giving rise to substantive rights. What his Lordship seems to posit is that, in the instant case, public interest considerations militated against the possibility of recognizing any legitimate expectation of a substantive character.

In Oloniluyi v. Secretary of State for the Home Department\(^{127}\), the petitioner was a visitor to the United Kingdom while an application for the variation of leave as a student was under consideration. The petitioner had received verbal assurances that she would have no difficulty in returning to the United Kingdom. Her passport was stamped and an endorsement was made that no visa was required for her re-entry. One of the issues that had to be considered, by the Court of Appeal, was whether the assurances made gave rise to a legitimate expectation that the petitioner would be allowed to return to the U.K. The Court of Appeal allowed the appeal of the petitioner and quashed the decision of the Secretary of State; leave to appeal to the House of Lords was refused. Commenting on the expectations that were within the zone of protection, Dillon, L.J., said:

"On the facts of this case, the appellant had a legitimate expectation that she would be re-admitted as a returning student when she presented herself at Heathrow on 5 January. It was therefore wrong that she was refused admission on the ground specified in the notice of refusal, that the immigration officer was not satisfied that she was a genuine student who intended to leave the United Kingdom on completion of her studies.\(^{128}\)

More recently, the Court of Appeal of England has delivered a number of


\(^{128}\) *ibid.*, at p. 146.
apparently contradictory judgments, at least, as far as substantive legitimate expectations are concerned. In *Hargreaves* the Court of Appeal refused to recognize a substantive legitimate expectation but did recognize such an expectation in *Unilever* and *Coughlan*. In *Hargreaves* it was argued by the applicants that the change of policy, as to home leave for prisoners, was unlawful because it frustrated a legitimate expectation which had arisen, under rules that were previously in existence, as to eligibility. It was argued that the compact entered into with the prison governor of HM Prison Risley under the previous rules gave rise to a legitimate expectation, which was substantive in character, that the rules will be honoured.

The Court of Appeal was not inclined to agree with this proposition. It even went to the extent of overruling the ratio of Sedley, J., in *Hamble*. Pill, L.J., referring to the fairness issue, which inevitably arises where substantive legitimate expectations are recognized, said that he could not agree "that the court could take and act upon an overall view of the fairness of the respondent's decision of substance." His Lordship was of the view that *Wednesbury* unreasonableness, as a ground of review, provides

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the best rubric to challenge a new policy which did not satisfy the expectations of the applicant. His Lordship observed that the claim to a broader power to judge the fairness of a decision of substance, was a decision which was wrong in principle and that he, therefore, disagreed, to that extent, with the reasoning of Sedley, J., in *Hamble*. Hirst, L.J., pointed out that "[o]n matters of substance (as contrasted with procedure) *Wednesbury* provides the correct test." His Lordship also stated that while the actual decision of Sedley, J., in *Hamble* stands, "his ratio in so far as he propounds a balancing exercise to be undertaken by the court should be overruled."  

In *R. v. Inland Revenue Commissioners, ex parte Unilever plc* Unilever and certain other companies challenged the validity of a decision of the Inland Revenue to disallow loss relief, a practice which had been allowed for over 20 years, on the basis that the claim had not, in terms of the relevant statute, been timeously made. The court had to consider, *inter alia*, whether the practice, adopted by the Inland Revenue, gave rise to a legitimate expectation, which was substantive in character, as far as Unilever were concerned. The court was of the view that the conduct of the Inland Revenue did give rise to such a substantive legitimate expectation; the court was clearly influenced by the

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134 *supra.*, note 131, at p. 416.
135 *ibid.*, at p. 412.
136 *ibid.*

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degree of unfairness that would arise if the Inland Revenue was allowed to resile from its previously adopted practice. Simon Brown, L.J., referring to the unfairness that would result if the Inland Revenue was allowed to depart from its previously adopted practice, said:

"Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens."138

Bingham, M. R., was of the view that the Inland Revenue's decision to reject Unilever's claims in reliance on a time limit without clear and general notice was "so unfair as to amount to an abuse of power."139 The decision of the Court of Appeal in Unilever is, therefore, illustrative of an approach that is prepared to recognize substantive legitimate expectations as rights worthy of protection. It is an important development for the purpose of advancing rights consciousness in the Commonwealth.

Despite the decision of the Court of Appeal in Hargreaves it is submitted, however, that substantive legitimate expectations have been protected, from time to time, by the English courts and such recognition is consonant with the advancement of rights consciousness and the preservation of the rule of law. This view is supported by a number of academic authorities. According to de Smith140 the protection of a substantive legitimate expectation is now fully accepted in English law as a principle

138 ibid., at p. 695.

139 ibid., at p. 691.

governing the exercise of discretion. Decisions of public bodies [may not be internally inconsistent]." Wade and Forsyth,\textsuperscript{141} observe that the doctrine of legitimate expectation was originally allied to unfairness by violation of natural justice. They point out that it is "now proving to be a source of substantive as well as procedural rights." In \textit{Pierson v. Secretary of State for the Home Department},\textsuperscript{142} Lord Steyn, referring to submissions made by counsel for the Home Secretary, to the effect that the doctrine of legitimate expectations does not have any substantive effect and that it merely gives rise to protection against procedural unfairness, was of the opinion that "counsel [was] not necessarily right".\textsuperscript{143}

In \textit{R. v. North and East Devon Health Authority, ex parte Coughlan},\textsuperscript{144} the petitioner and certain other patients had been given a clear promise by the Health Authority that they would be provided with a home for life and there was no overriding public interest that justified the Health Authority from breaking its promise. Sedley, L. J., in the Court of Appeal, with Lord Woolf, M. R., and Mummery, L. J., agreeing, held that the health authority must honour its undertaking.

In \textit{Coughlan} Sedley, L. J., was prepared to acknowledge that substantive


\textsuperscript{142} [1997] 3 All E. R. 577.

\textsuperscript{143} \textit{ibid.}, at p. 606.

legitimate expectations were very much part of English law. Referring to this type of legitimate expectation Sedley, L. J., said:

"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."145

Thus, it may now be possible to conclude that substantive legitimate expectations are very much part of English law in view of the unanimous decision of the Court of Appeal on this matter.

The development of a concept of substantive legitimate expectation may perhaps, to a certain extent, eclipse the notion of estoppel. It is submitted, however, that merely because legitimate expectations can create a substantive right it does not, necessarily, mean that there is no place in public law for the concept of estoppel. As Craig146 observes:

"The articulation of the concept of legitimate expectation is not, therefore, some intellectual panacea which will make the problem of estoppel in public law disappear. To contend otherwise would be to say that any representation which could otherwise raise an estoppel, and in this sense create a legitimate expectation, should do so in public law irrespective of any excess of power by the public body that might thereby be entailed."

It is relevant to note that it would be difficult to found an application for judicial review

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145 See p. 36 of the draft judgment.
based upon an estoppel. Yet, if a petitioner contends that he has a legitimate expectation, that a substantive right will be protected, then it may be easier to seek judicial review.

The difficulty in founding an application for judicial review based upon an estoppel was adverted to by Kulatunga, J., in the Sri Lankan case of Sannasgala v. University of Kelaniya, where his Lordship said:

"It seems to me that in the circumstances of this case it would also cause much prejudice to the respondents if they are directed on the basis of this point to confer a degree on the petitioner. It would create a situation where the University would be compelled to confer a degree by estoppel. It would not be in the general interest of University education; and even if estoppel is relevant such a situation is undesirable and should preferably be avoided."

In Sannasgala, the petitioner was provisionally registered as a candidate for the award of the D.Litt. Degree. His examiners recommended the award of the degree. However, as no regulations were framed for the award of the degree, the petitioner was informed that the degree could not be conferred until the relevant regulations were formulated, by the Senate of the University, for the conferment of degrees. Citing Wade with approval, Kulatunga, J., said:

"In public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority power which it does not in law possess. In other words no estoppel can legitimate action which is ultra vires."

The decision of the Supreme Court of Sri Lanka in Sundarkaran v. Bharathi warrants some analysis in the context of substantive legitimate expectations. In this case

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the petitioner was an applicant for a liquor licence for 1987. He had been granted liquor licences for the two preceding years. The petitioner was asked to pay the licence fee for 1987, but when he proceeded to the office of the Government Agent, he was informed, by the Assistant Accountant, that a licence could not be issued since he had failed to obtain the consent of all the Members of Parliament of his constituency in terms of the relevant circular. The petitioner appealed to the Minister of Finance but received no response. He then moved for a writ of *mandamus* to compel the issue of a licence. The Court of Appeal refused the application holding, *inter alia*, that judicial review was not appropriate because this was a matter of executive policy. The Supreme Court, however, reversed the decision of the Court of Appeal. Amerasinghe, J., in the Supreme Court, said:

"It seems to me to be manifestly unjust and improper that a decision to refuse to renew the licences was made in the circumstances of this case without hearing the Petitioner-Appellant who was being deprived not merely of a privilege but a vested right in property."  

Referring to the notion of a legitimate expectation Amerasinghe, J., commented as follows:

"It has been repeatedly recognized that no man is to be deprived of his property without having an opportunity of being heard. Even if what he had was mere permission to which the Appellant-Petitioner had no legal entitlement or claim of right, the refusal of the permission which had previously been granted I think may be at least sufficiently comparable to the act of taking away property so that the audi alteram partem rule will apply. .... He had, in my view, a legitimate expectation of success and therefore a right to a full and fair opportunity of being heard."  

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*ibid.*, at p. 59.

*ibid.*, at p. 60.
In Sundarkaran, Amerasinghe, J., was prepared to concede that a property right of the petitioner was affected; his Lordship, however, advanced the proposition that this gave the petitioner a legitimate expectation of a hearing before the renewal of his licence was refused. It is submitted, with all due respect, that this is not a correct analysis of the concept of legitimate expectation. If the petitioner is being deprived of a vested right to property, as a result of the refusal of the renewal of his licence, then it stands to reason that the expectation generated is one which is substantive in character. In such a situation, a right to a hearing is irrelevant; the expectation is that the renewal of the licence will not be refused. If, however, the proposition is advanced that the legitimate expectation that is created, is that of an expectation of a hearing, rather than an expectation of a particular outcome, then, the expectation created loses its substantive character; instead, it becomes a corollary of natural justice.

It is submitted, however, that the legitimate expectation created in Sundarkaran was not a legitimate expectation of a substantive right. In Sri Lanka, the Commissioner of Excise has a statutory discretion to refuse the renewal of a licence. A person who has, over the years, had his licence renewed would have a legitimate expectation that a further renewal would not be refused, unless, he is given a chance to make representations. It is true that the licence does have value, but, the character of the licence is such that its value is for a limited duration. Just as freehold land differs in value from leasehold land, a licence for a limited period of time must be distinguished from a right which is permanent in character. The non-renewal of the licence does not decrease the licence holder's net wealth, once it has run its course; it results, however, in his future earning
potential being diminished. He has a legitimate expectation that the status quo will continue; his expectation is that the renewal will not be refused unless he is granted a hearing. A licence which has run its course has no value; it is similar to a lease which has expired. Thus, the non-renewal of a licence cannot, therefore, be equated with a vested right in property. If a vested right in property is involved, the expectation is that it will not be interfered with. It would have been preferable if the court had come to the conclusion that principles of good administration militated against the refusal of the renewal of the licence without just cause. The refusal of a renewal without a prior hearing would be a procedural impropriety, justifying judicial review.

If, on the other hand, the argument is to be advanced that the petitioner was being deprived of a vested right in property, then, the law must be concerned with substantive legitimate expectations; yet, for a substantial expectation to be recognized, an essential prerequisite appears to be lacking. There is, however, in this case, a complete absence of a representation being made by the relevant public body or functionary. It would, therefore, have been futile to seek the protection of a substantive legitimate expectation, in the absence of such a representation. It is submitted, therefore, that the reference, by Amerasekere, J., to a vested right in property appears to be misconceived.

In Mowjood v. Pussadeniya\textsuperscript{152} judgment for ejectment of the tenant had been entered in respect of premises, whose standard rent did not exceed Rs. 100/-, on the

\textsuperscript{152} [1987] 2 Sri L. R. 287.
grounds that the premises were reasonably required for the landlord or a member of his family. The writ should only have been issued after the Commissioner of National Housing had informed the court that he could provide alternative accommodation to the tenant. The alternative accommodation should have had some relevance to the needs and circumstances of the tenant so as not to render the offer of alternative accommodation illusory and meaningless.

Referring to the concept of legitimate expectations Sharvananda, C.J., said that "the appellants have a legitimate expectation that they would not be evicted from their present premises except on a writ of execution allowed by court after the issue by the Commissioner of a proper notification in terms of section 22 (1) C. This right and expectation provide them with sufficient interest to challenge the legality and propriety of the notification made by the Commissioner."\textsuperscript{153} Therefore, when the court is of the view that the situation is one which gives rise to a legitimate expectation which creates a right of a substantive character, then, the right to a hearing prior to a decision being taken is of no application; the concern of the applicant is related to the outcome and the ensuing unfairness (which may amount to an abuse of power) rather than with procedural fairness.

In \textit{Perera v. Karunaratne},\textsuperscript{154} the question that arose for determination was whether a tenant, of a house that was divested, had a legitimate expectation that the house

\textsuperscript{153} \textit{ibid.}, at p. 297.

\textsuperscript{154} \textit{[1994]} \textit{3 Sri L. R.} 316.
will be offered for sale to him. Grero, J., was of the opinion that a legitimate expectation was a "right or interest which is looked forward to by a person."\(^{155}\) His Lordship was of the view that the legitimate expectation created was an expectation of a right to be heard. If, however, it is conceded that the petitioner had a right to be offered the property for purchase, then the legitimate expectation created is not that of a right to be heard. The petitioner has a substantive right, in terms of his expectation, to be offered the house for purchase. On the other hand, if it is contended that the petitioner has no legal basis for his expectation, in that the Commissioner of National Housing has a discretion in offering the house for sale, then, it cannot be said that the petitioner has a substantive legitimate expectation that he will be offered the house in the absence of a clear representation. In *Perera* no such representation was made. It is submitted, with respect, that Grero, J., had misdirected himself when his Lordship equated a legitimate expectation, in this context, with a right to be heard.

The above survey of Commonwealth case law indicates that there is a discernible trend in the direction of recognising the protection of substantive legitimate expectations as a ground for judicial review. It is submitted that this trend augurs well for the advancement of rights consciousness in society. It makes it possible for judicial review to be used as an effective tool for advancing individual rights and, thereby, vindicating the rule of law.

VII. The Protection of Fundamental Human Rights and Legitimate Expectations.

Our study of the impact of legitimate expectations, as an important device for advancing rights consciousness, would not be complete without an examination of the manner in which the concept has been used to take account of ratified, but unincorporated, treaties which accord recognition to international human rights obligations. As a result there has been a discernible trend in certain Commonwealth countries, such as in Australia and New Zealand, where a decision-maker must consider a ratified human rights convention as a relevant consideration in arriving at a decision and should, if he or she proposes to disregard the treaty obligation, give those affected the opportunity to be heard as to why such an obligation, imposed by treaty, should not be taken into account. Disregarding a treaty obligation could also, in some circumstances, give rise to the denial of a substantive legitimate expectation.

In Teoh the respondent entered Australia from Malaysia, on a temporary permit, and subsequently married his deceased brother's de facto wife. Teoh's wife had four children - including three fathered by his deceased brother - and a further three children were born of the marriage. He then applied for a grant of resident status. While the application was pending he was charged and convicted of a number of offences in connection with the importation and possession of heroin and was sentenced to six years

imprisonment. Thereafter, a delegate of the Minister refused the application for the grant of resident status on the basis that the applicant was not of good character.

The respondent then applied for review of the delegate's decision and submitted, for the purpose, testimonials that referred to the close relationship that existed between him, his wife and the children of the union and the impact on the family if he were to be deported. Consequent to the Immigration Review Panel recommending against allowing the application for the grant of resident status and the Minister's delegate taking steps to give effect to the panel's recommendation, the respondent applied to the Federal Court of Australia for an order of review of the delegate's decision. The trial judge dismissed the application but the Full Court of the Federal Court, in an unanimous decision, allowed the respondent's appeal\textsuperscript{157} on grounds added during the hearing of the appeal. The Minister appealed, by way of special leave, against the decision of the Full Court to the High Court of Australia. The High Court held, by a majority, that the appeal should be dismissed.

The grounds added by Teoh, during the hearing of the appeal, were that the Minister's delegate had failed to give proper consideration to the effect of his deportation on his family. It was argued that the delegate was bound to treat this as relevant inasmuch as Australia's ratification, in 1990, of the United Nations Convention on the Rights of the Child (1989) had given rise to a legitimate expectation in the respondent's

children that his application for resident status would be treated in a manner that was consistent with the terms of the Convention.

The Convention is based upon the firm conviction that the family is the fundamental group of society and is the natural environment for the growth and well being of all its members. The Convention is a reaffirmation by the States Parties to the Convention of their faith in fundamental human rights and in the dignity and worth of the human person. Thus, the Convention is declaratory of the fundamental human rights of the child. Article 3 (1) of the Convention, which is of relevance to the present discussion, provides as follows:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

It is a well established principle in international law that, in a country where there is a dualist system, the mere ratification of an international treaty does not per se result in it being incorporated into municipal law. This principle is well established in Australia and has, repeatedly, been judicially recognized. In Teoh the High Court of Australia took pains to stress that there was no departure from this well entrenched principle.

The court did, however, point out that a fundamental human right was at stake.


The ratification of the treaty by the executive government of Australia was a positive statement to the world and to the Australian people that the executive government and its agencies will act in a manner consistent with the Convention. The mere act of ratification was, therefore, an adequate foundation for a legitimate expectation, in the absence of any statutory or executive indications to the contrary, that the Minister's delegate would act in conformity with the Convention. The court was also of the view that, although it would have been preferable had the affected children made the claim based on legitimate expectation, there was no objection to a parent or guardian making the claim on behalf of the child.

The High Court of Australia, therefore, held that the Immigration Review Panel and the Minister's delegate treated the requirement of good character to be a primary requirement when considering his application for resident status. There was no indication, whatsoever, that the best interests of the child had been treated as a primary consideration. The majority of the court were of the view that there could be a want of procedural fairness if a decision-maker proposes to disregard a treaty obligation which deals with fundamental human rights in this manner. Procedural fairness required the Minister's delegate to give the affected children notice and an adequate opportunity of presenting a case against the proposed course of action.

Referring to the importance of the fundamental human right at stake and the legitimate expectations that could arise as a result of the Convention obligations, Gaudron, J., said:
"The significance of the Convention, in my view, is that it gives expression to a fundamental human right which is taken for granted by Australian society, in the sense that it is valued and respected here as in other civilised countries. And if there were any doubt whether that was so, ratification would tend to confirm the significance of the right within our society. Given that the Convention gives expression to an important right valued by the Australian community, it is reasonable to speak of an expectation that the Convention would be given effect. However, that may not be so in the case of a treaty or convention that is not in harmony with community values and expectations."

The significance of Teoh, however, is that the respondent did not rely upon any Convention right at the time that he applied for the grant of resident status. There had been no representation by the delegate of the Minister that the Convention would be taken into consideration. How then could it be said that there had been a disappointment of a legitimate expectation?

Responding to an argument, advanced by counsel for the appellant, that a ratified but unincorporated convention could never give rise to a legitimate expectation, Mason, C.J., and Deane, J., observed:

"The fact that the provisions of the Convention do not form part of our law are less than compelling reason - legitimate expectations are not equated to rules or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by the courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive

\[\text{supra.}, \text{note 156, at p. 376.}\]

\[\text{See, e.g., Taggart, Michael, 'Legitimate Expectation and Treaties in the High Court of Australia', (1996) 112 L. Q. R. 50, for a critical account of the Teoh decision. See also the dissenting judgment of McHugh, J., in Teoh, supra., note 156, pp. 376 - 389.}\]
indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as "a primary consideration." 

McHugh, J., on the other hand, delivering a strong dissenting judgment, observed that “[i]f the doctrine of legitimate expectations were now to be extended to matters about which the person affected has no knowledge, the term ‘expectation’ would be a fiction so far as such persons were concerned.” His Honour also pointed out that “[i]f a person does not have an expectation that he or she will enjoy a benefit or privilege or that a particular state of affairs will continue, no disappointment or injustice is suffered by that person if that benefit or privilege is discontinued. A person cannot lose an expectation that he or she does not hold. Fairness does not require that a person be informed about something to which the person has no right or about which that person has no expectation.”

It is submitted, however, that the decision of the majority of the High Court of Australia in *Teoh* is to be preferred inasmuch as the decision seeks to advance a rights culture. The central issue at stake is whether a decision-maker will act in a manner that will help to advance fundamental human rights particularly in circumstances where the state has entered into a treaty obligation committing itself to advance such rights. The act of ratification of a treaty results in a state being committed to honour its provisions. Thus, the act of ratification, it is submitted, gives rise to a legitimate expectation,

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162 *supra.*, note 156, at p. 365.

163 *ibid.*, at p. 383.

164 *ibid.*
independent of any personal representation, that the commitments undertaken by the state would be honoured.

In New Zealand, the Court of Appeal had to decide, in 1993, whether a decision-maker had to take into consideration international human rights treaties, which that country had ratified, when making decisions.\(^{165}\) Thus, in *Tavita*, the point in issue was whether the decision-maker had to take into consideration the Convention on the Rights of the Child, in circumstances that were broadly similar to *Teoh*. The Court of Appeal of New Zealand had no hesitation in holding that the executive was not free to ignore international human rights treaties when making decisions. Cooke, P., said:

"A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."\(^{166}\)

Thus, the Court of Appeal of New Zealand, in *Tavita*, has, preceded the High Court of Australia, in broadening the frontiers of judicial review by giving effect to international human rights treaties and, thereby, advancing rights consciousness in that country.

In England, the Court of Appeal has alluded to the importance of giving effect to fundamental human rights when decisions are made by state agencies. Thus, in *R. v. Secretary of State for the Home Department, ex parte Leech*\(^ {167}\) the court held that prison regulations which enabled the prison governor to read and stop prisoner’s correspondence


166 *ibid.*, at p. 266.
with his legal adviser in respect of contemplated proceedings were *ultra vires*. What was at issue was a citizen’s right of unimpeded access to a court. This right, according to Steyn, L. J., must rank “as a constitutional fundamental”\(^{168}\) despite the fact that the United Kingdom has an unwritten constitution.\(^{169}\) His Lordship drew inspiration from the European Convention on Human Rights when he advanced this proposition.\(^{170}\)

In *R. v. Uxbridge Magistrates' Court, ex parte Adimi*,\(^{171}\) the Queen’s Bench Division of the High Court had occasion to construe article 31 of the United Nations Convention Relating to the Status of Refugees, 1951. In terms of article 31 (1) it was necessary that refugees present themselves before the authorities, without delay, so that they may be granted asylum. It was the court’s view that this stipulation was not breached in circumstances where a person, having initially secured entry on false documents, thereafter, within a short time, sought to claim asylum after his arrival.

What is of relevance to the present discussion is that, even though the Convention had not been formally incorporated into English law, nevertheless, refugees were entitled to expect the benefit of article 31 in terms of the doctrine of legitimate expectations. The ratification of the Convention gave rise to a legitimate expectation that its provisions will be followed. This act gave rise to an obligation of fairness and that

\(^{167}\) [1993] 4 All E. R. 539.

\(^{168}\) *ibid.*, at p. 548.

\(^{169}\) See, e.g., the House of Lords decision in *Raymond v. Honey*, [1982] 1 A. C. 1, for *dicta* regarding this fundamental human right of access to the courts. See also the discussion in chapter 3, part 11, regarding the right of access to the courts.

\(^{170}\) *ibid.*

\(^{171}\) [1999] 4 All E. R. 520.
obligation would have been breached if a decision-maker acted, without reason, in a manner inconsistent with an international obligation.\textsuperscript{172}

It is submitted, therefore, that the doctrine of legitimate expectations has been widened considerably, in certain Commonwealth countries, so as to admit of an expectation that decision-makers will take into consideration those fundamental human rights which have been assumed by the executive of that country. This expectation is that of procedural fairness and/ or substantive fairness; however, it is independent of any direct representation. This trend will help significantly in expanding the scope of judicial review so as to admit of a rights culture.

VIII. Conclusion.

This chapter, after an analysis of the applicable principles, examined the manner in which the doctrine of legitimate expectations can be used as a tool for advancing rights consciousness. The expectation that a certain state of affairs will continue springs from a free standing right to procedural fairness. Where no free standing right exists, then a legitimate expectation of procedural fairness can be created by a promise, the adoption of a policy, by a previous practice or pattern of conduct. In both these types of situations the expectation is of procedural fairness. There is no expectation of outcome. Additionally, it is possible that international human rights norms, as given effect to by various treaties, can give rise to the expectation that decision-makers will not disregard

\textsuperscript{172} \textit{per} Simon Brown, L. J., at p. 535.
such norms without affording the affected parties certain process rights. This type of expectation arises independent of any direct representation.

Substantive legitimate expectations are created as a result of a representation or other promise; in the case of a ratified treaty it appears that a legitimate expectation will arise independent of any representation. A substantive legitimate expectation is not about procedural fairness. The ideal which the law seeks to promote, is that of legal certainty and non retroactivity. If the content of law is uncertain, that would not be consonant with the rule of law. Thus, to hold a public authority bound by its undertaking promotes this ideal of legal certainty which is an essential prerequisite for the rule of law.

The doctrine of legitimate expectations, in relation to its procedural dimension, is, today, well established in our law. It is the expectation in the nature of a substantive right or benefit, which is still in a stage of growth. The expansion of the frontiers of judicial review, as a result of the acceptance of the doctrine of substantive legitimate expectations, is consonant with upholding the rule of law and the maintenance of principles of good administration. In a sense, the acceptance of the doctrine of substantive legitimate expectations challenges the *ultra vires* doctrine as the basis of judicial review. This is because, like *Wednesbury*¹⁷³ unreasonableness, the doctrine of substantive legitimate expectations seeks to review the merits of a decision. It is, essentially, concerned with the unfairness that will result if the decision is not impeached.

The growth of the doctrine of legitimate expectations, both procedurally and substantively, augurs well for democracy and for advancing of rights consciousness in a country. Additionally, the growth of the doctrine of legitimate expectations so as to give effect to international human rights obligations is a salutary development in advancing a rights culture in a country. As Sir John Laws observes, "those who exercise democratic power must have limits set to what they may do: limits which they are not allowed to overstep."\(^{174}\)

The citizen looks in the direction of the courts for the performance of this important balancing function. The doctrine of legitimate expectations, in its different variations, therefore, performs this important function of ensuring that a person's rights are protected so as to achieve either procedural fairness or substantive fairness. The latter objective serves to promote the ideal of legal certainty which is an important constituent element of the rule of law and a fundamental of good administration. It is also deeply rooted to the fundamental right against retroactivity. The former objective, on the other hand, protects a process right which is, essentially, negative in character but which helps to advance the rule of law and the principles of good administration. This right can be traced to fundamental rights of due process and are, therefore, worthy subjects of protection.

\(^{174}\) Laws, Sir John, 'Law and Democracy' \([1995]\) \(P. L.\) 72, at p. 81.
The protection afforded to any type of legitimate expectation is significant from the perspective of advancing rights consciousness in society. This is because it ensures that the exercise of arbitrary power is circumscribed. Fairness in the process of decision making militates against the exercise of power in an arbitrary and capricious manner.

I. Introduction.

The abuse of discretionary power could result in arbitrary decisions and is, therefore, not conducive to the advancement of the rule of law. Discretion is never unfettered and must always be exercised in accordance with the law. It must be conceded, however, that in the modern state it is often necessary for administrative agencies to be able to exercise discretionary power. However, it is equally important that the courts are able to exercise effective supervisory jurisdiction so as to ensure that administrative agencies do not abuse their power and, more importantly, to ensure that they exercise their power in accordance with the principles of good administration. The control of the exercise of arbitrary discretionary power is a necessary element in advancing rights consciousness in society.

Rights consciousness requires that decision-makers and administrative agencies make decisions with due compliance with fundamental human rights norms and, in order to further such norms, that they act in a manner that is consistent with the principles of good administration. The adoption of the principles of good administration provides an important foundation for the articulation of a rights culture. Consequently, the control of the exercise of discretion, by having recourse to fundamental human rights norms and the principles of good administration, is an important precondition that must be satisfied so as to facilitate a rights culture.
According to Dworkin,¹ "[d]iscretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction." Therefore, in terms of Dworkin’s analysis, discretion can never be unfettered; it must only be exercised in accordance with some objective standard or norm. Thus, Dworkin argues that "[t]he concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority."² Discretion, therefore, cannot be equated with a licence and must always be exercised in accordance with standards of fairness and good sense; it must neither be exercised arbitrarily or capriciously. Referring to discretion, in its strongest sense, Dworkin states as follows:

"Almost any situation in which a person acts (including those in which there is no question of decision under special authority, and so no question of discretion) makes relevant certain standards of rationality, fairness, and effectiveness. We criticize each other’s acts in terms of these standards, and there is no reason not to do so when the acts are within the center rather than beyond the perimeter of the doughnut of special authority."³

Allan⁴ is of the view that when "the exercise of discretionary power is properly subject to substantive, as well as purely procedural, restraints, administrative and political choice may become closely intertwined with legal principle. In this field, therefore, the separation of powers is in practice neither straightforward nor self-evident; but it should

² ibid.
³ ibid., at p. 33.
not on that account be rejected as futile. On the contrary it forms, ... an essential pillar of the rule of law.” Judicial review of the exercise of discretionary power tends to blur the traditional dichotomy between appeal and review. In terms of the orthodox view, an appeal results in the appellate court substituting its own value judgment for that of the inferior tribunal. Judicial review, on the other hand, is concerned solely with the procedure adopted to arrive at a decision; it is concerned only with the legality and not with the merits of a decision.5

This traditional distinction between an appeal and an application for judicial review has been considerably eroded as a consequence of recent developments in judicial review and the enlarging of the circumference of the judicial role. Allan points out that judges, when determining applications for judicial review, do, in fact, exercise independent moral judgment. He states as follows:

“If the justification for judicial review is the need for independent appraisal of administrative action, inspecting its impact on the persons most closely affected, the court’s approach must be sensitive to all the circumstances. The jurisdiction cannot be reduced to a series of inflexible rules. Independent moral judgment - unconstrained by rule - fastens on the facts of particular cases in all their complexity; and a jurisdiction devised to secure fairness is necessarily committed to independent moral judgment.” 6

Thus, the judicial role, especially in cases where the exercise of discretion is the subject of review, involves the exercise of value judgments and is, therefore, significant for the advancement of rights consciousness and the rule of law. By having recourse to human rights norms and the principles of good administration, in judging the lawfulness of

6 ibid., at p. 185.

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official discretion, the judges are able to bring a certain measure of objectivity to judicial review. If judges themselves were to have open textured discretion when determining applications for judicial review then what would, in effect, happen will be that one value judgment (i.e., of the primary decision-maker) will be replaced by another (i.e., by that of the judge).

It must be noted that certain academic writers, particularly in America, have argued that modern administrative law is largely a failure. Thus, Ely is of the view that courts should abandon their guiding principle of the application of legal doctrines to control the discretion of non-elected bureaucrats and should, instead, pursue a policy of promoting good governance. He states that:

"Even after decades of experience, we are only resigned to life with big government, not comfortable with it. The attempts through administrative law to ease this discomfort have a certain dog-chasing-its-tail quality - courts use various legal doctrines to control bureaucratic discretion, but these doctrines afford judges themselves largely unconstrained discretion in displacing agency decisions. In this fundamental respect, administrative law embodies a strategy for dizzyingly limited success."  

Ely, on the other hand, argues that the American judiciary has been able to interpret fundamental constitutional values and the public has come to expect the court to intervene to prevent a gross abuse of power. Ely argues that the power of the court has continued to grow in the past two decades and as "public persons know one of the surest

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8 ibid., at p. 3.
Consequently, the judges own fundamental values are a source of constitutional judgment:

"It's because everybody down deep knows this that few come right out and argue for the judge's own values as a source of constitutional judgment. Instead the search purports to be objective and value-neutral; the reference is to something "out there" waiting to be discovered, whether it be natural law or some supposed value consensus of historical America, today's America, or the America that is yet to be."  

This theory of judicial review, articulated by Ely, it is submitted, is valid in most Commonwealth jurisdictions where the judges give effect to fundamental or core constitutional values, such as the rule of law, when determining applications for judicial review. It is by giving effect to such fundamental constitutional values that it is possible for the judiciary to act as a check on governmental lawlessness so as to protect the rule of law and advance rights consciousness. Thus, the abuse of discretionary power provides a very useful rubric for the judiciary to give effect to fundamental constitutional values and promote rights consciousness. From a natural law perspective judicial review of discretionary power is a method of balancing the interests of the weak and strong segments of society; it entails according individuals mutual trust, respect and understanding. According to Finnis, human rights can only be securely enjoyed in

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10 ibid.

11 ibid.

certain sorts of milieu - a context or framework of mutual respect and trust and common understanding, an environment which is physically healthy and in which the weak can go about without fear of the whims of the strong."

Galligan,\textsuperscript{13} is of the view that "[o]ne constant stream of criticism of discretionary powers is based on the threat that is allegedly posed to personal liberty. The rule of law is regarded as a fundamental protector of liberty, and, according to exponents of this view, discretionary powers are incompatible with the rule of law and thus constitute a threat to liberty." It is submitted, therefore, that judicial review of discretionary power (so as to prevent the abuse of power) is of pivotal importance for the purpose of advancing rights consciousness and the rule of law. In view of the importance attached to this area, in terms of advancing individual rights, we will examine, in this chapter, some of the different circumstances wherein the courts have exercised the right of judicial review so as to prevent a possible abuse of power. We will also examine the circumstances where the courts have declined to exercise their jurisdiction. It should be noted that the abuse of power, as a ground for challenging the lawfulness of administrative action, is not a ground of review developed in recent times; it is a ground of review that is rich in historical precedents and is, therefore, of ancient origin.

Additionally, abuse of power as a ground for judicial review challenges the premise that the \textit{ultra vires} doctrine is the basis of judicial review. It should be noted that when the courts review a decision of an administrative agency on the basis of an abuse

of power, then, the orthodox demarcation between 'appeal' and 'review' tends to be blurred. Consequently, the judiciary is called upon to review on merits rather than concentrate upon the decision making process. This aspect of judicial activism is of seminal importance in the advancement of rights consciousness and in furthering democratic ideals and values in society.

II. Unreasonableness.

(a) The Nature of Judicial Review for Unreasonableness.

Unreasonableness as a ground for judicial review admits of a wide range of differing connotations. In this section we are concerned, in one sense, with unreasonableness as "a condition of last resort, so that a discretionary decision could be considered invalid if it were so unreasonable that no reasonable authority could have made it." We are also concerned, in another sense, with unreasonableness in terms of a decision being in defiance of acceptable moral standards in public administration in contra distinction to strict legal requirements.

The focus of our attention is, therefore, not unreasonableness in an "umbrella sense" which encompasses a number of different grounds of challenge such as taking into account irrelevant considerations or ignoring relevant ones, acting in bad faith, trying to achieve an improper purpose and so on. On the contrary we are concerned, in this
chapter, with unreasonableness in a "substantive sense".\textsuperscript{15} That is, the term unreasonableness is being used in this chapter as a synonym for irrationality.\textsuperscript{16}

It is relevant to note, as indicated above, that a decision may be regarded as unreasonable or irrational for two broad reasons.\textsuperscript{17} On the one hand a decision can be regarded as irrational because it is in defiance of logic – for example if an employee is dismissed because she had red hair or when a decision-maker makes a decision based on astrology. On the other hand, a decision can also be regarded as unreasonable or irrational if it is in defiance of acceptable moral standards in public administration which facilitate good administration.

It is submitted, however, that the former type of situation is unlikely to be commonly encountered in practice. As a general rule, prior to an administrative decision being successfully impeached, on the basis that it is in defiance of logic, it may be possible to set aside such a decision on some other ground of review. The latter type of situation is, however, more commonly encountered. It is in this context that the court is

\textsuperscript{14} ibid., at p. 321.

\textsuperscript{15} See, e.g., Craig, P. P., Administrative Law [London: Sweet & Maxwell, 3\textsuperscript{rd} edn., 1994], at p. 404.


\textsuperscript{17} See, e.g., de Smith, S. A., Woolf, The Rt. Hon. The Lord and Jowell, Jeffrey, Judicial Review of Administrative Action [London: Sweet & Maxwell, 5\textsuperscript{th} edn., 268
called upon to undertake a balancing exercise whereby it must weigh up the different competing interests and, then, decide whether there is sufficient objective public interest justification, and the circumstances are appropriate, to permit individual rights to be trumped.18

This naturally brings us to the next important issue – namely, whether review for unreasonableness is concerned with the merits of a decision rather than the procedure by which the decision was reached. The pivotal consideration is whether unreasonableness is concerned with the substance of a decision rather than the manner in which the decision was reached. In the CCSU case19 Lord Diplock referred to illegality, irrationality and procedural impropriety as the principal grounds for judicial review in English administrative law. By attempting to draw a distinction between procedural impropriety and other grounds of review it could be inferred that his Lordship was, in fact, referring to irrationality and legality as substantive grounds of review.20

Irrationality can be viewed as a substantive ground of review because the judges are called upon to review the merits of a decision. They are judging the reasonableness of a decision on the basis that it is either in defiance of logic or that it is contrary to acceptable moral norms that must be observed by administrative decision-makers.

20 See, e.g., Jowell, Jeffrey and Lester, Anthony, Beyond Wednesbury: Substantive
Unreasonableness, as a substantive ground of review, gives judges an opportunity
to advance a rights culture in society. When fundamental human rights are at stake,
judges are likely to subject an administrative decision to the most anxious scrutiny.\(^{21}\) The
court, in weighing up the competing interests, judges the rationality of a decision on a
sliding scale. The more important the right at stake, the court is likely to be very exacting
and will scrutinize strictly any public interest justification offered for trumping individual
rights. Thus, unlike situations where a decision is plainly in defiance of logic and can,
therefore, be set aside a decision which falls short of acceptable moral standards, because
a fundamental human right is at stake, will be subject to a balancing exercise by the court.
The court is called upon to weigh up the competing interests when adjudicating upon the
rights of the parties.

It is indeed relevant to note that objective justification provided by a decision-
maker cannot, in all situations, result in a fundamental human right being trumped. On
the contrary, where certain fundamental human rights, such as freedom from torture or
freedom from slavery or servitude, are concerned no derogation is permissible.\(^{22}\) In such
circumstances a decision which results in a violation of such a fundamental human right,
whilst being plainly illegal, is also likely to be regarded as unreasonable.

\(^{21}\) See, e.g., R. v. Secretary of State for the Home Department, ex parte Bugdaycay,
[1987] A. C. 514 per Lord Bridge at p. 531; R. v. Ministry of Defence, ex parte Smith,
\(^{22}\) See, e.g., articles 3 (freedom from torture, inhuman and degrading punishment)
and 4 (1) (freedom from slavery or servitude) of the European Convention on Human
Rights; see, also, article 11 of the Constitution of the Democratic Socialist Republic
of Sri Lanka (freedom from torture, cruel, inhuman or degrading treatment or
punishment).
(b) The General Principle.

As a ground of review the principle of unreasonableness is significant for the purpose of advancing rights consciousness and the rule of law. A decision-maker who acts in a manner that is contrary to a fundamental human right norm is likely to act unreasonably and is liable to have his or her decision impeached by the courts. The human rights dimension of substantive unreasonableness will also be examined in this chapter.\(^\text{23}\)

Unreasonableness, as a ground of challenging the lawfulness of actions of administrative agencies, is ancient in origin. One of the most often cited cases in this regard is Rookes's\(^\text{24}\) case where the exercise of discretion by the Commissioners of Sewers, in respect of levying charges for repairing a river-bank, was challenged. The Commissioners had exercised their discretion in a manner that resulted in the whole charge being levied on one adjacent owner instead of levying it in an equitable manner by apportionment among all adjacent owners who benefitted from the repairs. Coke, C. J., disallowing the charge on the basis that it was inequitable, said:

"... and notwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit."\(^\text{25}\)

\(^{23}\) See part II (c) and (d).


\(^{25}\) ibid., at p. 100 a; 77 E. R. 210.
The principle of unreasonableness as a ground of review has also been upheld in many other early cases.\(^\text{26}\)

In more recent times the principle of unreasonableness, as a ground for challenging unlawful administrative action, has been accepted by Lord Greene, M. R., in the celebrated case of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*.\(^\text{27}\) In this case Associated Provincial Picture Houses Ltd., the owners of the Gaumont Cinema in Wednesbury, sought a declaration that a condition imposed by the licensing authority, in terms of the powers vested in it under section 1 (1) of the Sunday Entertainment Act 1932, was *ultra vires* and unreasonable.\(^\text{28}\) The Court of Appeal refused to grant the declaration sought on the basis that the well being and the physical and moral health of the children was a relevant matter that the authority could have properly taken into consideration. However, in the course of his judgment Lord Greene, M.R., acknowledging that unreasonableness was a sufficient ground to impeach a decision of an administrative agency, said:

"[I]t maybe still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in such a case is not as an appellate authority to override a decision of the local authority, but as a


\(^{27}\) [1948] I K. B. 223.

\(^{28}\) The licensing authority had specified that no child under the age of fifteen years shall be admitted to any entertainment irrespective of whether such a child was accompanied by an adult.
judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which parliament has confided in them."^29

Therefore, even though the *Wednesbury* case itself did not result in the declaration sought being granted, it resulted in firmly establishing unreasonableness as a ground for judicial review. According to Lord Bridge, the judgment of Lord Greene, M.R., "contains the classic exposition of the principle of reasonableness in relation to the exercise of administrative discretions."^30

In *Roberts v. Hopwood*,^31* a case that predates *Wednesbury*, a decision by a local authority, to grant equal wages to both men and women, was challenged on the basis that it was unreasonable and unlawful. In terms of the applicable enactment^32* a local authority had a discretion to determine the wages of its employees as they thought fit. Lord Sumner, pointing out that the discretion given to the local authority in this respect was not unfettered, said:

"There are many matters which the courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another. This, however, is not a recognition of the absolute character of the local authority's discretion, but of the limits within which it is practicable to question it."^33

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^29 supra., note 27, at pp. 233 - 234.


^32 Section 62, Metropolis Management Act 1855.

^33 supra., note 31, at p. 606.
It is relevant to note, however, that the decision in *Roberts v. Hopwood*, for some of the judges at least, was determined on the point of illegality because the local authority paid money not as “wages” but as a standard of living payment.\textsuperscript{34}

Yet another illustration of unreasonableness was provided by Warrington, L.J., who, in *Short v. Poole Corporation*,\textsuperscript{35} pointed out that it would be unreasonable to dismiss a teacher simply because she had red hair. In *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*\textsuperscript{36} Lord Denning, M. R., referring to unreasonable decisions said that it should be a decision that was “so wrong that no reasonable person could sensibly take that view.”

In the *CCSU*\textsuperscript{37} case Lord Diplock preferred to use the term "irrationality" rather than "*Wednesbury* unreasonableness" to describe unreasonableness as a ground of review. His Lordship stated that "[i]t applies to a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."\textsuperscript{38} Pointing out, in effect, that the standard is an objective one, Lord Diplock indicated that "[w]hether a decision

\textsuperscript{34} *ibid.*, per Lord Buckmaster at p. 585; per Lord Atkinson at p. 600.
\textsuperscript{35} [1926] Ch. 66.
\textsuperscript{36} [1977] A. C. 1014, at p.1026.
\textsuperscript{37} *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E. R. 935.
\textsuperscript{38} *ibid.*, at p. 951.
falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system." His Lordship further indicated that "[i]rrationality by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review."  

In *Nottinghamshire County Council v. Secretary of State for the Environment*  

Lord Scarman, commenting upon the guidance given by the Secretary of State, said:

"Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses."  

Thus, the orthodox *Wednesbury* formula results in the courts adopting an objective standard. The standard acknowledges that two different persons can come to opposite conclusions and would still not forfeit their right to be regarded as reasonable. To that extent, therefore, by orthodox standards it does not appear to be possible to review a decision on the basis of unreasonableness in a substantive sense unless it can be demonstrated that the unreasonableness was patent.

However, where fundamental human rights are at stake, then, the court will closely scrutinize the justification provided for the course of action adopted by the

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39 *ibid.*  
40 *ibid.*  
42 *ibid.*, at p. 247.
decision-maker. A powerful justification must be provided if important fundamental human rights of individuals are to be trumped. This trend, adopted by the English courts, has been followed in Sri Lanka and in other Commonwealth countries.

In Nakkuda Ali v. Jayaratne the Privy Council had to consider, inter alia, whether the Controller of Textiles of Ceylon was amenable to a writ of certiorari. In this case, the appellant sought to impeach the decision, made by the Controller of Textiles, to cancel his textile licence. The Controller of Textiles had, under and in terms of the relevant regulations, a power to cancel a textile licence if “he had reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer”. The Privy Council was of the opinion that when the Controller acted under regulation 62 he did not act judicially or quasi-judicially and was, therefore, not amenable to the jurisdiction of the court for the issue of a mandate in the nature of a writ of certiorari.

The Privy Council was, however, not prepared to examine the reasonableness of the Controller’s belief that the dealer was unfit to have a licence; it was sufficient if the Controller did in fact entertain such a belief prior to validly exercising his power of cancelling the licence. Lord Radcliffe, pointing out that the Controller did not act judicially when he decided to cancel the licence and was, hence, not amenable to a writ of certiorari, said:

“It is not difficult to think of circumstances in which the Controller might, in any

45 Regulation 62, Defence (Control of Textiles) Regulations, 1945.
ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he is acts under this Regulation. If he is not under a duty to so act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.\(^{46}\)

_Nakkuda Ali_ was a decision of the Privy Council, in the aftermath of the World War II, which marked a period of restriction where the advancement of a rights culture was concerned. The courts were not prepared to use objective standards to review subjectively worded powers and as such demonstrated a marked reluctance to interfere in administrative discretion. This policy may have been justified by the exigencies of the time but cannot any longer be sustained when there is a compelling need to advance a rights culture. In modern times the decisions of administrative agencies are closely scrutinized so as to ensure that there is due compliance with the requirements of reasonableness.

Subsequent to _Nakkuda Ali_ the Sri Lankan courts have, on a number of occasions, quashed regulations and by-laws that did not satisfy the standard of reasonableness. In _Thirunavukarasu v. Jayawardene\(^{47}\) the Supreme Court quashed the conviction of a trader who was convicted of selling a box of matches containing fifty sticks for six cents when the controlled price was five cents. The court held that the relevant Price Order was bad in law as it was unreasonable. de Kretser, J., reviewing the reasonableness of the Price

\(^{46}\) *(1950) 51 N. L. R. 457*, at p. 462.

\(^{47}\) *(1969) 71 N. L. R. 430.*
Order, said:

"The reasonableness of a Price Order can always be checked by its application to an extreme case. The law enacts that a trader must sell his box of matches with the banderol intact. To make a Price Order that requires him to fix his price in accordance with the number of sticks in the box which he cannot know with certainty except by breaking the banderol is manifestly unreasonable; and in my opinion goes beyond the authority given to the Controller of Prices ......"48

Consequently, the Price Order was held to be invalid inasmuch as it was manifestly unreasonable.

In Abusally v. Price Controller, Kandy,49 an appeal was made to the Supreme Court against a conviction for infringing a Price Order relating to the sale of mutton. The relevant Price Order fixed the controlled price of mutton with bones at Rs. 2.25 per pound and further directed that "when mutton is sold with bones the weight of bones sold therewith shall not exceed 25 per cent, of the total weight sold." Here too, de Kretser, J., in the Supreme Court held that the Price Order was invalid for manifest unreasonableness. His Lordship observed:

"The Law does not force anyone to do what is impossible, and when a Price Order directs a person to do what is impossible a Court can say with certainty that Parliament never intended to give the Controller of Prices authority to make such an order and that it is unreasonable and ultra vires. In the instant case I am completely satisfied that it is not possible to say of mutton with bone what percentage of it is bone and the proof of that is that even in this case a veterinary surgeon had to be called who says that he separated the flesh from the bone and had it weighed and it is on these weighings that this prosecution was launched. It is so unreasonable to insist that where there is a sale of mutton with bone that the percentage of bone must not exceed 25% that I hold that the Price Order to that effect is ultra vires."50

The above cases, therefore, clearly indicate that it is possible to challenge the validity of

48 ibid., at p. 432.
49 (1969) 72 N. L. R. 68.

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delegated legislation on the basis that it is manifestly unreasonable.

With the development of a rights centred culture the old distinction between judicial and quasi-judicial acts, on the one hand, which were amenable to review, and those that were purely administrative in character, on the other hand, which were not amenable to review, appears to have lost its relevance. The overriding concept is to advance principles of good administration and protect individual rights thereby advancing a rights culture. The era of open-textured, unfettered, discretion appears, therefore, to be a thing of the past.

This trend is clearly illustrated by the Sri Lankan case law which is supportive of the proposition that the exercise of discretion by administrative agencies can be impeached on the basis of manifest unreasonableness. For instance in Gooneratne v. Commissioner of Elections, the Commissioner of Elections (the first respondent) made an order whereby the Eksath Lanka Janatha Pakshaya (ELJP) was refused the status of a recognized political party. The petitioner alleged that his right to equality, protected under article 12 of the Constitution, was violated inasmuch as the Commissioner of Elections had made an order which was patently unreasonable. The Commissioner of Elections, on the other hand, sought to make out that the ELJP did not meet with the criteria necessary for recognition, namely, the time factor, the need for growth and the crystallisation of political consciousness. Sharvananda, C.J., in an unusually strong judgment articulating a rights culture, said:

\[50\] *ibid.*, at p. 71.
"In attaching undue significance to the factor of time, the 1st respondent has misdirected himself in law and has unreasonably refused recognition of Eksath Lanka Janatha Pakshaya as a political party under section 7(5) of the Act."  

Sharvananda, C. J., pointed out that although the relevant statute, under and in terms of the relevant section, did in fact require the Commissioner of Elections to form an opinion whether registration was warranted, this did not, however, confer upon him an unfettered discretion. In the instant case the ground of challenge was patent unreasonableness which vitiated the decision made by the Commissioner of Elections.

The Supreme Court, therefore, held that the decision of the Commissioner amounted to a violation of the fundamental rights of the petitioner inasmuch as the decision, which was patently unreasonable, resulted in the petitioner being treated differently from others similarly situated and consequently infringed the petitioner's right to equality.

Unreasonableness is, therefore, an important head of review in Sri Lanka and if decision-makers make decisions that cannot stand the test of reasonableness in the substantive sense, then, such decisions are amenable to challenge.

The principle of unreasonableness, as a ground for review is also well established in Canada. Thus, it is possible to obtain judicial review of a decision on the basis that it

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51 [1987] 2 Sri L. R. 165.
52 ibid., at p. 174.
54 Section 7(5).
is patently unreasonable. In Canadian Broadcasting Corp. v. Canada (Labour Relations Board) the appellant, a broadcasting corporation, required a journalist to resign his position as president of a trade union in view of the fact that he took a public position, in a union publication, whereby he indicated his opposition to a major government policy during an election campaign. The broadcasting corporation was of the view that the journalist had, thereby, compromised his independence. The Canada Labour Relations Board upheld a complaint of unfair labour practice under and in terms of the Canada Labour Code which prohibited an employer from participating in or interfering with the formation or administration of a trade union. An application for judicial review made by the broadcasting corporation was unanimously dismissed by the Federal Court of Appeal. On a further appeal to the Canadian Supreme Court it was decided, by a majority of the court, that the appeal should be dismissed.

The majority of the court was not prepared to accept that the tribunal had acted unreasonably. Laying down the applicable standard for review for unreasonableness, Iacobucci, J., said:

“When deciding whether the decision of a tribunal is patently unreasonable, the interpretation by the tribunal of its [constituting] legislation will not be disturbed if the approach taken by the tribunal is a reasonable one and the meaning given is one which the words of the statute can reasonably bear. Statutory language is often ambiguous and open to different interpretations. It is, therefore, for good reason that the courts will defer to the definition favoured by the tribunal, which can bring to bear on the determination it specialized expertise and knowledge of the overall statutory framework.”

58 ibid., at p. 408.
The Australian courts have also, on many occasions, impeached decisions which do not conform to the standard of reasonableness. For instance, in *Council of the City of Parramatta v. Pestell*\(^{59}\) the High Court of Australia, affirming an appeal from a decision of the Supreme Court of New South Wales, held a rate imposed by a municipal council to be invalid on the ground, *inter alia*, that the council could not have reasonably formed the view that the rated land enjoyed a special benefit that was not enjoyed by the excluded land.

In *Pestell*, under and in terms of the relevant section of an enactment,\(^{60}\) a municipal council was empowered to levy a rate for the executing of any work or service which in the opinion of the said council would be of special benefit to a portion of its area to be defined as prescribed. A regulation, made under the enactment, provided that if the area in respect of which the local rate was to be levied was less than a complete ward, riding, urban area, town improvement district or fire district it had to be defined “by metes and bounds”. The council of a municipality resolved to and described the area to be rated generally. However, from this description ninety lots, described only by lot or street number, were excluded. The area was generally used for industrial purposes but the excluded lots were residential in character – hence, their exclusion. The High Court of Australia decided, by a majority, that the rate was invalid for two principal reasons: firstly, because the council could not have reasonably arrived at the conclusion that the rated land enjoyed a special benefit that was not enjoyed by the land that was excluded; secondly, because the rated land had not been described, as required by the relevant

\(^{59}\) *(1972) 128 C. L. R. 305.*

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enactment, by metes and bounds.

Gibbs, J., after an analysis of the relevant issues, said:

"It may of course prove disputable whether a work benefits a particular parcel of land and, if so, whether it benefits that parcel more than another. For obvious reasons therefore, the legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area. A court has no power to override the council's opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law. If, in purporting to form its opinion, a council has taken into account matters which the Act, upon its proper construction, indicates are irrelevant to its consideration, or has failed to take into account matters which it ought to have considered, the opinion will not be regarded as validly formed. Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it."  

The decision of the Australian High Court in the Pestell case, therefore, clearly indicates that a decision could be vitiated if it is so unreasonable that no reasonable persons or body would have made such a decision. This is consistent with trends in other Commonwealth jurisdictions.

It should be noted that in Australia it is possible to appeal from an administrative decision to the Administrative Appeals Tribunal (AAT). The AAT, although headed by judges, has powers which extend beyond the orthodox judicial review of administrative action. In an appeal to the AAT it is possible to seek review of an administrative decision on policy or discretionary grounds. This aspect of the Australian AAT's function was adverted to by Justice Kirby, albeit, extra judicially.  

According to Justice Kirby:

60 Local Government Act 1919 (New South Wales), section 121.
61 supra., note 59, at p. 327.
62 See, Kirby, M. D., 'Administrative Review on the Merits: The Right or Preferable...
"The special function of the AAT is to reach the "correct" or "preferable" decision. Unlike the initial decision-maker, it is usually released from any binding observance of the Minister's statement of policy. This freedom permits a generalist body such as the AAT to test the established governmental or bureaucratic values against more general principles of fairness, liberty and so on."

Thus, it was justice Kirby's view that the AAT was in a position to judge the lawfulness of a decision by having recourse to principles of fairness, liberty and so on when it sought to exercise merits based review. Such standards help to bring a measure of objectivity to the process of judicial review which is desirable.

It is submitted, therefore, that the above analysis indicates that the general principle of unreasonableness as a ground for judicial review is well established in the Commonwealth and provides a means by which the judges are able to circumscribe the exercise of arbitrary power.

(c) The Human Rights Dimension of Substantive Unreasonableness.

A decision-maker who ignores fundamental human rights norms when making an administrative decision does so at his or her peril. This is because current developments in human rights jurisprudence have resulted in such a decision being liable to be regarded as being manifestly unreasonable. Thus even an unincorporated human rights treaty could give rise to the expectation that the rights contained therein will be respected by a decision-maker when making an administrative decision. This is particularly the case

Decision' (1979) 6 M. U. L. R. 171.
when the treaty is merely declaratory of pre-existing international human rights norms and does not seek to create new rights. On the other hand, if a country has a Bill of Rights, as for example in New Zealand, and now in England, then disregarding such rights when making a decision could render such a decision open to challenge on the grounds of unreasonableness or illegality. However, where a country has constitutionally protected fundamental human rights, such as in Canada, India and Sri Lanka, then, disregarding such fundamental human rights when making administrative decisions could be fatal to the sustainability of such a decision.

In this section we will examine the effect of disregarding international human rights norms as a background to unreasonableness. In the next section we will, thereafter, examine how administrative decisions could be vitiated if statutorily or constitutionally protected fundamental human rights are ignored.

In R. v. Secretary of State for the Home Department, ex parte Bugdaycay the applicants for judicial review (Bugdaycay, Santis, Norman and Musisi) had all been granted limited leave to enter the United Kingdom and had each applied for asylum as refugees. All but one of the applicants had initially misstated the purpose of their visits.

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63 ibid., at p. 190.
64 In the United Kingdom, for instance, in terms of section 6 (1) of the Human Rights Act 1998 it is unlawful for a public authority (the term includes a court) to act in a manner that is incompatible with a Convention right. Thus, in the case of a direct rights based challenge this section would give rise to a new species of illegality. On the other hand, in a traditional judicial review challenge the court could rely on Convention rights to determine the reasonableness of a decision of a public authority.
In terms of the Geneva Convention on Refugees 1951\textsuperscript{66} it was required that in order to qualify as a refugee it was necessary that the applicant for refugee status had a well-founded fear of persecution. The Home Office was of the view that only one of the refugees (Musisi) satisfied the preconditions necessary to be accorded refugee status but was of the further view that this applicant could properly be returned to Kenya, a state that was a signatory to the Convention, since he only entertained a fear of persecution in Uganda. Consequently, orders were made for the deportation of each applicant for refugee status on the basis that they were unlawful entrants.

The applications made for judicial review of the Home Secretary’s decision to deport the applicants were refused by the High Court. The appeals against that refusal were dismissed by the Court of Appeal. The subsequent appeals to the House of Lords were heard as a consolidated appeal. It was in this appeal that the House of Lords was called upon to consider the impact of the Convention on domestic law.

The House of Lords dismissed the appeals of Bugdaycay, Santis and Norman and allowed the appeal of Musisi. The House of Lords was of the view that the question as to whether an applicant was entitled to asylum was a matter to be determined by the immigration officers or the Secretary of State when exercising their powers under and in terms of section 4 of the Immigration Act 1971. Therefore, a claim for refugee status was only one of the several factors to be determined when granting or refusing leave to remain in the United Kingdom. The House of Lords did, however, grant a writ of \textit{certiorari} in

\textsuperscript{66} \textit{Geneva Convention relating to the Status of Refugees 1951} (Cmd. 9171) and

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respect of Musisi. This was due to the fact that there had been an apparent failure to adequately consider the evidence of the danger that Kenya might return Musisi to Uganda.

Adverting to one of the most important issues raised in the case, namely, the importance of taking into account fundamental human rights when assessing the reasonableness of an administrative decision, Lord Bridge of Harwich said:

"I approach the question raised by the challenge to the Secretary of State’s decision on the basis of the law stated earlier in this opinion, viz. that the resolution of any issue of fact and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the court’s power of review. The limitations on the scope of that power are well known and need not be restated here. Within those limitations the court must, I think, be entitled to subject an administrative decision to the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny."\(^{67}\)

It is submitted that the House of Lords in Bugdaycay appears to put rights in focus when evaluating the reasonableness of an administrative decision. Thus, where a fundamental human right is at stake then, in terms of Bugdaycay, the decision will be subject to rigorous scrutiny so that the court is satisfied that the decision is reasonable. An administrative decision that violates fundamental human rights is unlikely to satisfy the reasonableness criteria demanded by the courts unless sufficient objective justification is provided by the administrative agency or decision-maker. Where, however, an administrative agency or decision-maker seeks to trump a fundamental right by providing

\(^{67}\) supra., note 65, at p.531.

a public interest justification. then, the court must be satisfied that the justification is sufficient, in law, for the purpose.

In R. v. Secretary of State for the Home Department, ex parte Brind\(^68\) the Home Secretary issued a directive, under and in terms of section 29(3) of the Broadcasting Act 1981 and in terms of the licence and agreement with the British Broadcasting Corporation (BBC), that precluded the BBC and the Independent Broadcasting Authority from granting direct access to television and radio to spokesmen for terrorist and paramilitary organisations and those who support them. This decision was challenged, by way of an application for judicial review, by several broadcast journalists who were employed by the National Union of Journalists (NAU) and by a Mr Nash, employed by the NAU, who relied upon broadcasting for the provision of information.

The essence of the complaint of the applicants for judicial review was that: (i) the directive frustrated the policy and objects of the Broadcasting Act 1981; (ii) the directives were unlawful on Wednesbury grounds; (iii) the Minister failed to have proper regard to the European Convention for the Protection of Human Rights and in particular article 10; and (iv) the Secretary of State had acted ultra vires because he had acted in a disproportionate manner.

The High Court dismissed the application for judicial review. The Court of Appeal and the House of Lords, thereafter, dismissed the appeals of the petitioners. What is

relevant, however, to the present discussion was the attitude demonstrated by the House of Lords in respect of fundamental human rights as a background to review for unreasonableness.

In *ex parte Brind*, Lord Ackner referring to the status, at that time, of the European Convention on Human Rights in English law, said:

"It is well settled that the Convention may be deployed for the purpose of the resolution of an ambiguity in English primary or subordinate legislation."

Responding to an argument advanced by Anthony Lester, counsel for the petitioner, that the Secretary of State, before issuing his directive, should have properly construed and taken the Convention into consideration in terms of the *Wednesbury* doctrine his Lordship stated:

"If the Secretary of State was obliged to have proper regard to the Convention, i.e. to conform with article 10, this inevitably would result in incorporating the Convention into English domestic law by the back door. It would oblige the courts to police the operation of the Convention and to ask themselves in each case, where there was a challenge, whether the restrictions were "necessary in a democratic society....." applying the principles enunciated in the decisions of the European Court of Human Rights. The treaty, not having been incorporated in English law, cannot be a source of rights and obligations and the question "Did the Secretary of State act in breach of article 10? " does not therefore arise."

Underscoring the importance attached to the fundamental human right of free speech and the circumspection with which the court will view any restriction or curtailment of such a right, Lord Ackner said:

"In a field which concerns a fundamental human right – namely that of free speech- close scrutiny must be given to the reasons provided as justification for interference with that right."

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69 ibid., at p. 760.
70 ibid., at pp. 761-762.
71 ibid., at p. 757.

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Lord Ackner also laid great stress on the role of the courts when reviewing a decision on the basis that it was unreasonable in the *Wednesbury* sense. His Lordship pointed out that the judiciary should defer to the will of Parliament. He said:

"Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision - that is, to invite an abuse of power by the judiciary."72

The reasoning adopted by Lord Ackner, that the European Convention on Human Rights (ECHR) cannot be regarded as a background for reasonableness, can be criticized on the footing that his Lordship failed to regard the importance attached to the rights guaranteed by the Convention. The freedom of expression, protected by article 10 of the ECHR, is neither an obtuse nor an abstract right. It is an inherent human right which must be protected by any society which believes in democracy and the rule of law. It is submitted that the ECHR is merely declaratory of pre-existing rights and should not be regarded as a source of new rights. The freedom of expression is an important right to safeguard, irrespective and independent of the status of the ECHR in English law. The ECHR only declares the commitment of contracting states to protect and advance the rights enshrined therein. This does not necessarily imply that in the absence of the Convention the rights cannot be regarded as being of a universal character and has been
judicially acknowledged as such.

In R. v. Secretary of State for the Home Department, ex parte Simms, Lord Steyn, referring to the freedom of expression, said: "In a democracy it is a primary right: without it an effective rule of law is not possible." In Attorney General v. Guardian Newspapers Ltd (No 2), Lord Goff of Chieveley expressed the view that, where freedom of expression was concerned, in principle, there was no difference between the English law on the subject and article 10 of the ECHR.

In ex parte Brind, Lord Templeman adopted a different approach to that adopted by Lord Ackner; he appeared to recognize the central place that must be accorded to the rights protected by the ECHR. Yet, he dismissed the appeal on the basis that the Home Secretary had a sufficient margin of appreciation, a distinctively European concept, to determine the extent of the restriction to be imposed upon the freedom of expression. His Lordship stated:

"The discretionary power of the Home Secretary to give directions to the broadcasting authorities imposing restrictions on freedom of expression is subject to judicial review, a remedy invented by the judges to restrain the excess or abuse of power. On an application for judicial review, the courts must not substitute their own views for the informed views of the Home Secretary. In terms of the Convention, as construed by the European Court, a margin of appreciation must be afforded to the Home Secretary to decide whether and in what terms a restriction on freedom of expression is justified."
Lord Templeman further added:

"It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable. In terms of the Convention, as construed by the European Court, the interference with freedom of expression must be necessary and proportionate to the damage which the restriction is designed to prevent."\(^78\)

It is our view that the approach adopted by Lord Templeman is preferable to that adopted by Lord Ackner in promoting a rights culture. The fact that Lord Templeman had recourse to the margin of appreciation in order to justify the action of the Home Secretary indicates that his Lordship was concerned about the significance attached to the fundamental right involved (in circumstances where it is alleged that a decision is unreasonable because due consideration had not been given to this right). There is, however, an anomaly in the reasoning adopted by Lord Templeman. His Lordship had recourse to the concept of the margin of appreciation to dismiss the appeal. It is submitted that if the ECHR is not part of English law, because the Convention has not been incorporated, then it would appear that a concept such as the margin of appreciation, a central pivot in European jurisprudence, would have no place in English law. In any event, the concept of the margin of appreciation is used by an international court in order to recognize the sovereignty of a state in respect of certain matters. It is submitted that it is not open to a national court to have recourse to this concept because it is not in the same position as an international court.\(^79\) On the contrary, the basis on which the right to freedom of expression, enshrined in article 10 of the ECHR, could have been protected

\(^78\) ibid.

\(^79\) See, e.g., Singh, Rabinder, Hunt, Murray and Demetriou, Marie, 'Current Topic: Is there a Role for the “Margin of Appreciation” in National Law after the Human
in English law was to recognize that it was part of the common law of the land. There has been, however, a discernible trend in this direction prior to the enactment of the Human Rights Act 1998.  

In _R. v. Cambridge District Health Authority, ex parte B_ an application for judicial review was made by a next friend on behalf of a child, aged 10, suffering from a relapse of acute _myeloid leukaemia_. The respondent health authority had denied the child access to funds for further medical treatment on the basis that (i) such medical treatment was not in the child’s best interests because it was likely to cause considerable suffering; and (ii) there was no realistic prospect of success and, in the circumstances, funding such a course of treatment did not constitute an effective use of resources. The petitioner sought a writ of _certiorari_ quashing the decision of the health authority inasmuch as such a decision was unlawful.

Laws, J., in the High Court, held that a fundamental right, namely the right to life, was engaged. Consequently, the law required that where a respondent sought to exercise a discretion, in circumstances where the exercise of such a discretion might infringe such a right, it was precluded from permitting such infringement unless it was able to demonstrate substantial objective justification on public interest grounds. Laws, J., was  

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not satisfied that the respondent health authority had demonstrated substantial objective justification on public interest grounds. His Honour, therefore, granted a writ of certiorari quashing the decision of the health authority. Although the decision of Laws, J., was reversed, on the same day, by the Court of Appeal the reasoning adopted by his Honour assumes much significance in view of the enactment of the Human Rights Act 1998. This enactment results in a rights culture being a central pivot of judicial review.

Laws, J., pointed out that certain fundamental human rights, such as those protected under the European Convention on Human Rights, share with other principles “the substance of the English common law.” In ex parte B, Laws, J., said:

“The principle is that certain rights, broadly those occupying a central place in the European Convention on Human Rights and obviously including the right to life, are not to be perceived merely as moral or political aspirations nor as enjoying a legal status only upon the international plane of this country’s Convention obligations. They are to be vindicated as sharing with other principles the substance of the English common law. Concretely, the law requires that where a public body enjoys a discretion whose exercise may infringe such a right, it is not to be permitted to perpetrate any such infringement unless it can show a substantial objective justification on public interest grounds. The public body itself is the first judge of the question whether such a justification exists. The court’s role is secondary .... Such a distribution of authority is required by the nature of the judicial review jurisdiction, and the respect which the courts are certainly obliged to pay to the powers conferred by Parliament upon bodies other than themselves. But the decision-maker has to recognise that he can only infringe such a fundamental right by virtue of an objection of substance put forward in the public interest.”

The Court of Appeal, however, was critical of the reasoning adopted by Laws, J., in relation to the allocation of health authority funds and his requirement that they be required to provide objective justification for such allocations. Bingham, M. R., was of

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the view that "the courts [were] not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind."

Commenting on the decision of *ex parte B*, James and Longley\(^85\) point out that "where funding is limited everyone has an equal right to be considered. Indeed, where the rights of one affect the rights of another, justification for the abrogation of one individual’s fundamental right must surely require a demonstration that rights of other individuals have been taken into account."

James and Longley, in their article which is supportive of the reasoning adopted by Laws, J., state as follows:

"Rationing and prioritising is an integral function of a health authority. But by highlighting the essentially moral nature of choices inherent in much public administration the quality of decision-making may be improved. The courts have a part to play in structuring decision-making and ensuring that the policy choice made, even if reasonable, is explained and justified. The public interest in fairness requires the severing of reasons from the shackles of Wednesbury reasonableness where fundamental rights are threatened. This requires not only that all relevant factors are taken into account but also that they are subjected to a rigorous and open analysis before a conclusion is reached. This is not an argument for judges interfering with decisions, but for refining the decision making process, and consequently reducing any sense of unfairness and ultimately recourse to litigation. The difficulties inherent in devising principles for this approach are certainly great, but should not be regarded as an insurmountable obstacle by the courts."

Thus, in a human rights context, the court is called upon to carry out a balancing exercise

\(^83\) supra., note 81, at p. 1060.
\(^84\) supra., note 82, at p. 1071.
\(^86\) ibid.
adopting a variable standard of justification. According to Hunt,87 “[w]hen asked to interfere with an exercise of administrative discretion on the ground that it is irrational, the court must decide whether the decision is one which has been taken in a “human rights context”. ” What this means, in effect, is that the court, when called to make an adjudication in a human rights context, is prepared to judge the reasonableness of a decision using a sliding scale: the more fundamental the right involved the more powerful the justification necessary to trump such a right.

When a fundamental human right is at stake the test applied by the court is no longer the Wednesbury standard relating to the defiance of logic (a decision so unreasonable that no reasonable person or body would make it); on the contrary the court adopts the test of ‘anxious scrutiny’ because the court, then, applies a lower threshold. In such circumstances an objective public interest justification must be provided by the decision-maker or administrative agency if the court is to be satisfied of the reasonableness of the decision.88

In R. v. Secretary of State for the Environment, ex parte National and Local Government Officers Association,89 the applicant appealed to the Court of Appeal against an order dismissing its application for judicial review. The applicant, the National and


Local Government Association (NALGO), had sought a declaration that a certain regulation framed by the Secretary of State was *ultra vires* the Local Government and Housing Act 1989. The relevant enactment provided that if a person holds a politically restricted post, then, such a person shall be disqualified from being a member of a local authority. The aforesaid restrictions on political activities were deemed to have been incorporated into the terms of employment of persons holding restricted posts if regulations were framed for the purpose.

The Secretary of State had framed, in very broad terms, regulations which placed extensive restrictions on political activities of persons who held politically restricted posts. NALGO challenged the legality of the regulations arguing that they were disproportionate or unreasonable. They also argued that the regulations interfered with the freedom of expression in a manner or to an extent that was not necessary in a democratic society and as such ran contrary to article 10 of the European Convention on Human Rights. It was the contention of NALGO that the regulations were void for overbreadth because they exceeded the scope of the enabling section of the empowering Act.

The Court of Appeal, however, dismissed the appeal of NALGO. The court was satisfied that the public interest justification advanced by the respondent was sufficient to outtop the petitioner's rights. After an analysis of the applicable case law, Neill, J., referring to the human rights context when judging the reasonableness of a decision, said:

"Nevertheless, where fundamental human rights including freedom of expression are being restricted the Minister will need to show that there is an important

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competing public interest which is sufficient to justify the restriction."90

Thus, the Court of Appeal underscored the importance of providing a sufficient and objective public interest justification in a context where a decision would result in restricting a fundamental human right.

In *R. v. Ministry of Defence, ex parte Smith*91 four applicants for judicial review, who had otherwise distinguished service records, had been administratively discharged by the armed forces on the basis that they were of homosexual orientation. They challenged their discharge from the armed forces on the basis that the policy adopted in this regard was irrational, contrary to articles 8 and 14 of the European Convention on Human Rights and in breach of article 2 and 5 of the Council Directive.92 The applicants had been discharged from the armed forces not due to any act of homosexual conduct with fellow members but on the basis of their sexual orientation only. This policy was clearly out of line with modern trends and attitudes towards human sexuality and in fact out of step with policies adopted by the armed forces of the United States of America and other European countries. The application for judicial review was, however, refused and the Court of Appeal dismissed the appeals. Bingham, M.R, referring to the role of the courts in regard to the protection of fundamental human rights, said:

"The present cases do not affect the lives or liberty of those involved. But they do concern innate qualities of a very personal kind and the decisions of which the applicants complain have had a profound effect on their careers and prospects. The applicants' rights as human beings are very much in issue. It is now accepted that this issue is justiciable. This does not of course mean that the court is thrust into the position of the primary decision-maker. It is not the constitutional role of the court

90 ibid., at p. 798.
to regulate the conditions of service in the armed forces of the Crown, nor has it the expertise to do so. But it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer the expertise of responsible decision-makers, it must not shrink from its fundamental duty to "do right to all manner of people..."." 93

Bingham, M. R., was, however, prepared to concede that there may have been a violation of article 8 of the European Convention but refused to acknowledge that the Convention could provide a background for a complaint of irrationality inasmuch as the Convention was not enforceable by the domestic courts. He said:

"It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and secure compliance with this article is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning that exercise of discretion." 94

However, his Lordship was prepared to acknowledge that it was quite possible that a breach of the Convention had in fact taken place but that it "may be necessary for the applicants, if all else fails, to incur the expense and endure the delay of pursuing their claim in Strasbourg." 95 Thus, his Lordship appeared to be of the view that the proper forum to vindicate the relevant fundamental human rights was at Strasbourg and not before the domestic courts of the land.

It is submitted, however, that this decision is rather disappointing in view of the fact that the court failed to appreciate the view that fundamental human rights are of a universal character; the Convention is merely declaratory of such rights. The Convention

93 supra., note 91, at p. 556.
94 ibid.
does not, in fact, create new rights but ensures that contracting states will honour their obligations under it.

In *Smith*, the Court of Appeal also failed to adequately scrutinize the public interest justification adduced by the decision-maker. The respondent did not provide a sufficiently strong justification for its decision but merely asserted its right to adopt its chosen policy by the submission of certain affidavits. The evidence tendered by the respondents were merely to the effect that most armed servicemen are homophobic. The conclusion reached by the court, albeit after subjecting the public interest justification offered to anxious scrutiny, was in fact a demonstration of the court shirking its constitutional responsibility of safeguarding fundamental human rights. A decision-maker, it is submitted, cannot merely assert a public interest justification; he or she must adduce cogent evidence to substantiate such a justification.

It is submitted that it would be perfectly proper that a decision-maker takes fundamental human rights into consideration when making administrative decisions involving an exercise of discretion if principles of good administration are to be observed. It is a trend that is consistent with developments in the Commonwealth.

For instance, in Australia, the courts have accepted that international human rights treaties can provide background justification for review for illegality and irrationality.\(^5\)

\(^{55}\) *ibid.*, at p. 559.

In *Premalal* the applicant, a citizen of Sri Lanka, arrived in Australia from a third country, on a visitor’s visa. On the basis of an immigration officer’s belief that the applicant was not a *bona fide* visitor to Australia he was detained. While in detention, Premalal applied for refugee status. He claimed that if he was returned to Sri Lanka he would be likely to become a victim of a government sponsored terror campaign.

The applicant was subsequently informed by the respondent’s delegate that his application for refugee status had been refused. Premalal, thereafter, sought review of the decision. The Refugee Status Review Committee (RSRC), after considering submissions from various bodies, recommended that the applicant be granted refugee status. However, despite this recommendation, the respondent’s delegate refused the application for refugee status on the basis that he was not satisfied that the facts established that there was a real chance of persecution should the applicant return to Sri Lanka. The applicant sought judicial review of this decision arguing that he had a legitimate expectation that his submissions before the RSRC would be adequately taken into consideration and that the delegate’s exercise of power was unreasonable. Einfeld, J., giving judgment for the General Division of the Federal Court of New South Wales, dismissed the application for judicial review.

However, *Premalal* is of significance to our present discussion because it reaffirms the long and well established principle in Australian administrative law that when a court reviews refugee status decisions it takes into consideration the best available examples of objectivity in the field, namely, the various human rights principles and conventions
to which Australia is a party. It is a principle that has been repeatedly and unambiguously reaffirmed by the High Court of Australia in recent times.

In Premalal Einfeld, J., citing Dworkin with approval, referred to the role of the court when considering an application for judicial review. His Honour observed thus:

"It is fundamental to judicial integrity that judges do not review decisions simply according to personal conceptions of policy or according to their individual moral systems. Decisions must be reviewed with an integrity which comes from a strictly legal though not necessarily formalistic approach to law."

His Honour also quoted Dworkin to the following effect:

"Law as integrity asks judges to assume, as far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards."

His Honour laid emphasis upon the fact that international human rights norms would indeed provide an important background when judging the reasonableness of an administrative decision. He said: "[n]owhere are considerations of international instruments of human rights more important then in the area of refugees." After a survey of the applicable international human rights instruments ratified by Australia, his Honour observed:

97 See, e.g., the decision of the High Court of Australia, as far back as in 1948, in Chow Hung Ching v. The King, (1948) 77 C. L. R. 449, at p. 477.
100 supra., note 96, at p. 138.
"It is against the background of these considerations that the issue must be considered whether, in light of international law recognised, acknowledged and accepted by Australia, the present decision was unreasonable."103

Einfeld, J., also referred to the circumstances under which an administrative action is likely to be impeached on the basis that it did not satisfy the requirements of reasonableness. His Honour said:

"Unreasonableness may be established even though no irrelevant matters have been taken into account and natural justice has been granted, and even if no other errors of law appear on the record...... The test of reasonableness has been variously put and it is not necessary to redescribe it here...... Suffice to say that the principle of reasonableness may encompass the concepts of proportionality, consistency and legal certainty. Furthermore, and importantly in this context, reasonableness encompasses a recognition of fundamental human rights and unreasonableness may occur if they are breached or denied....."104

The Australian judiciary has, therefore, very clearly demonstrated that the principle of reasonableness should encompass fundamental human rights. Thus, if an administrative decision is arrived at without taking into consideration the fundamental human rights at stake, or if the human rights involved are overridden without sufficient public interest justification, then, the decision is likely to be classified as unreasonable.

It is submitted that, as recognized by the Australian courts, international human rights treaties, ratified by the contracting state, should provide a decision-maker with objective criteria in arriving at a reasonable decision. To arrive at a decision ignoring human rights norms, or overriding them without sufficient objective public interest justification, could result in such a decision being vitiated on the basis that it is unreasonable.

102 supra., note 96, at p. 138.
103 ibid., at p. 139.
(d) Unreasonable Decisions in the Context of Constitutionally or Statutorily Protected Fundamental Human Rights.

Where a country has constitutionally protected fundamental human rights, such as in Sri Lanka, India or Canada, then a decision-maker who ignores such protected rights will arrive at a decision which is liable to be assailed unless such a decision-maker is able to provide sufficient justification for his action so as to bring his decision within a permissible derogation from such rights. Countries such as New Zealand and, now, the United Kingdom have statutorily protected Bills of Rights which have special political status and administrative decision-makers are expected to honour such statutorily protected rights when making decisions.

In 1998 the United Kingdom enacted the Human Rights Act which resulted in articles 2 – 12 and 14, plus the First Protocol, of the European Convention on Human Rights and Fundamental Freedoms being incorporated into domestic law. As a result it is possible to vindicate such rights before the domestic courts. Consequently, it is now unlawful for a public authority to act in a manner which is incompatible with a Convention right. It is submitted, therefore, that a decision made by a decision-maker, in the United Kingdom, incompatible with the Convention, may be assailed on the basis that it is illegal and/ or unreasonable. Thus, with the incorporation of the Convention, a rights culture lies at the heart of judicial review in Britain.

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104 *ibid.*, at p. 140.
In Sri Lanka, the Supreme Court has interpreted the right to equality before the law and the right to equal protection of the law in such a manner that executive and administrative action should not be arbitrary or capricious. Article 12 (1) of the Constitution provides as follows:

"All persons are equal before the law and are entitled to the equal protection of the law."

Decision-makers in Sri Lanka should honour constitutionally protected rights when making decisions. The principle of reasonableness, therefore, would encompass respect for constitutionally protected rights. The constitutional norm, being the highest norm in the country, should be the guiding principle for a decision-maker. Constitutionally protected rights provide objective criteria against which an administrative decision could be measured. An arbitrary or capricious action would, undoubtedly, be regarded as unreasonable. However, the violation of a fundamental human right protected by article 12 (1) of the Constitution would result in it being possible to vindicate such a right before the Supreme Court by way of an application in terms of article 126(1) of the Constitution.

It is our view, however, that all constitutionally protected fundamental human rights should also provide a sufficient background for judging the reasonableness of executive and administrative action. Thus, in addition to a constitutionally guaranteed remedy, provided by article 126 (1), it should also be possible to have regard to such rights when seeking any of the prerogative writs in an application for judicial review.

In Sri Lanka the Supreme Court has sole and exclusive jurisdiction in matters

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105 Human Rights Act 1998, section 6 (1).
relating to the violation of fundamental human rights as a result of executive and 
administrative action. A violation of a constitutionally guaranteed fundamental human 
right will result in the victim of such a violation receiving compensation from the state 
or from the individual who violated his or her rights. However an application under 
article 126 (1) of the Constitution must be made within one month from the date of the 
alleged infringement of the fundamental right.106

The Court of Appeal and the Provincial High Courts have jurisdiction in respect 
of prerogative writs; the parties have a right of appeal to the Supreme Court. An 
applicant for a prerogative writ must seek his or her remedy within a reasonable time 
without undue delay. Where the prerogative writs are concerned, it is not possible to 
receive compensation for any unlawful administrative action. In Sri Lanka, unlike in 
England, it is not possible to seek an injunction, declaration or damages combined with 
an application for a prerogative writ. Procedural exclusivity in respect of public law and 
private law remedies is firmly established in Sri Lanka. As a result, an aggrieved party 
must seek the proper remedy before a proper forum when seeking to vindicate his or her 
rights.

However, if a person invokes the writ jurisdiction of the Court of Appeal or that 
of the Provincial High Court and in the process complains that there has been an 
infringement of a fundamental right, then, the court is bound to refer the matter to the 

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Corporation, [1995] 2 Sri L. R. 120.
Supreme Court for its determination. Thus, if a person seeks a writ on the basis that a decision was unreasonable inasmuch as the said decision was made by disregarding the fundamental rights of the petitioner, then, fundamental rights become important as background to such a challenge.

This right is especially important if the petitioner is out of time for the purpose of instituting a fundamental rights application. It should be noted, however, that if a rights based challenge is instituted, in terms of article 126(1) of the Constitution, then, it is possible to seek compensation for the violation of a fundamental right. On the other hand, if the prerogative writ jurisdiction is activated it would not be possible to seek compensation but other appropriate public law remedies could be sought.

The human rights context is, therefore, important when judging the lawfulness of an administrative action. If a decision has been reached as a result of executive or administrative action which is per se unreasonable because the decision is arbitrary or capricious then it could give the aggrieved party a right to vindicate his or her rights before the Supreme Court by way of a fundamental rights action under and in terms of article 126 (1) of the Constitution. On the other hand if a decision has been made without paying due regard to the fundamental rights of a person, then, it is submitted that it would be possible, using the human rights context as background, to impeach the decision on the ground that it is unreasonable. It is unfortunate, however, that no litigation has arisen.

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107 See, article 126 (3) of the Constitution read with section 8 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. For the jurisdiction of the Supreme Court in such matters see, e.g., Chandrasekeram v. Wijetunga, [1992] 2 Sri
in Sri Lanka where a decision has been challenged on the ground that it is unreasonable because the human rights background has been disregarded when reaching the said decision. This has been so despite the fact that such a situation has been envisaged by the Constitution.\textsuperscript{108}

It should be noted, however, that where an arbitrary or capricious decision has been reached as a result of executive or administrative action then the decision-maker is liable to have his or her decision set aside on the basis that the said decision violates the constitutionally protected right to equality before the law. The Supreme Court of Sri Lanka has on many occasions held that a decision which is arbitrary or capricious amounts to the violation of the fundamental right to equality guaranteed by the Constitution.\textsuperscript{109}

In Chandrasena \textit{v. Kulatunga,}\textsuperscript{110} the petitioner, a teacher, was transferred from one school to another with only six days notice of such transfer. The petitioner alleged that the transfer was made without any valid reason and in an arbitrary, malicious and capricious manner, subjecting him to selective hostile discrimination. The petitioner further averred that no other teacher in the same province had been transferred in such a manner. de Silva, C. J., with whom Ramanathan, J., and Wadugodapitiya, J., agreed, held that in the absence of any valid or acceptable reason for the transfer it was unreasonable and arbitrary and, therefore, amounted to a violation of article 12 (1) of the

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\textsuperscript{108} \textit{ibid.}
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The Supreme Court of Sri Lanka has also, on many occasions, indicated that if, as a result of executive and administrative action, promotions have been made in the absence of a proper scheme of promotion, then, this could amount to a denial of the right to equality guaranteed by article 12 (1) of the Constitution.\(^{112}\)

In \textit{Priyangani v. Nanayakkara}\(^{113}\) the petitioner, a primary school teacher, had completed a five year period of service at a school classified as a “difficult school”. After her period of service at the aforesaid difficult school she applied and was granted a transfer to a school close to her husband’s home. About four months later, she received a letter from the Zonal Director of Education transferring her back, with immediate effect, to the previous school. The petitioner, in a fundamental rights application, complained that she was the victim of a sudden and arbitrary transfer which amounted to the denial of her right to equality guaranteed under and in terms of article 12 (1) of the Constitution.

It was the contention of the respondents that the petitioner had not served at a “difficult school” because her parents’ home was in close proximity to the “difficult

\(^{110}\) \textit{ibid.}

\(^{111}\) \textit{ibid.}, at p. 329.

\(^{112}\) See, e.g., \textit{Piyasena v. People’s Bank}, [1994] 2 Sri L. R. 65; see also, \textit{Abeysinghe v. Central Engineering Consulting Bureau}, [1996] 2 Sri L. R. 36, where the petitioners failed to establish that there had, in fact, been an infringement of article 12(1).

\(^{113}\) [1996] 1 Sri L. R. 399.
school”. The respondents further argued that they had a contractual right to transfer the petitioner if they wished to do so. This contention was rejected by the Supreme Court as being without justification. The court further held that it was not concerned with contractual rights but with safeguards based on the rule of law. There had been a violation of the petitioner’s article 12 (1) rights inasmuch as the petitioner had been the victim of the arbitrary and unreasonable exercise of discretionary power.

Fernando, J., with whom Dheeraratne, J., and Wijetunga, J., agreed, outlined the applicable criteria for the review of the exercise of discretionary power. His Lordship observed as follows:

"Discretionary powers can never be treated as absolute and unfettered—unless there is compelling language; when reposed in public functionaries, such powers are held in trust, to be used for the benefit of the public, and for the purpose for which they have been conferred—not at the whim and fancy of officials, for political advantage or personal gain. Education, as the Transfer Circular emphasises, concerns the child; the power to transfer teachers exists to promote the education of the child; a fair and reasonable system of teacher transfers, implemented according to established principles and criteria, will promote the education of the child; and the absence of such a system will undermine good education."

Thus, if a decision-maker acts arbitrarily or capriciously in the exercise of his discretion, then, such an exercise of discretion could be subject to judicial review. In such circumstances unreasonableness is available as a free standing ground of review. Unreasonableness, in the process of decision-making, in this context, could amount to a denial of a fundamental human right.

The above trend, in relation to unreasonableness as a ground of review, observed
in Sri Lanka, is consistent with developments in India. Article 14 of the Indian Constitution protects the right to equality. Article 14 is to the following effect:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

Equality implies the absence of discrimination. Chaturvedi, commenting upon the nexus between discretion and discrimination, states as follows:

"It is well settled that discretionary power is not necessarily a power to discriminate. The power of courts to strike down mala fide or illegal exercise of power, judicial or administrative, is itself a check on arbitrary exercise of power since the constitutional validity of a law is not liable to be tested on the assumption that where a discretionary power is conferred on a high authority, the same may not be abused or exercised in a discriminatory manner particularly when power under the statute cannot be said to be uncontrolled."

Chaturvedi, referring to the tests adopted to determine whether an act of discrimination impinges article 14 of the Indian Constitution, states:

"There are two tests to determine whether a discrimination is hit by Article 14; first, that the discretion given to an authority is in respect of a fundamental right; and second, that such discretion admits of real and substantial discrimination; and as regards the possibility of the misuse of discretion, the usual presumption that the authority shall act honestly and fairly shall prevail, provided the discretion is exercised impartially and without discrimination, because arbitrary exercise of discretion is no exercise at all."

Thus, in India the unreasonable exercise of discretion can be regarded as arbitrary and is liable to be impeached on the basis that it is inconsistent with constitutionally protected rights. It is also possible to challenge the validity of a statute on the same basis.

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114 ibid., at pp. 404 – 405.
116 ibid., at p. 105.
117 See, e.g., Reddy v. State of Jammu and Kashmir, A.I.R. 1980 S.C. 1992, where the Supreme Court of India held that the directive principles of state policy enshrined in the Constitution could be used to determine the constitutionality of a law without relying on any particular fundamental right.
The Indian Supreme Court has even gone to the extent of stating that article 14 of the Constitution is applicable even to the distribution of government largesse. In *Shetty v. International Airport Authority of India*,118 Bhagwati, J., said:

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."

Thus, in India, as in Sri Lanka, it is imperative that decision-makers give due regard to constitutionally protected fundamental rights when making decisions. Failure to do so carries with it the attendant risk that the decision may be invalidated on the ground that it is unreasonable.

Canada, on the other hand, has a statutorily enacted Bill of Rights and a Constitutionally protected Charter of Rights and Freedoms. The latter has proved to be more effective than the former. The Supreme Court of Canada has, on many occasions, assailed the exercise of discretionary powers by decision-makers on the footing that there had been a breach of Charter of Rights. Section 1 of the Canadian Charter of Rights and Freedoms provides as follows:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Thus, the scope and ambit of section 1 is such that it contemplates judicial review not only of administrative and executive action but also of legislation which is inconsistent with the Charter “subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Consequently, any challenge

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of legislation, inconsistent with the Charter, will be judged by the standard of a reasonable limitation that is consonant with a “free and democratic society”.

A violation of a Charter right results in a decision being regarded as illegal despite the fact that the court may come to the conclusion that the decision-maker had acted unreasonably. This is clearly illustrated by certain cases dealing with the criminal law. It appears that where a person can demonstrate that his Charter rights have been violated, he or she would rely on this ground to challenge a decision rather than having recourse to a remedy provided by administrative law, such as a prerogative writ, whereby an unreasonable decision can be assailed. It is submitted that this is likely to be the case in England as well once the Human Rights Act 1998 comes into force.

In *R. v. Heywood*, the respondent had been charged with vagrancy on account of the fact that he was found loitering at Beacon Hill Park in Victoria. He had previously been convicted of two counts of sexual assault. Under and in terms of section 179 (1) (b) of the Criminal Code, a person commits vagrancy if at any time previously he or she has been convicted of certain offences, including sexual assault, and is found loitering in or near a school ground, playground, public park or bathing area. It was the submission of the respondent that the offence of vagrancy, under and in terms of section 179 (1) (b) of the Criminal Code was an unconstitutional violation of sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

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The submission of the respondent was accepted by the trial judge to the extent that he was prepared to accept that the section violated the Charter but the judge was of the view that it was a reasonable limitation within the meaning of section 1 of the Charter. The Summary Conviction Appeal Court dismissed the appeal of the respondent. However, the British Columbia Court of Appeal allowed a further appeal by the respondent. The Supreme Court of Canada, by a five to four decision, dismissed the appeal of the Crown.

Cory, J., was of the view that section 179(1) (b) suffered from "overbreadth and, thus, the deprivation of liberty it entails is not in accordance with the principles of fundamental justice." Earlier on in his judgment, Cory J., explained that a decision which suffers from overbreadth would be arbitrary or disproportionate. His Honour stated as follows:

"Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: Are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will be limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary and disproportionate."  

Thus, in Canada it is possible to impeach the validity of a statute on footing that it is unreasonable inasmuch as it is inconsistent with the Canadian Charter of Rights and Freedoms. Consequently, fundamental human rights are accorded a pivotal role when determining whether legislation is void for unreasonableness.

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121 ibid., at p. 385.
122 ibid., at p. 384.
However, it addition to providing a means of challenging the constitutionality of legislation the Charter also helps to advance a rights culture by ensuring that state action conforms to its requirements. Actions which cannot be objectively justified can be impeached on the footing that they are unreasonable if they are inconsistent with the Charter.

In *R. v. Stillman*, the appellant, who was 17 years old at the time of the alleged offence, was arrested for the murder of a 14 year old girl. Subsequent to the appellant’s arrest the police obtained hair samples, teeth impressions and [mucous] swabs from the accused, without his consent. The evidence so gathered was used for the purpose of DNA analysis. Additionally, whilst the accused was in custody he had used tissues to blow his nose and he had, thereafter, thrown the tissue into a waste receptacle. These tissues where subsequently retrieved by the police and submitted for DNA analysis.

The appellant was convicted of first degree murder and sentenced to life imprisonment. The majority of the Court of Appeal of New Brunswick dismissed his appeal. On further appeal the Supreme Court of Canada held, by a majority, that the appeal should be allowed and ordered a new trial. The Supreme Court of Canada held that the taking of bodily samples, without the consent of the accused, constituted unreasonable search and seizure and amounted to a violation of the accused’s right to security of person. The court was of the view that there had been a violation of sections 7, 8 and 24 (2) of the Canadian Charter of Rights and Freedoms.

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Outlining the scope of the common law power to seize bodily samples and the requirement of reasonableness in such circumstances. Cory, J., said:

"The common law power cannot be so broad as to empower police officers to seize bodily samples. They are usually in no danger of disappearing. Here, there was no likelihood that the appellant's teeth impressions would change, nor that his hair follicles would present a different DNA profile with the passage of time. There was simply no possibility of the evidence sought being destroyed if it was not seized immediately. It should be remembered that one of the limitations of the common law power....was the discretionary aspect of the power and that it should not be abusive. The common law power of search incidental to arrest cannot be so broad as to encompass the seizure without valid statutory authority of bodily samples in the face of a refusal to provide them. If it is, then the common law rule itself is unreasonable, since it is too broad and fails to properly balance the competing rights involved."\(^{124}\)

Cory, J., was of the view that there had been a violation of section 7 of the Canadian Charter inasmuch as it resulted in a violation of the appellant's right to security of person.\(^{125}\) His Honour was also of the view that there had been a violation of section 8 of the Charter when the discarded tissue was examined without the consent of the appellant. He said:

"However, in this case, the accused had announced through his lawyers that he would not consent to the taking of any samples of his bodily fluids. The police were aware of his decision. Despite this they took possession of the tissue discarded by the appellant while he was in custody. In these circumstances the seizure was unreasonable and violated the appellant's s.8 Charter rights."\(^{126}\)

Pointing out that the evidence against the appellant had been obtained in a manner that violated the Charter, Cory, J., was of the view that this was inconsistent with section 24(2) of the Charter.\(^{127}\)

\(^{124}\) ibid., at p. 216.
\(^{125}\) ibid., at p. 217.
\(^{126}\) ibid., at p. 220.
\(^{127}\) In terms of section 24 (2), if a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, it is possible
Thus, in Canada it is possible to challenge state action on the basis that it is unreasonable inasmuch as it violates protected Charter rights. Unreasonableness, therefore, provides a useful rubric to judge the lawfulness of state action; it helps to advance a rights culture because if a decision is to be regarded as reasonable, then, it must not infringe any fundamental human rights without sufficient objective public interest justification.

III. The Nexus Between Proportionality and Unreasonableness.

(a) The Origin and Nature of the Concept of Proportionality.

The concept of proportionality is of European origin and is regarded as a general principle of community law. The principle is derived from German law, where it is referred to as *Verhältnismäßigkeit*, and it underpins certain provisions of that country’s constitution. The origin of the principle can be traced back to nineteenth century Prussia. In terms of this principle, “a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.” As a basic principle of European Community law to exclude such evidence if its inclusion in proceedings is likely to bring the administration of justice into disrepute.

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130 *ibid.*

According to Craig and de Burca,\footnote{Craig, Paul and de Burca, Grainne, EU Law [Oxford: Oxford University Press, 2nd edn., 1998], at p. 350.} different linguistic formulations of proportionality are discernible and they encompass the following tests: (i) whether, in the applicable circumstances, the disputed measure is the least restrictive; (ii) whether there is correspondence between the importance attached to a particular aim and the means adopted to achieve it and whether such means are necessary for its achievement; (iii) whether the impugned act is suitable and necessary for the achievement of its objective and whether it does not impose excessive burdens upon the individual; and (iv) whether there is any balance between the costs and benefits of the measure under challenge.

Craig and de Burca are also of the view that when a proportionality inquiry is conducted, in terms of any of the above tests, it is inevitably necessary to address a set of prior and subsequent issues.\footnote{ibid.} They are of the further view that a proportionality inquiry involves the following stages:

\begin{quote}
(i) The relevant interests must be identified;
(ii) There must be some ascription of weight or value to those interests, since this is a necessary condition precedent to any balancing operation;
(iii) Some view must be taken about whether certain interests can be traded off to achieve other goals at all;
(iv) A decision must be made on whether the public body's decision was indeed proportionate or not in the light of the above considerations. ..... 
(v) The court will have to decide how intensively it is going to apply any of
\end{quote}
It is important to note that in Strasbourg, the European Convention jurisprudence requires a slightly different formulation of the proportionality test. “Inherent in the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”

The Committee of Ministers of the Council of Europe, in 1980, described the applicable principles, in relation to proportionality, in the following manner:

"An appropriate balance must be maintained between the adverse effects which an administrative authority’s decision may have on the rights, liberties, or interests of the person concerned and the purpose which the authority is seeking to pursue."  

(b) The Situations in Which Review for Proportionality Can Arise.

In terms of European Community jurisprudence, judicial review based on proportionality could arise in the following situations: (i) where an individual seeks to make out that his or her rights have been excessively circumscribed by administrative action; (ii) where a penalty imposed by a decision-maker or administrative agency is impugned on the footing that it is excessive; (iii) where policy choices made by decision-makers or administrative agencies are being challenged on the basis that they are disproportionate because there is, for example, a lack of congruence between costs and

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134 ibid., at pp. 350 – 351.
136 Recommendation No R (80) 2, 11 March 1980.
The first type of situation results in administrative action clashing with individual rights and the courts are likely to scrutinize vigorously the competing claims. Whilst it is conceded that most individual rights cannot be regarded as being absolute they can, however, only be outtopped by community rights if the court is satisfied that the interference with the individual right is kept to a minimum and that there is sufficient objective public interest justification for permitting such a right to be trumped.

The second type of situation could arise where the foundation of the claim is that the penalty imposed is excessive. Penalties can indeed substantially interfere with the autonomy of the individual and thereby curtail liberty. Consequently, a court is likely to subject to close scrutiny any penalty imposed so as to ensure that it is not excessive and also justified. There must be a sufficient nexus between the alleged wrong and the quantum of the penalty imposed. By adopting a proportionality test the court is able to strike down a penalty without, thereby, jettisoning the entire administrative policy from which the penalty is derived.

The third type of situation envisages the policy adopted being challenged in circumstances where neither rights nor excessive penalties are involved. In such a context the courts are more circumspect when they decide to adjudicate upon policy choices. It may be because they do not feel that they are adequately equipped to do so. It may also

\[\text{benefits}^{137}\]

\[\text{ibid., at p. 351.}\]

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be due to reluctance, on the part of the court, to substitute its value judgment for that of
the decision-maker. Yet a proportionality test will not, in all circumstances, be excluded
where policy choices are involved; it is merely that the court is more reluctant to
intervene when it is compelled to make policy choices or called upon to evaluate the
adequacy of a particular policy adopted by a decision-maker. However, judicial review
of administrative policy based on proportionality is an invaluable tool for advancing
individual rights because it is possible to call upon an independent and disinterested body
to undertake a cost benefit analysis of a particular policy and to, thereby, evaluate its
efficacy.

(c) Proportionality and English Common Law.

In the CCSU\textsuperscript{138} case Lord Diplock expressed the view that it was possible that
proportionality may, in the near future, be accepted as an independent ground for judicial
review. Referring to illegality, irrationality and procedural impropriety as the existing
heads of judicial review his Lordship ventured the opinion that it was possible that further
grounds could be added on a case by case basis. He said:

"I have in mind particularly the possible adoption in the future of the principle
of 'proportionality' which is recognised in the administrative law of several of
our fellow members of the European Economic Community..."\textsuperscript{139}

However, in \textit{ex parte Brind}\textsuperscript{140} some members of the House of Lords, notably Lords

\textsuperscript{138} \textit{Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All E.}
\textit{R.} 935.

\textsuperscript{139} \textit{ibid.}, at p. 950.

\textsuperscript{140} [1991] \textit{A. C.} 696.
Ackner and Lowry, were unequivocally of the view that proportionality was not a principle of English common law.\(^1\)

On the other hand Lord Templeman was of the view that “the interference with the freedom of expression must be necessary and proportionate to the damage which the restriction [was] designed to prevent.”\(^2\) Lord Bridge, in his judgment, did not exclude the possible development of this ground of review in the future.\(^3\) Lord Roskill was of the view that the doctrine of proportionality should be developed, in line with the common law, on a case by case basis.\(^4\) His Lordship was, however, of the view that the instant case was not an appropriate one to take the first step.

Lord Lowry, in a detailed analysis, attempted a justification for excluding proportionality as a ground of review. His Lordship was of the view that there was no authority for the proposition that proportionality was part of the English common law.\(^5\) This was, in his Lordship’s view, not a cause for regret. He adduced four reasons for this proposition: (i) decision-makers, often elected, were conferred with discretion by Parliament and to interfere with such discretion, beyond tolerable limits, was to exceed the supervisory jurisdiction exercised by the courts which was tantamount to a possible

\(^{1}\) Per Lord Ackner, at p. 763: “Unless and until Parliament incorporates the Convention into domestic law, a course which it is well known has a strong body of support, there appears to me to be at present no basis upon which the proportionality doctrine applied by the European Court can be followed by the courts of this country.” See also, Lord Lowry at pp. 766 – 767.
\(^{2}\) ibid., at p. 751.
\(^{3}\) ibid., at p. 749.
\(^{4}\) ibid., at p. 750.
\(^{5}\) ibid., at p. 766.
abuse of power by the judges; (ii) judges are not equipped by experience and training to answer administrative problems where the scales are evenly tipped; (iii) the stability and relative certainty in the process of administrative decision-making is likely to be threatened if proportionality was recognized as a ground for judicial review; and (iv) the recognition of proportionality, as a ground for judicial review, is likely to open the floodgates, to the prejudice of the public interest, with a dramatic increase in the number of applications for judicial review.\textsuperscript{146} Lord Lowry was also of the view that "there can be very little room for judges to operate an independent judicial review proportionality doctrine in the space which is left between the conventional judicial review doctrine and the admittedly forbidden appellate approach."\textsuperscript{147}

It is submitted, however, that the objections raised by Lord Lowry, against the recognition of the doctrine of proportionality, in English law, are difficult to sustain for a number of reasons.

Firstly, Lord Lowry raises an objection based upon an apparent lack of a democratic mandate on the part of the judiciary. The mere fact that discretion has been conferred upon a decision-maker by Parliament does not necessarily mean that an exercise of discretion should be beyond the realm of challenge. This is because the notion of democracy has progressed beyond merely recognizing a statistical majority in Parliament. In England, the Queen in Parliament consists of the Sovereign, the House of Lords and the House of Commons. It is only the House of Commons that consists of

\textsuperscript{146} ibid., at pp. 766 – 767.
elected members. In any event, because of the first past the post system of voting, the party which has a majority in the House of Commons may not, necessarily, have obtained more than 50% of the votes of the whole country. Therefore, it is submitted that an argument rejecting merits-based review, founded on an alleged lack of a democratic mandate, is misconceived. Furthermore, European countries, such as Germany and France, where proportionality is well accepted as a ground for judicial review, also have elected decision-makers. Yet, it has never been seriously contended, in those countries, that judicial review based on the merits of a decision is incompatible with the democratic status of the decision-maker. The rule of law is as much a fundamental part of democracy as an elected decision-maker. It is important to note, lest it be forgotten, that even persons such as Adolf Hitler and Benito Mussolini were originally elected decision-makers. In the circumstances, judicial reticence in developing merits-based review cannot be justified by founding it upon an argument based on democracy.

Lord Lowry’s second objection to the recognition of proportionality is based upon the lack of judicial expertise to weigh competing interests where the scales are evenly tipped. English judges have never felt constrained, in criminal cases, to weigh competing evidence of forensic experts; they have never claimed a lack of expertise in evaluating the evidence of financial experts and auditors in complex fraud cases. Yet, they claim that they lack expertise when it comes to weighing competing interests in matters of public law. How then does a Minister, who requires no formal qualification to hold office - other than the confidence of the Prime Minister, suddenly become an

\[147\] *ibid.*, at p.767.
expert when deciding matters of policy which could affect the personal liberty and rights of the subjects? The answer lies in the fact that the Minister has the benefit of the advice of his civil servants and other recognized experts in the field. Similarly a judge in a proportionality inquiry would also have access to the views of experts in arriving at his or her determination. It must be conceded, however, that he or she may not have access to the same level of resources as the civil service; additionally, a Minister may have expertise in sensitive political matters because he or she is a politician (expertise which a judge may lack). Yet such constraints should not militate from the general principle that in circumstances where the judges can reach a decision, and obtain the necessary expertise for the purpose, they should not be excluded from doing so.

The third objection adduced by Lord Lowry is founded upon his fears of destabilizing the process of decision-making and creating a situation where there is a lack of certainty. This argument can be raised against any application for judicial review. In any event, an application for judicial review must be made within a reasonable time and the court is unlikely to entertain a belated application for judicial review.

The fourth objection raised by Lord Lowry is based upon his fear of opening the floodgates as far as applications for judicial review were concerned. This fear was also expressed when the courts were grappling with the problem of liberalizing the rules of standing and it has since been discovered to be without foundation. European countries do not have a higher incidence of applications for judicial review merely because proportionality is accepted as a ground for judicial review.
Lord Lowry was also of the view that it was not possible to accommodate the proportionality doctrine, which admits of merits-based review, in the space left between the conventional judicial review doctrine and the, allegedly, prohibited appellate approach. Yet, it is significant to note that Bentham, in his famous work, printed in 1780, expressed the view that there must be some proportion between punishments and offences. This demonstrates the fact that Bentham advocated the principle of proportionality when punishments were imposed. The concept of proportionality, therefore, is no stranger to English common law. It should also be noted that in the sphere of private law when damages are assessed the concept of proportionality plays an important part.

The crucial issue, however, is whether the concept has acceptance and validity in English public law. It has been pointed out that the concept of proportionality has implicit recognition in English common law. Thus, in _ex parte Hook_, the Court of Appeal held that the revocation of a licence of a market trader because of the fact that he had urinated in the street, after the market and all its toilets were closed, was a penalty that was out of proportion to the offence. In _ex parte Hook_ Lord Denning, M. R.,

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advocated proportionality as a principle of English public law and as a hallmark of good administration. Of course, at that time English judges were not prepared to explicitly acknowledge the fact that proportionality was acceptable as a basis for judicial review due to their aversion to merits-based review.

Yet, in the CCSU case\footnote{Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All E.} the fact that Lord Diplock drew a distinction between procedural impropriety on the one hand and illegality and irrationality on the other serves to illustrate the fact that English common law has now advanced to a stage where it is possible to permit merits-based review. The principle of proportionality, which without doubt is a mode of merits-based review, could be accommodated within the English common law by expanding the test of irrationality or, in the alternative, by recognizing it as an independent ground of review. However, with the enactment of the Human Rights Act 1998, proportionality is likely to be accepted as a valid ground for review in England either as a free standing ground or as a modification of the unreasonableness test. Thus, the courts may determine that a decision, which does not satisfy the proportionality test, may be illegal in terms of section 6 of the Human Rights Act. Alternatively, proportionality may also become a ground of judicial review either as a modification of the reasonableness test or as a free standing ground due to the requirements imposed by section 2 (relating to the interpretation of Convention rights) and 6 (1) (whereby it is unlawful for a public authority to act in a way which is incompatible with a Convention right).
(d) Proportionality in Other Commonwealth Jurisdictions.

The courts of Commonwealth countries, such as Australia, India and Sri Lanka, unlike their English counterparts, have had no difficulty in dealing with the principle of proportionality as a basis for judicial review. This is because the judiciary in such countries has been able, either due to constitutionally protected rights or specific statutory provisions, to subject administrative action to more intense scrutiny than their English counterparts. The principle is often accommodated as an extension of the principle of reasonableness or as a free standing ground for review.

In Australia, for instance, section 43 (1) of the Administrative Appeals Tribunal Act 1975 provides as follows:

"For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision in writing –
(a) affirming the decision under review;
(b) varying the decision under review; or
(c) setting aside the decision under review and –
(i) making a decision in substitution for the decision so set aside; or
(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal."

Consequently, the Administrative Appeals Tribunal (AAT), which is not technically a court of law, is able to review a decision on the merits. Brennan, J., referring to the scope of section 43, in Re Brian Lawlor Automotive Pty Ltd. and Collector of Customs (NSW), made the following observation:

"Section 43 manifests the legislature's intention that the Tribunal should have

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R. 935, at p. 950.
and might exercise wide and flexible powers of correction, although it is an administrative decision and not a judicial declaration which emerges from its review."

In *Collins v. Minister for Immigration and Ethnic Affairs*, the Full Federal Court was of the view that "the Tribunal may give weight to the Minister’s reasons in the same way as it gives weight to the oral argument of the legal or other representatives of the parties appearing before it." In other words what was required of the AAT was to arrive at the right or preferable decision rather than to review the procedure by which the decision was made.

Australian law has long acknowledged the principle of proportionality in situations such as (i) when the court reviews an enactment for breach of the Constitution; (ii) when the court reviews subordinate legislation on the footing that it is *ultra vires* the parent enactment; (iii) in the course of sentencing appeals; and (iv) when the court entertains appeals against the size of damages awards. The AAT can rely upon the proportionality doctrine when reviewing a decision made by a decision-maker. It, therefore, follows that the Australian courts will also not be precluded from reviewing a decision on its merits. In the circumstances, the doctrine of proportionality can be relied upon in a judicial review application in Australia.

The Supreme Court of India has held on a number of occasions that a policy

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which infringes the principle of proportionality is likely to be struck down as arbitrary and, therefore, unconstitutional. Article 14 of the Constitution of India provides as follows:

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

What article 14 prohibits is acts of hostile discrimination rather than a permissible classification. Thus, the state is permitted to enact laws that distinguish between different classes of people or things provided, however, that the court regards the classification adopted as permissible. A permissible classification must satisfy two fundamental prerequisites: (i) the classification sought must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others that are left out of the group; (ii) the differentia must have a rational relation to the object sought to be achieved by the statute or policy in question.\(^{158}\)

When the Indian courts review policies adopted by administrative agencies and decision-makers, for compliance with article 14 of the Constitution, they are sometimes called upon to consider whether a particular policy adopted amounts to a permissible classification. If the policy adopted by the administrative agency or decision-maker fails the test, it can amount to an act of hostile discrimination.

The concept of proportionality is, indeed, a relevant factor to be taken into account when judging the lawfulness of policies in such circumstances. It results in a

more intensive and rigorous scrutiny of a particular action; an appraisal of the merits of a decision being a central feature of judicial review in such circumstances. This is particularly relevant when the court evaluates the means adopted to achieve a given outcome.

Although the court may not explicitly refer to the concept of proportionality when arriving at its determination, the concept is implicitly accepted and appears to be subsumed within the wider constitutional norm of equality. In *Bachan Singh v. State of Punjab*, Bhagwati, J., expressed the view that it was a necessary concomitant of the rule of law that the law should not be arbitrary or irrational. The notion of the rule of law, therefore, excluded arbitrariness.

In Sri Lanka the Supreme Court, like its counterpart in India, has had no difficulty in accommodating the concept of proportionality within the wider norm of equality protected under article 12 of the Constitution. Whilst the court does not explicitly refer to the concept it implicitly recognizes it when it is determining the lawfulness of executive and administrative action.

Thus, the Supreme Court of Sri Lanka has struck down schemes adopted for the recruitment and promotion of public officers and the criteria adopted for the selection

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161 See, e.g., *Perera v. Ranatunga*, [1993] 1 Sri L. R. 39; *Perera v. Monetary Board*
of university students\textsuperscript{162} on the footing that inadequate or undue weight was given to a particular matter. The Supreme Court has been able to review the merits of a policy adopted by a decision-maker so as to determine whether it complies with the requirements of article 12 of the Constitution. When the court determines that inadequate weight has been given to a particular matter or that excessive weight has been given to certain matters, then it is reviewing the merits of a decision. It is also embarking upon a proportionality inquiry because the court is, in effect, reviewing policy choices adopted by the decision-maker and coming to the conclusion that the measure adopted is neither necessary nor suitable to achieve the end in view.

(e) Should Proportionality be Subsumed within the Concept of Irrationality?

The explicit or implicit acceptance of the concept of proportionality in Commonwealth jurisdictions such as Australia, India and Sri Lanka poses no difficulty for the purpose of judicial review. It is submitted that with the enactment of the Human Rights Act 1998 it will only be a matter of time before English judges also begin to acknowledge the concept as a free standing ground of review.

If, however, judges are reluctant to accept proportionality as a free standing ground for judicial review, then, it is submitted that the concept should be accommodated within a wider and modified principle of irrationality. In circumstances where there is

a lack of balance between the means and the end, it is possible for the court to impeach an administrative decision on the footing that it is irrational because it is disproportionate and, therefore, contrary to acceptable norms of good administration.

It is submitted, however, that no convincing reason could be adduced today, with the current advances in human rights jurisprudence, to reject proportionality as a free standing ground of review.

IV. Is it Desirable for Judges to Determine the Merits of a Decision?

Judicial review has now progressed to a stage where it is possible to depart from the traditional approach, of reviewing only the procedure by which a decision was reached, and adopt a holistic approach to judicial review. The recent strides made in the field of judicial review, where human rights occupy a pre-eminent position, must inevitably culminate in a merits-based review. This is because the protection of fundamental human rights are far too important to be left only in the hands of decision-makers.

One of the strongest objections to merits-based review is founded on the premise that judges lack a democratic mandate to review policy matters that should, or so it is argued, more appropriately be determined by elected representatives. It is further argued that decision-makers, frequently with a mandate from the people to undertake certain tasks, should not be stifled in their tasks by unelected judges. It has been further argued
that if the electorate does not endorse the course of action adopted by policy-makers, then, the appropriate course of action is to use the franchise in a fitting manner.

This argument is, however, fundamentally flawed. It presupposes that the only element of a vibrant democracy is to have an elected legislature and makes this requirement prior to the presence of the rule of law. The rule of law, in a substantive sense, it is submitted must exist if democracy is to flourish. It is the constitutional duty of the judges to ensure that decision-makers act according to law. Current developments in human rights jurisprudence suggest that even a former head of state can be held accountable, in another state, for human rights violations in his state; the protection of human rights is so important for the common good that they cannot be circumscribed by geographical limits nor can they be confined to national boundaries. It is everybody's duty to protect and advance human rights and the courts must not abdicate their responsibility on this score.

It should also be noted that different countries have different modes of electing the legislature and a party in power does not, necessarily, command the support of a majority of the people on all matters that it legislates upon. Thus, it is of essence that the court, as the constitutional guardian of the fundamental rights of the people, ensures that elected governments and decision-makers act in a manner that is consistent with the rule.

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See, e.g., R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet.
of law. It is submitted that merits-based review is not inconsistent with advancing fundamental rights jurisprudence; it is a necessary corollary for the existence of a vibrant democracy.

There is, however, yet another argument that has been advanced against merits-based review. It has been suggested that judges are ill equipped to decide matters of policy because of their lack of expertise and training in such matters. It has been further suggested that policy matters should be left in the hands of decision-makers with a minimum of interference from the judges. If judges are to substitute their value judgments for that of the decision-maker, then, the purpose of conferring discretion on a decision-maker will be lost.

This argument is, however, more powerful than the argument founded upon the unelected position of the judiciary. It is a fact that judges might be ill equipped with the necessary expertise in determining policy matters. Yet, judicial review does not require that judges substitute their decision for that of the primary decision-maker in all circumstances. There is nothing to preclude a judge from calling upon a decision-maker to provide justification for a particular decision or policy. The judge can also have access to the expertise of recognized experts in the field. It is in this manner that judges, for a number of years, have evaluated forensic evidence in criminal trials despite the fact that they have no formal training and/or expertise in the field. It is in the same manner that a minister, who may not also have any formal training or qualifications in the field,

_Ugarte (Amnesty International and others intervening)(No 3), [1999] 2 All E. R. 97._

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evaluates competing policy choices. The minister will no doubt draw from the pool of expertise at his disposal. Similarly, with the current adversarial approach being adopted in judicial review proceedings, it is possible for judges, after evaluating the different expert evidence, to draw a conclusion that better promotes and protects the rule of law.

V. Conclusion.

This chapter examined the manner in which the courts have sought to curb decision-makers from exercising discretionary power in an unreasonable manner. Unreasonableness in the process of decision making results in a lack of public confidence in the process of decision making; it is not conducive towards good administration and the promotion of the rule of law.

Unreasonableness, as a head of review, results, in effect, in a form of review on merits. The judiciary is called upon to scrutinize the lawfulness of executive action. The principle underpinning such scrutiny is the need to protect individual liberty. Unfettered discretion, it is submitted, is incompatible with the concept of individual liberty. Therefore, in order to promote and protect the rule of law, it is necessary that decision-makers are required to act reasonably.

The judicial scrutiny of the reasonableness of executive action ensures that decision-makers are compelled to support the legality of their decisions. Judges should not shirk their responsibilities when it is necessary to decide on the lawfulness of
executive action. This was alluded to by Lord Atkin in *Eshugbayi Eleko v. Government of Nigeria*\(^{165}\) when his Lordship observed:

> “In accordance with British Jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.”

Judicial scrutiny of executive action, particularly on the merits of a decision, assumes pivotal importance when it is sought to advance a rights culture in society.

The courts are an important safeguard of individual liberty. They do not depend on the political process to support their existence and can, therefore, decide on matters after taking into consideration the need to promote fundamental constitutional values.

Referring to the role of the courts in this regard, Galligan\(^{166}\) states:

> “The legislature is a creature of the electoral process, and accountable to it; the administration is the creature of the legislature, and while the former is accountable in various ways to the latter, the administration acquires a certain independence and autonomy from the legislature.

> It is here that the courts are important. They stand outside the relationship between legislature and administration in two ways; they are not concerned directly with the formulation and implementation of social programmes and objectives, nor are they accountable to the political process, either directly or through the legislature. This suggests that the legitimacy of judicial review depends not so much on accountability to the political process, but rather on advancing fundamental and enduring constitutional values. This gives some guidance to judicial review; judicial review is most justifiable not when it is directed at substantive policy choices that occur in exercising discretion, but rather when it draws on values which form part of the constitutional framework within which the discretion occurs. Far from being value free, the justification for review lies in the assertion of certain values as sufficiently important to be constraints on the exercise of discretion.”

\(^{165\,}{[1931]}\) A. C. 662, at p. 670.

It is submitted, therefore, that the judicial evaluation of the exercise of discretion, in terms of fundamental human rights norms and other fundamental constitutional values, is a salutary development in the direction of advancing rights consciousness and the rule of law.
7. Controlling the Abuse of Power: Illegality.

I. Introduction.

Illegality as a ground for judicial review, in the orthodox sense, is founded upon the doctrine of *ultra vires*. Thus, if a statute empowers a decision-maker to do X and he or she does Y then it is possible to impeach the decision on the footing that it is illegal. Similarly, if a decision-maker purports to exercise a power which in law he or she does not possess then his or her decision is liable to be challenged on the ground that it is illegal.

Illegality in this strict sense, although important for the advancement of rights consciousness and the rule of law, is a concept which is well defined and understood. We do not propose to deal with this aspect of illegality in much detail in this chapter. On the contrary, our interest in illegality, as a ground for judicial review, is in respect of substantive illegality. Here, we are concerned with illegality in the sense that it amounts to an abuse of power.

In his celebrated judgment in the *CCSU* case Lord Diplock, by drawing a distinction between procedural impropriety and illegality, underscored the fact that illegality did not merely imply that a decision was only liable to be vitiates by a procedural flaw but, on the contrary, that it could also be impeached upon substantive grounds. His Lordship observed that "the decision-maker must understand correctly the

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1 *Council of Civil Service Unions v. Minister for the Civil Service*, [1984] 3 All E. R.
law that regulates his decision-making power and must give effect to it. Whether he has
or not is par excellence a justiciable question to be decided, in the event of dispute, by
those persons, the judges, by whom the judicial power of the state is exercisable."^2

Lord Diplock was of the view that a decision-maker must understand the "law
that regulates his decision-making power". His Lordship was careful in his choice of
terminology in that he used the word law instead of statute. Thus, review for illegality
should not be narrowly construed so as to encompass statutory illegality but to cover a
wider spectrum of possible abuses of power such as when a decision is made ignoring
relevant considerations or taking into account irrelevant considerations, using power for
an improper purpose, acting in bad faith, fettering one's discretion and acting under
dictation.

II. Should Judges be Reviewing Decisions for Illegality Amounting
to an Abuse of Power?

Judicial review founded upon illegality, not in its strict sense, but in the sense that
there has been an abuse of power is not immune from criticism. Even in India, where
advances in judicial activism has been far greater than in most other Commonwealth
countries, a note of caution has been sounded.^3 Andhyarujina commenting upon the

935, at p. 950.
2 ibid., at pp. 950 –951.
3 See, e.g., Andhyarujina, T. R., Judicial Activism and Constitutional Democracy in
India [Bombay: N. M. Tripathi Private Ltd., 1992]; c. f., Sharma, Mool Chand,
competence of the Indian judiciary in reviewing the merits of executive and administrative decisions states as follows.\(^4\)

"With an expanding and an omnipresent judicial review – interpretative and non-interpretative kind – and its public interest and social action activism, the Indian judiciary cannot be regarded as merely an adjudicating body. Its commands are not merely of the nay-saying type but positive prescriptive type involving financial outlays and administrative duties by other organs of Government. A body which can theoretically review each and every action of other organs functioning under the Constitution and order their courses of action necessarily possesses power in a political sense.

This development cannot be viewed merely as an advance in judicial review. A highly activist judiciary with an unlimited power of judicial review must be reconciled with the representative and majoritarian character of our Constitutional democracy. We know how to make the political branches accountable – but tenured judges cannot be made accountable in the same sense. At the apex level the commands of the judiciary are irreversible except by itself. An all pervasive and highly activist judiciary also brings into focus the social and political outlook of judges of superior courts and the method of their selection.

The situation is not entirely of the judiciary’s own making. By the near collapse of responsible government in India and the pressures on the judiciary to step in aid, the judiciary is forced to respond and to make political capital or policy making judgements. By the so called public interest “litigation” in purely administrative matters the judiciary is diverted from its traditional duties and functions and made to enter into fields in which it has no competence or safe standards for judicial action. Should the nation make the judiciary do such services? Should there not be a recognition by the judiciary itself of its limitations and of the fact that it cannot be made a substitute for the failure or the irresponsibility of the other branches of government? Will the judiciary maintain its independence, detachment and respect if it increasingly descends into problems of peoples’ politics or delivers legislative or administrative “judgements”?"

The criticism made by Andhyarujina is that the judiciary is ill equipped to perform the

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Justice P. N. Bhagwati Court Constitution and Human Rights [Delhi: Universal Book Traders, 1995].

\(^4\) supra., note 3, at pp. 8 - 9.
function of merits based review. It is his view that the judiciary should not be involved in reviewing decisions made by decision-makers and administrative agencies on substantive grounds.

Whilst acknowledging the fact that mistakes can be made, due to the lack of competence on the part of the judiciary when undertaking merits based review, this does not necessarily mean that all decisions made by policy-makers are free from error. The judiciary performs a valuable function as a neutral umpire when adjudicating upon a dispute between the citizen and the state. As discussed in the previous chapter, the lack of a democratic mandate poses no impediment to merits based review. This is particularly relevant when the issue is to expand and develop fundamental rights jurisprudence. The notion of democracy has today progressed well beyond being synonymous with a statistical majority. Democracy entails respect for fundamental human rights and the promotion of the rule of law. A vibrant democracy entails a continuous tension between respecting the wishes of the majority and protecting the rights of minorities. In Dworkin’s terminology, an elected legislature should determine matters of ‘policy’ whilst matters of ‘principle’ should be determined by the judges. Thus, both the legislature and the judiciary have separate and distinct roles to play in their capacity as important institutions of government.

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5 See, e.g., Breyer, Stephen, ‘Judicial Review: A Practising Judge’s Perspective’, (1999) 19 O. J. L. S. 1. In this article, Breyer (an Associate Justice of the Supreme Court of the United States of America) evaluates the classical criticisms of judicial review - namely, its (i) undemocratic nature; (ii) subjectivity; and (iii) impracticality – in order to demonstrate the extent to which these criticisms militate against a system of constitutional judicial review.

Yet, it must be acknowledged that there are practical constraints upon the exercise of judicial power. These constraints were alluded to by Lord Denning, in an introduction to a series of essays in honour of Justice Krishna Iyer, when he made the following observation:

"So far as creative work is concerned, so far as active policy is concerned, there the judges have no hand. They cannot direct the government to spend money on this or that. They cannot do anything to help the poor or unemployed. They cannot provide housing for the homeless. All social reform must be left to others. So must all political reform.

This is not to say that judges are not concerned with social implications. Many of their decisions have political consequences. You will find that politicians of one party agree with a particular decision, and politicians of the other party disagree with it. One side or the other then accuse the judge of being political—quite unjustly. But, seeing that many decisions have social implications, it is as well that judges should be instructed on the likely consequences on society of this decision or that. The consequences may be good or bad economically. They may involve hardship on this or that section of the community. All this must be borne in mind."

It is submitted, therefore, that there is no doubt that judges do, in fact, make political decisions and that they are called upon, from time to time, to pronounce upon the legality of official policies when they adjudicate upon matters involving individual and group rights. Judges, by their training and experience, are in a position to do this after taking into consideration certain core constitutional values such as respect for human rights and the promotion of the rule of law.

It is also of relevance to note that judges have not, in recent times, been hesitant

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when reviewing matters of a polycentric nature. Thus, the courts have demonstrated an interest in expanding the frontiers of judicial review beyond the process of decision-making and into the realm of the policy-making process. This has resulted in both the decisions and policies adopted by the executive being judged for their lawfulness in terms of fairness. Legality is, therefore, also capable of being measured in terms of whether it amounts to an abuse of power and judicial review is exercised, not infrequently, on substantive grounds. This may involve an appraisal of the merits of an application and is a departure from the traditional basis of judicial review where it was, in fact, the decision-making process that was being subject to vigorous scrutiny.

One of the arguments frequently advanced, against substantive review, is that judges are not accountable to anyone and should not, therefore, be reviewing the exercise of official discretion (on substantive grounds). Supporters of this view argue that the exercise of executive power is best left in the hands of Parliament. This argument is strongly criticized by Jowell. He states as follows:

"Many constitutional lawyers today accept the need for official discretion, rely on parliamentary controls on its excesses, exhort judges not to interfere in the business of public administration, and doubt the efficiency of legal techniques to tame Leviathan. In my view this approach abdicates appreciation of the reality of the condition of the citizen in the face of the modern state. In many respects the underlying need for the control of administration is more pressing today than in Dicey's time. Certainly bureaucracy is much larger and Parliament is less able, because of lack of time and the complexity of its designs, to define its

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purposes with precision. It is also, for a variety of reasons, not easily able to control its own chosen instruments of implementation."\(^{10}\)

The control of the exercise of arbitrary power is a valuable safeguard of liberty. This control, particularly where the protection of fundamental human rights are involved, is best left in the hands of a neutral body such as the judiciary rather than exclusively in the hands of Parliament. The citizen has more confidence in the judges, despite their occasional lapses, rather than in a legislature - which may be more concerned about cheap populism and electoral gains to the detriment of core constitutional values and the rule of law.

It is in this context that we maintain that substantive review is not inconsistent with democratic ideals. The rights culture that would, thereby, be advanced helps to further modern democratic values. Rights are devoid of meaning if they are not accessible to a vast majority of the people. This is a matter that has been accorded recognition by the Indian Supreme Court in seeking to promote social justice and to make rights accessible to all.\(^{11}\) The law should not only be available to the rich and powerful, to be used as a tool for their benefit, but should be accessible and meaningful to all.

A free society, as Sir Stephen Sedley argues, should be one that is governed by principle and by law (which is an essential prerequisite for personal freedom).\(^{12}\) Sir John

\(^{10}\) *ibid.*, at p. 77.


Laws has pointed out that the good constitution assumes “that all the state’s citizens start with equal rights before the law.” Democracy, according to Laws, “is fully capable of suppressing minorities and perpetrating injustice”. Therefore, the ideals of the good constitution are logically prior to democracy or, in terms of the modern notion of democracy, must be part of it. Consequently, a democracy which seeks to accord primacy to the rule of law must, inevitably, provide for judicial review which espouses the ideals of the good constitution. The conceptual notion of the rule of law promotes certain norms, ideals and values and is a necessary concomitant for a vibrant democracy (as distinguished from a democracy based, solely, upon majoritarian rule alone).

We will, in the ensuing sections, examine the different circumstances under which judicial review has been exercised in respect of decisions which are illegal inasmuch as they amount to an abuse of power. Prior to that, however, we will examine, albeit briefly, the manner in which a decision can be assailed if it is illegal in the strict sense.

**III. Illegality in the Strict Sense.**

Traditionally, judicial review has been utilized extensively for impeaching illegal decisions (in the strict and narrow sense, as opposed to illegality in a substantive sense encompassing merits based review). Illegality, in the strict sense, was referred to as

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14 ibid., at p. 623.
15 See, e.g., Allan, T. R. S., ‘The Rule of Law as the Rule of Reason: Consent and
substantive *ultra vires*. Thus, a decision-maker who made a decision beyond his or her remit – that is beyond the substance of the power conferred – was likely to have his or her decision impeached on the footing that it was unlawful.

For instance, in *Hazel v. Hammersmith and Fulham London Borough Council*, the Hammersmith Council had borrowed large sums of money. The Council, with the intention of alleviating its interest burden, entered into interest rate swap contracts. The intention of entering into such contracts was to save money by converting from fixed to variable rates or *vice versa* on the basis of fluctuations of base rates. The auditor appointed by the Audit Commission for Local Authorities was of the view that the swaps were *ultra vires* the powers of the council. He, therefore, applied for a declaration, under and in terms of section 19 (1) of the Local Government Finance Act 1982, that swaps were unlawful. The House of Lords held that the activity was not authorised either expressly or by implication by statute and was, consequently, unlawful.

In *Laker Airways v. Department of Trade*, a licence was granted to Laker by the Civil Aviation Authority. Consequent to a change of government the relevant Minister issued guidance to the effect that licensing should only take place with the consent of British Airways. This was tantamount to a direction to the Civil Aviation Authority to revoke the licence already issued to Laker. The Civil Aviation Authority duly revoked the licence and Laker sought a declaration that the guidance issued by the Minister was

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16 *[1992]* *2 A. C. 1.*

ultra vires his powers. The Court of Appeal granted the declaration sought and held that that the guidance issued was unlawful.

Judicial review on such a basis acknowledged the sovereignty of Parliament and the ultra vires rule lay at the heart of such review. Thus, if Parliament had conferred a power upon a decision-maker to construct highways, then, it was unlawful to construct and sell residential accommodation. The principle that a decision-maker or administrative agency should act within the confines of its empowering statute or other source of power is well recognized in the Commonwealth.\(^8\)

This principle is clearly illustrated by the decision of the Supreme Court of Sri Lanka in Senanayake v. Mahindasoma.\(^9\) In this case the Governors of the North Central and Sabaragamuwa Province proceeded to dissolve the respective Provincial Councils, on the basis of complaints received regarding the administration of the Councils, contrary to the wishes and advise of the Chief Ministers of the relevant Councils. The Provincial Governors had, upon receipt of the Chief Minister’s advise, sought an order and direction from the President under and in terms of article 154 B read with article 154 F of the Constitution.

The Chief Ministers sought judicial review of the relevant Provincial Governors’ decision to dissolve the Provincial Councils on the basis that orders were illegal, null and

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void. It was contended, on behalf of the petitioners, that the President, although the appointing authority, had no power to give a direction to the Governor to dissolve a Provincial Council.

The Supreme Court of Sri Lanka held, *inter alia*, that the power of dissolution of a Provincial Council has been conferred by Parliament upon the Governor of the province. Parliament had not made the Governor a delegate of the President for this purpose. The fact that the Governor held office at the pleasure of the President did not detract from this principle. Article 154 B (8) (c) of the Constitution did not contemplate the exercise of the Governor's power solely as a delegate of the President. As a result the Provincial Governors had acted unlawfully in exercising their power, on the direction of the President, as such an exercise of power was not contemplated by the Constitution.\(^{20}\)

In *Cooray v. Bandaranayake*\(^{21}\) the petitioner sought to challenge the findings of a Presidential Commission of Inquiry (PCI) appointed to inquire into the circumstances relating to the assassination of Lalith Athulathmudali (a former Cabinet Minister and subsequently a leading figure of the opposition). The PCI was essentially a fact finding body but it was empowered to recommend, *inter alia*, that persons found guilty of unlawful conduct be deprived of their civic rights. Such a recommendation, to be effective, had to be passed by parliamentary resolution. The petitioner who failed to appear before the PCI, after summons had been issued for the purpose, was held to have

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\(^{19}\) [1998] 2 Sri L. R. 333.
\(^{20}\) Amerasinghe, J., was of the view that article 154 B (8) (c) did not contemplate the exercise of a discretionary power by the Governor (*ibid.*, at p. 364).
been in contempt of the Commission and, consequently, the Commission proceeded to
convict the petitioner of the offence. Additionally, the Commission found that the
petitioner was responsible for the death of Lalith Athulathmudali.

The petitioner challenged the findings of the PCI by way of an application for a
writ of certiorari. The Supreme Court held, inter alia, that the Commission, in terms of
the applicable statute,\(^1\) had no power to convict any person of any offence and had,
therefore, acted unlawfully.\(^2\) Dheeraratne, J., was of the view that the power to convict
a person of an offence was a power vested in the regular courts in terms of article 13 (3)
of the Constitution.\(^3\) Thus, the Supreme Court of Sri Lanka quashed the determination
of the Special Presidential Commission of Inquiry on the basis that its determination was
arrived at in an unlawful manner.

In Rajapaksha v. Wickramanayake,\(^4\) the petitioner, who was at one time the
Mayor of Colombo, was removed from his position by the Minister of Local
Government, of the Western Provincial Council, consequent to certain findings made by
a Commission of Inquiry. The Commission of Inquiry inquired into five charges made
against the petitioner and found that he was guilty of three charges. The Minister acting
on the basis of the report furnished by the Commission of Inquiry removed the Mayor

\(^{1}\)[1999] 1 Sri L. R. 1.
\(^{2}\)Special Presidential Commissions of Inquiry Law, No 7 of 1978.
\(^{3}\)It was the court’s view that the PCI had, in effect, exercised a jurisdiction that it
did not have.
\(^{4}\)supra., note 21, at p. 29.
\(^{5}\)[1997] 1 Sri L. R. 384.
from office under and in terms of the relevant provincial statute.\textsuperscript{26}

The petitioner, then, sought to challenge the decision of the Minister by way of a writ of \textit{certiorari} but was unsuccessful in the Court of Appeal. The Supreme Court, however, held that the petitioner was entitled to the relief sought.

It was the case of the petitioner that the Minister was not obliged to act, in terms of the relevant enactment, solely upon the basis of the report of the Commission of Inquiry. What the statute contemplated was that the Minister should be satisfied that the charges made against the petitioner had been proved. What was of essence, therefore, was that the Minister should have brought his mind to bear on the matter; in other words, it was imperative that the Minister be satisfied that the petitioner was guilty of the charges made against him. Here, according to the Supreme Court, the Minister had acted under the mistaken notion that he was under an obligation to act in terms of the report tendered by the Commission of Inquiry. Consequently, this had the effect of rendering the decision, to remove the petitioner from his position, unlawful.

The decision of the Supreme Court in \textit{Rajapaksha v. Wickramanayake} can be criticized, however, because it failed to appreciate the fact that the petitioner should not have been entitled to invoke a discretionary remedy in the nature of a writ of \textit{certiorari} in the teeth of the findings made against him. It was not the petitioner’s complaint that he had been deprived of his process rights when the Commission of Inquiry went into the

\textsuperscript{26} Powers of Supervision of the Administration of Local Authorities Statute, No 4 of 351
charges against him. It was the petitioner's complaint that, in terms of the Minister's letter, written in Sinhala, the Minister had been of the view that he was compelled to act and, in terms of the findings, remove the Mayor from office.

The text of the letter written by the Minister to the petitioner indicated, in no uncertain terms, that he had read the report of the Commission of Inquiry. It was, perhaps, terminological inexactitude, on the part of the Minister in communicating his decision, that resulted in his making the statement that he was compelled to act in terms of the findings of the Commission. In the Supreme Court, Dheeraratne, J., however, was of the view that the Minister was under no legal compulsion to remove the Mayor, even if he was satisfied that he was guilty of one or more of the acts or omissions specified in the enactment.27 It is submitted, however, that it is difficult to accept the argument adduced by Dhreeraratne, J., in this case because there was no statutory formula provided for the Minister to communicate the fact that he was satisfied that the charges were proved. His Lordship should have appreciated the fact that the substance of a decision was more important than its strict legal form. The Minister had, after being of the opinion that the allegations made against the Mayor were sufficiently serious so as to merit inquiry, duly appointed a former judge of the Supreme Court to conduct the inquiry; the petitioner was afforded all necessary process rights at the inquiry. Additionally, the petitioner had, in fact, been exonerated of two charges and was found guilty to three charges.

1991 (Western Province).
The Minister, after perusing the determination of the Commission of Inquiry had made the decision to remove the petitioner from office. He would not have made such a decision unless he was satisfied that the Mayor should have been removed. In the absence of a statutory procedure for the communication of the decision of the Minister, it is indefeasible to rely upon terminological inexactitude to quash the decision of the Minister on the basis that such a decision was illegal. In any event, there was no statutory procedure for the Minister to stray outside the boundaries of the report so as to be further satisfied that the Mayor was guilty of the charges proffered against him. The Minister had neither the power to question witnesses nor the power to seek further clarifications from the Mayor; all that he could do, in the circumstances, would have been to read the report which, admirably, the Minister had done.

It is also relevant to note that if, after receipt and perusal of the report, the Minister failed to act upon it, stating that he was not satisfied that the petitioner should be removed, after a former Supreme Court judge was satisfied that the petitioner was guilty, then, it would have been possible for another interested party to have obtained a writ of mandamus compelling the Minister to remove the Mayor (on the basis that the Minister was acting unreasonably by failing to take necessary action to remove the Mayor in the light of a prejudicial report).

It is submitted that the rule of law, whilst requiring fair procedures and the advancement of individual and group rights, should not be viewed as a vehicle to

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27 supra., note 25, at p.388.
encourage lawlessness. The facilitation of good administration should also be an objective of the rule of law. The Supreme Court of Sri Lanka, when exercising prerogative writ jurisdiction is, in fact, dispensing a discretionary remedy. It is of vital importance, therefore, that the conscience of the court is satisfied that its jurisdiction has been properly invoked. This is of vital importance if public confidence is to be maintained in the integrity of the judicial process. No judicial decision should shock the public conscience or bring the administration of justice to disrepute. This is because of the importance attached to the conceptual notion that justice must not only be done but that it must also appear to be done.

In this section we have examined certain illustrations of situations where decisions have been set aside because they are illegal in the strict sense. In the ensuing sections we will examine how the courts have, with a possible view to advancing a rights culture, reviewed decisions which, although not illegal in the strict sense, have been declared to be illegal in a substantive sense.
IV. Decisions Ignoring Relevant Considerations, Taking into Account Irrelevant Considerations or the Failure to Attach Sufficient Weight to Relevant Considerations.

(a) The General Principle.

A decision-maker who makes a decision after failing to take into account relevant considerations or takes into account irrelevant considerations is liable to have his or her decision impeached on the footing that it is illegal. A decision could also be regarded as illegal if a decision-maker fails to attach sufficient weight to a relevant consideration. Here, however, the term illegal is being used not in the strict sense, discussed in section III above, but in a substantive sense.

In *Roberts v. Hopwood*²⁸ a local authority, purportedly acting under statutory powers which gave it a discretion to pay its workers such wages as it deemed fit, decided, by resolution, to pay its male and female workers a wage of £4 per week. The District Auditor was of the view that payments made, in terms of the said resolution, were contrary to law and, therefore, challenged the legality of the payments. The contention of the District Auditor was eventually approved by the House of Lords which was of the view that the local authority had taken into account irrelevant considerations when it based its decision on its determination to set an example as a model employer; it had

²⁸ *[1925] A. C. 578.*
relied wrongly on "eccentric principles of socialist philanthropy, or by a feminist ambition to secure the equality of sexes in the matter of wages in the world of labour."^29

The House of Lords was also of the view that the local authority had also ignored relevant considerations inasmuch as it failed to take into account the fact that the cost of living was falling during the relevant period and wages should have been reduced rather than increased.

In R. v. Secretary of State for Social Services, ex parte Wellcome Foundation,^10 the applicants for judicial review challenged the decision of the Secretary of State to issue an import licence. It was the contention of the applicants that the Secretary of State was wrong to treat as an irrelevant consideration the possible infringement of a trademark when exercising his discretion to allow the importation of certain medicinal products under licence. The Court of Appeal was of the view that there had been a lawful exercise of discretion inasmuch as the principal consideration that should have governed the exercise of discretion, in terms of the relevant legislation, was public health and safety. Consequently, the Court was of the view that the possible infringement of a trademark was an irrelevant consideration.

In Bromley London Borough Council v. Greater London Council,^31 a proposed scheme of fare cuts intended to be introduced by the Greater London Council was invalidated by the House of Lords. If the scheme, envisaged by the Greater London

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29 per Lord Atkinson, ibid., at p. 594.
Council (GLC), had been introduced it would have resulted in a substantial increase in the level of rates payable by the ratepayers. It was the contention of the GLC that they had been elected with a mandate to reduce fares by 25% and what they contemplated was, in effect, to carry out the policy on the basis of which they had been elected to office. The House of Lords was, however, of the view that the course of action proposed by the GLC was unlawful.

The principal grounds that influenced the House of Lords in arriving at this decision was its view that the local authority had failed to have sufficient regard to the impact that the scheme would have on its ratepayers and that it had attached too much importance to an election promise to cut fares. In other words, the GLC had attached too much weight to its promise to cut fares. It had failed to take into account relevant considerations when it failed to consider the impact upon ratepayers. Consequently, it was possible to successfully impeach the lawfulness of the contemplated scheme. 32 It is of significance to note, however, that in the Bromley case it was the Labour Party that was elected to power in the GLC.

Thus, the Bromley case seems to indicate that giving too much weight to electoral promises could result in the ensuing decision being open to challenge. However, it is relevant to note that the House of Lords had previously reached an opposite conclusion

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32 Lord Diplock, however, based his judgment on illegality, based on a narrow interpretation of the statutory remit "economic" (ibid., at p. 823).
in Secretary of State for Education v. Tameside Metropolitan Borough Council. In Tameside, the Conservative Party had given an undertaking to voters that if it was elected to power it would preserve grammar schools in the area. Consequently, when elected to power, the Conservative majority decided not to proceed with the pre-election proposal to convert secondary schools into comprehensive schools. Under and in terms of the relevant enactment, the Secretary of State had a power to give such directions as he would consider expedient to any local education authority if he was satisfied that they were proposing to act unreasonably.

The Secretary of State, a Labour Minister, then issued directions to the Conservative dominated local authority under and in terms of section 68 of the Education Act requiring the council to implement the original proposal formulated at a time when a Labour majority was in office. The Minister followed his directive with an application for a writ of mandamus to compel the council to follow his directive. The Divisional Court granted an order of mandamus but the Court of Appeal upheld the appeal of the council. On an appeal by the Minister to the House of Lords it was held that since there was no basis to arrive at the conclusion that the council proposed to act unreasonably the Minister had either misdirected himself, asked the wrong question or taken into account an irrelevant consideration when arriving at the said conclusion.

The Tameside case appears to indicate that electoral mandates are a relevant consideration when determining the legality of the action of a local authority. Lord

33 [1977] A. C. 1014
Wilberforce, referring to the importance attached to an electoral mandate, said:

"On the whole case, I come to the conclusion that the Secretary of State, real though his difficulties were, fundamentally misconceived and misdirected himself as to the proper manner in which to regard the proposed action of the Tameside authority after the local election of May 1976: that if he had exercised his judgment on the basis of the factual situation in which this newly elected authority were placed – with a policy approved by its electorate, and massively supported by the parents – there was no ground, however much he might disagree with the new policy, and regret such administrative dislocation as was brought about by the change- upon which he could find that the authority were acting or proposing to act unreasonably."

Yet, in *Bromley* the House of Lords appears to have departed from the importance attached to electoral mandates when judging the legality of decisions. Although the two decisions appear to be *per se* contradictory it is possible to attempt a reconciliation on the basis that judges political views also play an important role when review on merits takes place. It has been suggested that the judicial ideology seemed to synchronize with the steps adopted by the Conservative dominated Tameside MBC but not with that adopted by the Labour dominated Greater London Council.

According to Griffith, the decision of the House of Lords, in *Bromley*, upholding the decision of the Court of Appeal "has been widely regarded as a political decision, no doubt because it gave a ruling in an acutely political controversy. Both the ruling itself and the judicial reasoning adopted by the Court of Appeal and the House of Lords exemplify what is meant by the politics of the judiciary."

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34 Education Act 1944, section 68.
35 *supra.*, note 33, at p. 1052.
37 *supra.*, note 36.
The decision of both the Court of Appeal and that of the House of Lords has been criticized on the ground that judicial review is unsuitable to determine matters which are essentially of a polycentric nature. Commenting on *Bromley*, Griffith states:

"It may be that the Court of Appeal and the Law Lords deliberately intervened to control the collectivist policies of the administration at County Hall because they disapproved of those policies. But in addition and perhaps more significantly, they seem not to have understood what they were doing, because they did not grasp the nature of the problem of London Transport. The administrative build-up to the Fares Fair Policy had its roots in the mid-1960's; and professional administrators, not only in London, had been grappling with the problems over a long period. It was for that reason that those administrators were stupefied and dismayed by what seemed to them to be arbitrary and wholly unrealistic sets of reasons advanced by the Court of Appeal and the House of Lords for upsetting an attempt to solve the financial, administrative, social and economic problems of London Transport."

Thus, according to Griffith, the *Bromley* case serves to illustrate how unsuitable judicial review is as a tool to adjudicate on matters that are, essentially, of a policy nature.

Yet, it is difficult to accept Griffith's thesis uncritically. It is submitted that it is dangerous to read into every single judicial decision an underlying political motive. Judges, by their training and experience, are in a position to weigh the competing interests that are at stake and arrive at decisions that seek to advance certain fundamental and core constitutional values which are necessary concomitants for advancing the rule of law. The analysis of the social and political backgrounds of judges does not appear

38 *ibid.*, at p. 302.
39 *ibid.*, at pp. 301 – 302.
to suggest, in any conclusive manner, that they are ideologically motivated in the
direction of any particular political view or value. Simon Lee, in a sustained critique of
Griffith’s thesis, states:

“It does seem to assume, mistakenly, that judges have homogeneous views. It
does seem to assume, mistakenly, that judges always agree with one another. It
does seem to assume, mistakenly, that they always decide for the Conservative
government. It does seem to assume, mistakenly, that the interests of the State,
its moral welfare, the preservation of law and order and the protection of
property rights are all dangerous values to be associated solely with the
Conservatives. It does seem to assume, mistakenly, that cases involve one class
against another.”

It is submitted, therefore, that it would be extremely difficult to accept Griffith’s thesis
without any qualification.

It is also of relevance to observe that, when weighing up the competing interests
at stake, judges are in a position to bring in a certain degree of objectivity into the process
of evaluation. Where individual or group rights are at stake, this becomes an invaluable
tool for ensuring that public confidence is maintained in the integrity of the system.

A decision-maker is also liable to have his decision assailed if he or she fails to
take into account the aims and objects of applicable legislation when arriving at his
decision. This is clearly illustrated by Padfield v. Minister of Agriculture, Fisheries and
Food. In this case the Minister possessed a subjectively worded power to order an
investigation in relation to the manner in which the Milk Marketing Scheme was being
administered. The Minister had refused to refer a complaint made by Mr Padfield to a

41 ibid., at p. 34.
committee of inquiry. The Minister was of the view that he had an unfettered discretion
to determine whether or not a complaint should be referred to a committee of inquiry.

On appeal to the House of Lords it was held, by a majority, that in failing to order
an inquiry the Minister was frustrating the aims and objectives of the parent enactment.\(^{43}\)
Thus, even though the Minister may have been given very wide powers, with the
resulting ability to exercise a subjective discretion, these powers were not to be exercised
in a manner that would result in frustrating the purpose of the enactment. Thus, the
purpose of the parent enactment, from which a subjectively worded power is derived, is
a relevant consideration when making a decision.

The majority decision in Padfield has been criticized\(^{44}\) because what it does, in
effect, is to impose a duty upon the Minister to refer a complaint for inquiry. Lord Reid
was of the view that the relevant enactment imposed a duty upon the Minister to have a
complaint investigated.\(^{45}\) His Lordship also stated that if the Minister did not do so “he
is rendering nugatory a safeguard provided by the Act and depriving complainers of a
remedy which ..... Parliament intended them to have.”\(^{46}\)

Austin is of the view that the reasoning adopted by Lord Reid is “circular”.
According to him, “if the Minister does not exercise his power to refer he deprives

\(^{42}\) [1968] 1 A. C. 997.
\(^{43}\) Agricultural Marketing Act 1958.
\(^{44}\) See, e.g., Austin, R. C., ‘Judicial Review of Subjective Discretion – at the
\(^{45}\) supra., note 42, at p. 1032.
complainers of a remedy; therefore his power is a duty not a discretion. But the clear words of the statute confer a discretion ..."\textsuperscript{47} It is submitted, however, that whilst a Minister does appear to have a discretion, in terms of the applicable statute, as to whether he should refer a matter for inquiry, it does appear that the Minister must when exercising his discretion regard as relevant the aims and objectives of the statute. His failure to do so would result in the vitiation of his subsequent decision. Discretion is never unfettered; it must be exercised within a certain penumbra of constraints. The purpose of a statute is certainly a relevant consideration when exercising one's discretion.

The general principle, that taking into account irrelevant considerations or the failure to take into account relevant considerations is likely to render a decision invalid, is well recognized in Canada, Australia, Sri Lanka and other Commonwealth countries.

In \textit{Penny v. Alberta (Workers' Compensation Board)}\textsuperscript{48} the respondent, a worker, had, in the course of his employment, suffered a back injury which was not of a very serious nature. However, his condition worsened and his principal complaint was that he suffered from continuous and severe pain. Consequently, as a result of the failure of the medical assistance rendered, he became addicted to the prescribed narcotic pain-killer.

The respondent was awarded a permanent partial disability amounting to 38% of the total disability benefit. The disability benefit was awarded by the appellant's Appeals Commission on the basis of a directive in terms of which it was required to follow

\textsuperscript{46} \textit{ibid.}
\textsuperscript{47} \textit{supra.}, note 44, at p. 170.
American Medical Association guidelines in evaluating permanent impairment as a basis for determining permanent disability awards. The guidelines did not, however, offer any guidance on the impact of pain and on the manner in which it could affect earning capacity.

The respondent successfully sought judicial review of the decision from the Queen’s Bench. The Workers Compensation Board appealed from this decision but the Alberta Court of Appeal affirmed the order of the Queen’s Bench. The court was of the view that the Appeals Commission failed to address the issue as to whether there was a causal nexus between the worker’s present attitude towards his narcotic addiction and the accident. This was, in effect, a relevant consideration that had been disregarded. The Appeals Commission had also been of the view that permanent benefits should not be paid since the Workers Compensation Board had done all it could to help the worker.

Kerans, J. A., of the Alberta Court of Appeal, was of the view that this was “an utterly irrelevant consideration.” Pointing out that there had been a failure to consider relevant matters and that irrelevant matters had been taken into consideration his Honour said:

"In my view, the commission here failed to address the critical consideration, causation. A failure to consider a relevant factor is as important as consideration of an irrelevant matter. Here, the commission arguably also had regard to an irrelevant consideration, the absence of blameworthiness on the part of the board."^49

Thus, it is submitted that the principle of judicial review for illegality when a decision-maker has (i) taken into account irrelevant considerations, (ii) failed to take into account relevant ones, or (iii) failed to attach sufficient weight to applicable considerations, is
Similarly, the Australian courts have held, on many occasions, that a decision that takes irrelevant considerations into account or one that fails to take relevant considerations into account is liable to be assailed as illegal and that judicial review would be available for the purpose. It is also illegal not to attach sufficient weight to a relevant consideration.

In Sri Lanka, the Court of Appeal had occasion to comment on the significance of taking into account irrelevant considerations or ignoring relevant considerations in *Ismail v. Commissioner of Inland Revenue*. In this case, a taxpayer challenged a decision made by an Assessor to reject his return, without furnishing any reasons for doing so, on the basis that the Assessor had ignored a mandatory provision of law. The Court of Appeal was of the view that the Assessor was under a duty to give reasons when he decided to reject the return. The decision of the Court of Appeal was upheld by the Supreme Court.

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49 *ibid.*, at p. 714.
51 See, e.g., the decision of the Federal Court of Australia in *Bond Corporation Holdings Ltd. v. Australian Broadcasting Tribunal*, (1988) 84 A. L. R. 669; see also, *Fares Rural Meat and Livestock Co. Pty. Ltd. v. Australian Meat and Livestock Corporation*, (1990) 96 A. L. R. 153, although the court was of the view that, in the instant case, on the basis of the facts presented, the respondent had not taken into account irrelevant considerations and had sufficient regard to relevant considerations in arriving at the decision.
What is relevant, however, to our present discussion is the court’s view of the Assessor’s conduct in making an estimated assessment in order to prevent the time bar from coming into operation. As admitted by the Assessor, the estimated assessment was made as a protective measure in order to overcome the time bar from coming into operation in the absence of an assessment being made within the stipulated period. Holding that the assessment was invalid on this score, Perera J., said:

"The petitioner has had no opportunity after October 1978 to challenge or correct any estimate made by the Assessor before he made the final assessment. There has been a total non-compliance with the relevant sections of the law. It cannot be said that the Assessor in fact made an assessment of tax in terms of section 96 (C) exercising his judgment as he himself states [that] it was done as a protective measure, whatever that may mean. Therefore, it is obvious that no assessment of tax was made by the exercise of his judgment, but the Assessor had attempted to keep it open, as it were, to make a proper assessment later. The Assessor had no jurisdiction to make such a tentative assessment in order to circumvent the law in respect of the prescribed time limit or for future compliance with the law."

In other words, what Perera, J., in effect meant was that the Assessor had taken into account an irrelevant matter when arriving at the decision to assess the petitioner. It could also be argued that the statutory power to assess had been used to achieve an ulterior purpose.

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54 supra., note 52, at pp. 111 – 112.
(b) The Human Rights Dimension: Taking into Account Irrelevant Considerations, Failing to Take into Account Relevant Considerations or Attaching Insufficient Weight to Relevant Considerations.

It is possible for a decision-maker to violate fundamental human rights if he fails to take into account relevant considerations or if he takes into account irrelevant considerations when arriving at his decision. A violation of a right could also arise if insufficient weight is attached to a fundamental right at stake. There are, however, two aspects to his matter. On the one hand, a decision could be challenged on the basis that human rights norms have been ignored or violated or that insufficient weight has been attached to them when arriving at a decision. Here, however, fundamental human rights are being used as a background to impeach a decision which is illegal (the term illegal is being used here in the substantive sense).

On the other hand, a decision may be impeached, on the basis that it is illegal in the strict sense, because it attaches insufficient weight to, or fails to take account of, relevant human rights norms or takes into account irrelevant matters. Illegality, in this context, would, therefore, constitute a basis for alleging that a constitutionally or statutorily protected right has been violated. The former type of situation could be encountered when a petitioner seeks a prerogative writ whilst the latter type of situation would be encountered when it is sought to vindicate a constitutionally or statutorily protected right by way of a direct rights based challenge.
The introduction of the Human Rights Act 1998, in the United Kingdom, will have a significant impact upon administrative law in that country. Section 3 of the Act will have a profound impact upon the manner in which legislation is to be interpreted: all legislation is to be interpreted in a manner that is compatible with Convention rights.

Section 3 provides as follows:

"3 (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section –
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of incompatibility.

Section 2 of the Act makes it necessary for a court or tribunal, when interpreting Convention rights, to take into account a wide spectrum of Convention jurisprudence (including determinations of the European Court of Human Rights, opinions of the European Commission, under article 31 of the European Convention, decisions of the Commission, in connection with article 26 or 27 (2), and decisions of the Committee of Ministers, under article 46 of the Convention). This will inevitably result in Convention jurisprudence being incorporated into domestic law. It will result in developing, perhaps, a free standing ground of review, in terms of the Act, and the common law is bound to be enriched with the infusion of Convention jurisprudence.

Section 6 (1) of the enactment makes it unlawful for a public authority to act in
a way that is incompatible with a Convention right. It has been suggested that the effect of this section could be to create a new, and separate, category of unlawfulness as distinct from the already established grounds of judicial review such as illegality, irrationality and procedural propriety\(^55\) (the court has the power, under section 8 (2), to award damages or order compensation in civil proceedings). In the alternative it has been suggested that, instead of creating a new ground of judicial review, the courts may decide to review acts that are incompatible with Convention rights within the existing categories of illegality or irrationality.\(^56\) In either situation, section 6 “has the potential to expand significantly the substantive scope of judicial review of administrative action.”\(^57\)

Yet, the European Convention has, even prior to the enactment of the Human Rights Act, had an impact upon administrative law. In R. v. Secretary of State for the Home Department, ex parte Sinclair,\(^58\) a deportation order had been made against the applicant who was born in Trinidad and who had the right of abode in the United Kingdom. In terms of the deportation order the applicant was to be extradited to the United States of America where, a number of years previously, he had been convicted of fraud.

It was contended on behalf of the applicant for judicial review that the decision of the Home Secretary was unreasonable in the Wednesbury sense inasmuch as the Home


\(^{56}\) ibid.

\(^{57}\) ibid.

\(^{58}\) [1992] Imm. A. R. 293.
Secretary had wrongly exercised his discretion under the Extradition Act 1870. It was argued, on behalf of the Secretary of State, that there had been a proper exercise of power and that the course of action adopted was legally justified. The Divisional Court of the Queen’s Bench Division comprising of Watkins, L.J., and Judge, J., reviewed the scope and ambit of the Home Secretary’s discretion. The court was of the view that it would be unjust and oppressive to return the applicant to the United States and, therefore, allowed the application for judicial review. The court was of the view that the applicant had suffered great prejudice as a result of delays on the part of the American government. The court was also of the view that, although article 8 of the European Convention on Human Rights, in the strict sense, probably did not apply, the underlying principle of the article was relevant when making a decision.

Watkins, L.J., referring to the delay on the part of the United States government in seeking the extradition of the applicant and to the importance attached to the substance of article 8 of the European Convention on Human Rights when the Secretary of State arrived at his decision, said:

"It was further argued on behalf of the Home Secretary that any prejudice caused to the applicant by delay on the part of the United States government was slight. I profoundly disagree. Whilst I doubt if, strictly speaking, article 8 of the Convention for the protection of Human Rights is applicable to present circumstances the principle underlying it is very much to the point. Whilst the United States government over many years showed complete indifference to the whereabouts and the way of life of the applicant and took an inordinate time to make and pursue the extradition request, he has devoted himself to creating a settled family life firstly in Trinidad and secondly in the United Kingdom. The delay in this respect, on any view of it, is, in my opinion, inexcusable and quite appalling."
Thus, it appears that in terms of the reasoning adopted by Watkins, L. J., the substance of the rights contained in the European Convention would be relevant when arriving at a decision. Consequently, a decision-maker who fails to take this matter into consideration when arriving at his decision is liable to have his decision impeached. Human rights norms, therefore, in this context provide a background against which the legality of a decision could be judged.

In *R. v. Secretary of State for the Home Department, ex parte Simms*, the applicants, who were prisoners serving life sentences for murder, sought judicial review of a decision made by the prison authorities to deny journalists permission to visit prison inmates unless an undertaking was given that the material obtained would not be used for professional purposes. The applicants contended that the Prison Service Standing Orders which required such undertakings were unlawful and *ultra vires*.

Latham, J., of the High Court, was of the view that the right to free speech included the right of access to the media. His Honour was of the view that imposing restrictions upon communicating with the media unless undertakings were given that the material obtained would not be used for professional purposes constituted a restriction on free speech. The prohibition imposed on the journalists in making use of the material obtained on a visit could not be justified as the minimum interference with the

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59 *ibid.*, at p. 300.
61 *ibid.*, at p. 275.
right of free speech necessary to meet statutory objectives. His Honour held that the relevant paragraphs of the prison regulations were, therefore, unlawful.

It is submitted, therefore, that *Simms* is authority for the proposition that fundamental human rights norms are relevant considerations when making a decision. The failure to take these norms into account when arriving at a decision would result in the decision being open to challenge on the footing that it is illegal.

It is also of importance to note that even if fundamental rights are taken into account when arriving at a decision this is not sufficient in law; a decision-maker is under an obligation to attach sufficient weight to the fundamental rights at stake. He should, if presented with a situation where conflicting rights are at stake, ensure that sufficient weight is attached to the relevant fundamental rights at stake.

In *Tabag v. Minister for Immigration and Ethnic Affairs* the appellant, who lived with his wife and family in Australia, was convicted of the offence of drug trafficking and was sentenced to a period of imprisonment. The Minister, exercising his discretion under and in terms of section 12 of the Migration Act 1958, ordered that the appellant be deported from Australia. The Administrative Appeals Tribunal (AAT) affirmed the Minister’s decision and the appeal to the Federal Court of Australia was dismissed. In his appeal to the Federal Court the appellant alleged that the AAT had made an error of law inasmuch as it had failed to take into account the fact that if the

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*ibid.*, at p. 276.
appellant was deported, then, it would result in the disintegration of his family life.

The submission was also advanced, on behalf of the appellant, that the right not to have one's family life disintegrated was recognized by the International Covenant on Civil and Political Rights (ICCPR) by virtue of articles 23(1) and 24(1). The appellant also claimed the right to due process by virtue of article 13 of the ICCPR. Referring to these international human rights norms, Woodward, J., said that “[s]uch provisions would act as a reminder, if one were needed, of the importance of the family and the protection of children in our society.”

Woodward, J., expressly recognized that the fundamental rights at stake were relevant considerations for the AAT to arrive at its decision. His Honour was, however, satisfied that the AAT had given due and sufficient weight to these factors. His Honour said:

"I accept that in deportation cases the breaking up of a close-knit family is a consideration of major significance. A similar degree of significance should be given to the uprooting of a child from thoroughly familiar Australian surroundings, and the placing of that child into a totally foreign setting, where language, culture and opportunities for personal development are completely different.

It is clear that the Tribunal in this case recognized the hardships involved and I am not satisfied that it undervalued them to the point were it could be said to have erred in law." 65

It is submitted, therefore, that the appeal was dismissed, not because the fundamental

64 ibid., at p. 710.

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rights at stake were irrelevant, but on the contrary, because the AAT had given due consideration to this matter when it arrived at its decision.

In *Kaufusi v. Minister for Immigration and Ethnic Affairs*, the applicants obtained a stay of the execution of a deportation order made against them as prohibited non-citizens. The applicants also had two children who were born in Australia. The Minister of Immigration and Ethnic Affairs sought a discharge of the stay order. Smithers, J., in the Federal Court of Australia, was of the view that the stay order had been properly issued.

His Honour was also of the opinion that, prior to exercising his discretion to deport the parents of Australian children, the Minister should have taken into account the interests of the children by virtue of the operation of the general principles of administrative law. According to Smithers, J., the exercise of discretion entailed a balancing exercise: the reasons for deporting the parents should have been weighed against the interests of the children in not being deported.

The New Zealand case of *Re J (An Infant): B and B v. Director – General of Social Welfare*, decided by the Court of Appeal, serves to underscore the importance attached to weighing conflicting fundamental human rights when judging the lawfulness of an action of a decision-maker. In this case the parents of a three year old child,

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65 *ibid.*, at pp. 711 – 712.
67 *ibid.*, at p. 482.
suffering from a life threatening nose bleed, refused to grant their consent to their child being treated with a blood transfusion on account of their religious beliefs. The blood transfusion was regarded by medical specialists as being essential, and urgently required, for the treatment of the child. The Hospital, Police and Department of Social Welfare personnel, without the knowledge and consent of the parents, successfully sought and obtained a court order from the District Court Judge permitting the transfusion. It was only after the court order had been obtained were the parents informed that steps had been taken to override their withholding of consent.

The parents subsequently sought judicial review of the District Court orders. The High Court made an order making the child a ward of court. It appointed a medical doctor as an agent for the purpose of granting the consent required in respect of medical treatment involving blood transfusion for the child. The parents were appointed as general agents for the court in all other respects. The court, therefore, regarded the best interests of the child as paramount when arriving at its decision.

In the Court of Appeal the parents challenged the order of the High Court inasmuch as the decision was against the Bill of Rights Act 1990. It was alleged that the court had exceeded its inherent parens patriae jurisdiction. Central to the issue was whether the parents right to observe and practice a religious belief of their choice out-topped the most fundamental right of all – the child’s right to life. In other words, a decision-maker was called upon to decide upon two competing fundamental rights, weigh

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the competing interests, and then make an appropriate decision. The human rights context was indeed a relevant consideration here when evaluating the lawfulness of the decision made.

Dismissing the appeal of the parents and putting the decision, firmly, in a human rights context Gault, J., delivered the judgment of the Court of Appeal. His Honour said:

"Every child has the right not to be deprived of life except on such grounds as are established by law and consistent with the principles of fundamental justice (s8). If the parental right to manifest religion in practice is taken as extending to the right to consent to and refuse medical treatment for a child there is a potential overlap between that right and the child’s fundamental right to life. At points of potential conflict, as in circumstances such as those with which we are concerned, we do not accept that the conflict is resolved by employing s 5. It is not an issue of whether the state has established that action to protect the life or health of a child is a limitation of the parents’ right that is prescribed by law and can be justified in a free and democratic society. Such an approach rests on presumptions first that protecting children who are unable to assert their own right to life is to be perceived as a state of intrusion no different from denial by the state of other civil rights, and secondly that the parents’ right is superior to that of the child. As to the first presumption, intrusion by the Court to protect the right of the child is indistinguishable from intrusion by the Courts to uphold any other right. It is not a denial of rights by the state but the securing of a right of a child."^{60}

In Re J the human rights dimension occupied central stage when judging the lawfulness of the decision made. Here, what was at stake was not merely the parents’ fundamental human right to manifestation of religion and belief but whether such manifestation could impinge upon a child’s right to life. Consequently, in this case, the court had to weigh

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69 This section deals with justified limitations. In terms of this section the rights and freedoms contained in the Bill of Rights may only be subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.

70 supra., note 68, at p. 146.
and balance the competing rights at stake and, in the end, to choose which right trumped the other.

It is submitted that in circumstances where a decision-maker has to pay attention to non conflicting human rights norms when arriving at a decision it is only necessary that due regard is paid to such norms when arriving at his decision. On the other hand when he or she has to deal with conflicting rights claimants, then, it is necessary to undertake a balancing exercise an attach greater importance to the more important human rights rather than the less important ones if the decision is to be regarded as reasonable. Thus, the human rights context is indeed a relevant consideration in the entire decision-making process. This is further illustrated by the New Zealand High Court decision of *Alwen Industries Ltd. v. Collector of Customs*.\(^7\)

In *Alwen*, the applicants, Alwen Industries Ltd. and Wong, had information laid against them under the Customs Act 1966. It was alleged that they had illegally imported goods into New Zealand. The operational language of Wong was Cantonese or Mandarin. The applicants had sought an order from the District Court whereby the briefs or evidence and documentary exhibits for the purpose of the trial be provided in written Chinese. If the order was granted it would have entailed a cost in excess of $60,000. This order was refused and the applicants sought judicial review of the decision. In was submitted by the applicants that their right “to have the free assistance of an interpreter if the person cannot understand or speak the language used in court”, guaranteed under

\({7}\) [*1996*] *3 N. Z. L. R.* 226.
and in terms of section 24(g) of the Bill of Rights Act 1990, had been infringed. In other words, the court should have taken into consideration the relevant human rights at stake before it arrived at its decision. The failure to do so resulted in a want of procedural fairness at the trial and, thereby, vitiated the decision, namely, to refuse to allow Chinese translations.

It is mandatory that decision-makers in Countries with constitutionally protected fundamental human rights take into account relevant human rights norms when making decisions. Decisions which fail to recognize constitutionally protected norms can normally be assailed on the footing that they fail to satisfy the test of reasonableness.

In Sri Lanka the Supreme Court has held on many occasions that where a decision-maker arrives at a decision without taking into account fundamental human rights norms, then, he or she has disregarded a relevant consideration and this would render his or her decision liable to be impeached.

In de Silva v. Atukorale,\footnote{[1993] 1 Sri L. R. 283.} the petitioner sought a writ of mandamus compelling the Minister to divest land purportedly acquired for a public purpose but which was not, for various reasons, fully utilized. In terms of the relevant enactment\footnote{[1993] 1 Sri L. R. 283.} the Minister had a discretion to divest the land if it was not being utilized for a public purpose provided that the following conditions were satisfied: (i) no compensation had been paid; (ii) the land had not been used for a public purpose after possession was taken; (iii) no
improvements had been effected after the order for possession had been made; and (iv) the person or persons interested in the land should have consented in writing to take possession of the land after the order divesting the land was published in the Gazette.

Thus, the minister had a discretion to divest the land, in terms of the relevant statute, if the four conditions set out above were satisfied. However, the discretion vested in the Minister in relation to making a divesting order was not unfettered. The four conditions laid down in the statute are obviously relevant considerations that must be satisfied before the Minister elects to exercise his discretion. The Supreme Court, after a review of the evidence, was satisfied that the Minister had not exercised his discretion properly and, therefore, granted the petitioner a writ of mandamus.

Fernando, J., after a survey of the applicable principles, emphatically rejected the suggestion that the Minister had an unfettered discretion in relation to exercising his discretion in respect of a divesting order. His Lordship said:

"The argument that an executive discretion of this nature is unfettered or absolute, that the repository of such a discretion can do what he pleases, is not a new one. But it is one which has been unequivocally rejected. The discretion conferred in 1979 must also be considered in the background of the constitutional guarantees which sought to make the Rule of Law a reality, and in particular Article 12."  

Fernando, J., placed the constitutional postulate of equality, guaranteed by article 12, at the centre of discretion. A decision-maker is obliged to respect constitutionally guaranteed fundamental human rights norms when he or she decides to exercise his or

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her discretion in a particular manner. It is a relevant consideration to pay due attention to fundamental rights obligations when deciding to exercise one’s discretion even though a statute, at first glance, appears to confer the decision-maker with an unfettered discretion.

In *Wickrematunga v. Ratwatte*, the petitioner was a dealer in petroleum products appointed by the state owned, 2nd respondent, Ceylon Petroleum Corporation (CPC). The CPC, purporting to act under the terms of a contract with the petitioner, terminated his appointment as dealer. In terms of the contract it was possible for the CPC to terminate the agreement without notice and without assigning any reason whatsoever. The petitioner complained that the conduct of the CPC in terminating the agreement, motivated by political considerations, amounted to a breach of his fundamental right to freedom from discrimination (guaranteed by article 12(2) of the Constitution) and his freedom of occupation (guaranteed by article 14(1) (g) of the Constitution).

The Supreme Court held that there had been a violation of the petitioner’s fundamental right to freedom from discrimination, guaranteed by article 12(2), inasmuch as the conduct of the CPC had been motivated by political considerations. The Supreme Court also held that there had been a violation of article 14(1) (g).

The decision of the Supreme Court in *Wickrematunga* serves to illustrate the fact that an executive agency cannot take into account irrelevant considerations when making

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74 *supra.*, note 72, at p. 293.
a decision because to do so could amount to a breach of the constitutional guarantee of freedom from discrimination.

Amerasinghe, J., delivering judgment for a unanimous bench of the Supreme Court, disagreed with the view advanced by counsel for the second and third respondents that the breach of a contract came within the sphere of private law and was, therefore, beyond the reach of the constitutional protections afforded to fundamental rights. His Lordship was of the view that public authorities and functionaries must conform to constitutional requirements and must pay due regard to fundamental rights when making decisions. He said that "they cannot avoid their Constitutional duties by attempting to disguise their activities as those of private parties."\(^{76}\)

Amerasinghe, J., was of the view that even if there had been a breach of contract, the petitioner's right to maintain a fundamental rights application had not been extinguished. His Lordship said:

"In my view, where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances, there is no justification in law for holding that only one of the available remedies can be availed of and that the other consequently stands extinguished."\(^{77}\)

Thus, in terms of the reasoning adopted by Amerasinghe, J., even in the sphere of contract where a public body or public functionary chooses to exercise its discretion it must ensure that it complies with all relevant human rights norms if its decision is to escape challenge. Failure to do so will result in the decision being regarded as arbitrary.

\(^{75}\) [1998] 1 Sri L. R. 201.
\(^{76}\) ibid., at p. 230.
inasmuch as it is illegal.

V. Improper Purpose and Bad Faith.

(a) The General Principle.

A decision which has been made for an improper purpose or one which is motivated by bad faith is likely to be regarded as illegal and, therefore, liable to be assailed. A decision-maker is likely to be accused of abusing his power if he or she has used the powers entrusted to him or her so as to achieve an ulterior purpose. Thus, in Sydney Municipal Council v. Campbell\(^{78}\) the Privy Council held that a local authority had used its powers for an improper purpose because they had exercised their powers of compulsory purchase for speculative transactions in property. This, according to the Privy Council, was an improper exercise of power even if the profit made on the transaction was to be used to offset the rates.

In Congreve v. Home Office\(^{79}\) the decision of the Secretary of State, to revoke television licences of those who had sought to renew their licences, in order to beat an increase in price, was challenged. It was held that the Minister had clearly exercised his discretion in order to achieve an improper purpose and had, therefore, acted unlawfully.

\(^{77}\) ibid., at pp. 230 – 231.

\(^{78}\) [1925] A. C. 388.
If a decision-maker exercises his discretion with the ulterior purpose of raising revenue, then, such an exercise of discretion can be challenged. For instance, in *R. v. Bowman* the decision of two liquor licensing justices, resulting in the imposition of a fee of £1,000, was successfully challenged despite the fact that the charge had been imposed with very laudable motives in mind. Consequently, the principle is well established that power which has been conferred for one purpose cannot be used to achieve a collateral objective. A public body or functionary which seeks to use its powers so as to achieve a collateral purpose will, therefore, be liable to have its actions set aside on the basis that it has acted unreasonably.

This must be contrasted, however, with a situation where some incidental benefit accrues to the power-holder. This type of situation is clearly illustrated by the case of *Westminster Corporation v. London and North Western Railway Co.* The relevant local authority had power to build public conveniences, but no power to build subways. However, in exercising its powers to build a public convenience it, in effect, created a subway under a particular street. This was challenged by a railway company which contended that the power to build lavatories was being used to build subways; in other words the power was being used for an improper purpose. The House of Lords, however, was not prepared to accept this contention. It held that the construction of the subway

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80 [1898] 1 Q. B. 663.
81 See, e.g., *R. v. Hillingdon London Borough Council, ex parte Royco Homes Ltd.*, [1974] Q. B. 720, where it was held that a local authority could not use its powers to grant planning permission in such a manner so as to achieve the collateral objective of reducing homelessness.
was an incidental benefit that accrued from a legitimate exercise of the local authority’s powers and such an exercise of power was, therefore, lawful.

In Australia the courts have held, in a manner consistent with developments in England and in other Commonwealth jurisdictions, that the repository of a power cannot use such a power for an improper purpose; to do so would amount to an abuse of power.\(^83\) In *Kent v. Johnson*,\(^84\) the Supreme Court of the Australian Capital Territory held that the proposed construction of a tower, incorporating tourist and restaurant facilities for revenue generating purposes, was not within the statutory powers of the Postmaster – General. Consequently, the Postmaster – General was proposing to use his powers for an improper purpose and an injunction was issued to restrain him from acting unlawfully.

In *Schlieske v. Minister for Immigration and Ethnic Affairs*,\(^85\) the Federal Court of Australia held that when exercising the power to deport, under and in terms of section 18 of the Migration Act 1958, if a person is deported with the intention of presenting that person to the law enforcement authorities of that country this would be outside the purposes of the Migration Act and would, therefore, be unlawful.

It is submitted, therefore, that the courts will closely scrutinize the actions of public functionaries as well as those of public bodies so as to ensure that power has not

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\(^{84}\) *supra.*, note 83.

\(^{85}\) *supra.*, note 83.
been used for an improper purpose. This type of scrutiny is important for circumscribing the abuse of power by preventing decision-makers from acting unreasonably.

A further ground on which a decision can be set aside, because it is illegal, arises in circumstances where a decision-maker has been motivated by bad faith when arriving at his or her decision.

In *Roncarelli v. Duplessis* the Canadian Prime Minister purported to revoke a liquor licence of a person because the holder of the licence had, on a regular basis, provided sureties for Jehovah's Witnesses arrested by the police. In this case, the Prime Minister was clearly exercising a power that he did not have and was attempting to adversely affect the interests of the citizen whose liquor licence he purported to revoke.

The Supreme Court of Canada held, by a majority, that the action of the defendant was arbitrary and without legal justification. Rand, J., referring to the importance attached to good faith when discretion is exercised, said:

"In public regulation of this sort there no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. " Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption."  

\[86\] 1959] S. C. R. 121..  
\[87\] ibid., at p. 140.
His Honour also went on to point out that "[t]o deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred." Thus, a decision made by a decision-maker, motivated by bad faith will vitiate the subsequent decision.

In J. B. Textiles Industries Ltd. v. Minister of Finance and Planning, the appellant company challenged a vesting order made by the Minister of Finance in terms of which the company was acquired by the state. In four separate applications it sought two orders for writs of mandamus and two orders for writs of certiorari. It was the contention of the company that the acquisition was tainted by mala fides and was, therefore, void. Despite a recommendation by the Advisory Board that the acquisition was bad in law, the Minister refused to divest the company. The company sought to adduce evidence of bad faith by submitting copies of the Hansard which contained statements made in Parliament. The Court of Appeal was of the view that statements made in Parliament could not be used to establish bad faith. The Court, however, held that the vesting order was vitiated due to a want of procedural fairness. The Court refused to grant orders for writs of mandamus but granted writs of certiorari.

On appeal to the Supreme Court, both by the Minister and the company, it was held that the Court of Appeal had erred in law by refusing to allow statements made in Parliament to be adduced as evidence of bad faith. Samarakoon, C. J., delivering the

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88 ibid., at p. 141.
89 [1981] 1 Sri L. R. 156.
A decision influenced by bad faith would be vitiated due to the fact that it would be regarded as illegal.

(b) The Human Rights Dimension of Improper Purpose and Acting in Bad Faith.

A decision which has been reached in bad faith or is motivated by an improper purpose would be regarded as an arbitrary decision; it will fail to satisfy the constitutional norm of equality and would, therefore, be regarded as illegal. This broad principle has been underscored by the Supreme Court of Sri Lanka on numerous occasions.

In Tennakoon v. de Silva, the petitioner, an Assistant Superintendent of Police, complained that this transfer without just cause, purportedly at the instigation of one of his subordinates against whom he had occasion to take action for serious acts of misconduct, was unreasonable and arbitrary and, therefore, amounted a violation of his rights protected by article 12 (1) of the Constitution. It was the contention of the 1st respondent that the petitioner was transferred in order to avoid friction and to ensure that there was a satisfactory working relationship between the parties. Fernando, J., however, was of the view that this could be regarded as a proper reason only if the 1st respondent,

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91 supra., note 89, at p. 169.
after due inquiry, was satisfied that there had been a breakdown in the working relationship. His Lordship said:

"Let me assume, however, that such a working relationship was required, in the public interest. A bare assertion that it was unsatisfactory is not enough. The Court must ascertain whether there were grounds for that opinion, and, if there were, it must examine those grounds: upon such an examination the Court is not entitled to substitute its own opinion, simply because it disagrees with the respondent; and it can only intervene if that opinion is found to be arbitrary, capricious, unreasonable, or discriminatory (or otherwise violative of fundamental rights)."\(^{93}\)

Fernando, J., was, in effect, of the view that the decision to transfer the petitioner was intended to achieve an improper purpose. Thus, a decision arrived at with the intention of achieving an improper purpose will not stand the scrutiny of the court because it would amount to a violation of a fundamental human right.

In *Tennakoon v. Piyadigama*,\(^{94}\) the petitioner whose post was suppressed as a consequence of a change of government, was sent on compulsory and premature retirement. The petitioner complained that his fundamental right to equality, guaranteed under article 12 (1) of the Constitution had been violated. He had effectively been subjected to selective hostile discrimination. The Supreme Court held that the petitioner was entitled to relief as his fundamental right to equality had been violated.

In *Chandrasena v. Kulatunga*,\(^{95}\) the petitioner, a trained teacher, complained that

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\(^{92}\) [1997] 1 Sri L. R. 16.

\(^{93}\) ibid., at p. 34.

\(^{94}\) [1996] 1 Sri L. R. 341.

\(^{95}\) [1996] 2 Sri L. R. 327.
he was transferred, without sufficient notice, in an arbitrary, malicious and capricious manner subjecting him to selective hostile discrimination. The Supreme Court held that, in the circumstances, the transfer was unreasonable and arbitrary and, therefore, violated the petitioners rights guaranteed under article 12 (1) of the Constitution. Consequently, the decision to transfer the petitioner resulted in his being subject to selective hostile discrimination. The transfer was not effected bona fide and would, as a result, be liable to be set aside.

It is submitted, therefore, that where a decision-maker is influenced by improper motives when arriving at his decision or if he or she acts in bad faith, then, his or her actions are likely to involve an infringement of a fundamental human right and will, therefore, be liable to be impeached. It would be very difficult for an action of a decision-maker to escape judicial sanction, on the footing that a fundamental right has been violated, if it is motivated by bad faith or improper motives.

VI. Acting Under Dictation.

It is a well established principle of administrative law that if a decision-maker, given the power to make a decision, acts on the basis of instructions received from a person not authorised to give such instructions, then, his subsequent decision is liable to be impeached on the footing that he has acted illegally. According to Aronson and Dyer, "[i]t has long been said that the repository of a statutory or common law power must turn
their own mind to its exercise, rather than do the bidding of others. 96

Dictation, in the strict sense, comes into operation only when the instructions emanate from a person occupying a higher position of authority but who is not legally entitled to give such instructions. It could also arise where a decision-maker, conferred with a discretion, exercises his or her discretion subject to the approval or policy of some other government department or authority when such reliance was not contemplated by law.

Illegality, in this context, stems from the fact that the decision-maker has been acting under dictation instead of exercising his discretion as contemplated by law. Acting under dictation is, therefore, an unlawful fetter upon the exercise of discretion and renders nugatory any subsequent decision reached. Review based on illegality, in such a situation, is an important safeguard for the protection of individual rights.

In R. v. Stepney Corporation 97 the council of a metropolitan borough had resolved to abolish the office of vestry clerk to a local authority which had been transferred to the said council. It was the view of the council that they were bound by a practice adopted by the Treasury to deduct one fourth of the amount of compensation in situations where the officer was not required to devote his entire time to the duties of his office. The officer concerned sought a writ of mandamus so as to compel the council to exercise its

lawful discretion in this matter. Darling, J., said that the council did not act "upon any real judgment of their own"\textsuperscript{98} and was, therefore, of the view that \textit{mandamus} should issue.

In Australia, the courts have, on many occasions, made reference to the fact that a decision could be impeached on the footing that a decision-maker has acted under dictation.\textsuperscript{99} In fact, section 5 (2) (e) of the Administrative Decisions (Judicial Review) Act 1977 provides that an improper exercise of power would result in circumstances where there is an exercise of a discretionary power at the direction or behest of another person. Reference was made to this ground of challenge in \textit{Azemoudeh v. Minister for Immigration and Ethnic Affairs}.\textsuperscript{100} However, the petitioner failed to establish that the decision-maker had, in fact, acted under dictation. The case involved an examination of the issue of refugee status. It was alleged that the regional director’s decision to allow the applicant to be taken to the city from the airport, so as to enable an interview to take place, was overruled by the secretary of the department concerned and the applicant was sent back to Hong Kong. Wilcox, J., made the following observation:

\begin{quote}
"The sudden change in attitude of the airport officers is consistent with receipt of an overriding direction from a more senior officer, but the effect in law of any such direction is presently obscure. Everything must depend upon the precise nature of the decisions which were made and the authority of those who made the decisions."
\end{quote}\textsuperscript{101}

\textsuperscript{98} \textit{ibid.}, at p. 324.
\textsuperscript{100} (1985) \textit{8 A. L. D.} 281.
\textsuperscript{101} \textit{ibid.}, at p. 291.
Where it is possible, however, to affirmatively establish that a decision-maker has, in fact, acted under dictation (in circumstances where such a course of action is clearly inappropriate for the purpose of exercising his or her discretion), then, it is possible to impeach his or her decision on the basis that it is an unlawful exercise of power. This principle is now well established in Australia, New Zealand and other Commonwealth countries.

The rationale underpinning the objection, to the exercise of power under dictation, is based on the premise that that such an exercise of power is, in essence, an abuse of power and that it is inconsistent with principles of good administration. Judicial review on this score helps to advance a rights culture; it ensures that the integrity of the system is not prejudiced. A decision-maker is expected to address his or her mind to a matter and make an objective decision. Objectivity in the process of decision-making, particularly in circumstances where discretionary power has to be exercised, is lost if the decision-maker tends to act under dictation. The decision-making process suffers from a want of fairness in such circumstances. Consequently, the purported decision ceases to be entitled to be accorded the status of a legally sustainable decision.

VII. Acting on 'No Evidence'.

A decision that is unsupportable by the evidence can be assailed on the ground that it is unlawful inasmuch as such a decision could be regarded as unreasonable. Additionally, such a decision may be challenged on the footing that it fails to satisfy certain jurisdictional preconditions necessary prior to the exercise of power. The 'no evidence' rule has the added attraction that, unlike other grounds of substantive review, it depends less on judges idiosyncrasies and individual conceptions of unreasonableness or relevant considerations and depends more on satisfying objective criteria before power can lawfully be exercised.\textsuperscript{104}

This ground of review is widely regarded as a substantive ground of review because the court evaluates the decision in the light of the evidence available and, then, determines whether the decision reached is one which is sustainable. A decision-maker who has arrived at a decision without sufficient evidence to justify his or her decision is likely to have the resulting decision impeached.

In \textit{Sheffield Burgesses v. Minister of Health},\textsuperscript{105} it was accepted that in the event of it being established that a minister, in order to demonstrate that it was reasonably necessary to exercise his powers of compulsory purchase, had no evidence to support his

\begin{footnotes}
\footnote{Fitzgerald v. Muldoon, [1976] 2 N. Z. L. R. 615.}
\end{footnotes}
decision, then, his decision would be liable to be quashed. However, in this particular case, the minister was able to demonstrate, to the satisfaction of the court, that he had sufficient evidence to support his decision.

In *Coleen Properties v. Minister of Housing and Local Government*, a ministerial order which confirmed a sum clearance scheme was quashed by the Court of Appeal when it was found that no evidence supporting it had been offered at a public inquiry and that the inspector had, in fact, recommended against it. There was also no new evidence justifying a departure from the inspector’s conclusions and, therefore, the minister’s order was liable to be quashed for lack of evidence.

In *R. v. Home Secretary, ex parte Zamir*, it was held by the House of Lords that an immigration officer, empowered to refuse leave to persons to enter the country if satisfied of the existence of certain facts, was, on normal principles, not at liberty to refuse leave to enter if he did not have any evidence to support such a decision.

The Canadian courts have made use of the ‘no evidence’ ground of review on a number of occasions by making explicit or implicit reference to the concept. Thus, a number of decisions have been given wherein orders made by decision-makers have been invalidated on the footing that the lack of evidence to support the decision rendered it

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105 *supra.*, note 104.
107 *supra.*, note 104.
devoid of jurisdiction. There are also a number of decisions of the Canadian courts which indicate that some evidence was available to support the impugned decision, thereby, implicitly recognising the 'no evidence' ground of review.

In Australia, specific statutory provision has been made recognising the 'no evidence' rule as a ground for judicial review of a decision which is administrative in character. The 'no evidence' rule is a form of substantive review because the court scrutinises the evidence in order to satisfy itself that there was sufficient evidence for the decision-maker to reach his or her decision.

In *Television Capricornia Pty Ltd. v. Australian Broadcasting Tribunal*, two television companies, Television Capricornia and Imparja Television, had applied for a television licence. The Australian Broadcasting Tribunal had recommended to the Minister for Communications that Imparja Television be granted a licence to operate a remote commercial television service. One of the grounds on which the recommendation was made was on the basis that Imparja Television had the financial capability necessary to provide the service.

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111 See, section 5 (1) (h) read with section 5(3) of the Administrative Decisions (Judicial Review) Act 1977 which provides that judicial review can be sought on the ground that there was no evidence or other material to justify the decision.

112 (1986) 70 A. L. R. 147.
Television Capricornia sought judicial review of the decision of the Australian Broadcasting Tribunal on the basis that there was no evidence to justify making such a finding. Wilcox, J., in the Federal Court, dismissed the application for judicial review and held, inter alia, that establishing the financial capability of the applicant for a licence was not a requirement, contemplated by law, which had to be satisfied before a licence was granted. In the circumstances, Wilcox, J., although accepting that the 'no evidence' rule was a valid basis for judicial review, felt that no evidence of financial capability was necessary prior to the decision being made to grant the relevant licence.

In Hanson v. Commonwealth Director of Quarantine, the applicants for judicial review conducted a pigeon stud and advertised falsely in a trade magazine that the stud had available certain pigeon strains that were of, distinctively, European origin. It was known that some pigeons in Europe suffered from an avian virus disease, known as Newcastle disease, which was a quarantinable disease for the purpose of the relevant enactment.

At the relevant time, and for a long period prior to that, no bird could have been imported to Australia without ministerial consent and no such consent had been granted. In the circumstances, the quarantine authorities were of the view that the birds advertised, as being of European origin, must have been illegally imported or in the alternative that they must have been bred off birds that had been so illegally imported into the country.

Consequently, a quarantine officer entered the property of the applicants and issued a quarantine notice in respect of the birds. Subsequently, the Chief Quarantine Officer issued instructions to the effect that the birds should be destroyed. The applicants were also handed notices of seizure of all the birds on their property.

Judicial review was sought of the decision to quarantine, destroy and seize the birds on the applicants property. Wilcox, J., in the Federal Court, found that none of the birds were infected by Newcastle disease, nor were they a source of infection. His Honour also found that there was no evidence of a quarantine officer being of the opinion that the birds were infected with the avian virus or that they were likely to be so infected. In the circumstances the application for judicial review was granted.

In Sri Lanka the ‘no evidence’ rule is well established as a valid ground for judicial review. This is consistent with developments in the commonwealth. In recent times, however, the Supreme Court has gone to the extent of holding that a decision which is unsupportable by evidence could result in a denial of, the constitutionally protected, fundamental right to equality before the law. This principle is well illustrated by the case of Bandaranaike v. Rajaguru.

In this case the petitioner, Anura Bandaranaike, the son of two former Prime Ministers and the estranged brother of the President, complained that his right to equality,
guaranteed under and in terms of article 12 (1) of the Constitution, had been violated by the police. The essence of his complaint was that his house had been searched, purportedly on the suspicion that he was harbouring a fugitive from justice, in the absence of any credible evidence to support such a suspicion.

Dheeraratne, Wadugodapitiya and Bandaranayake, J.J., in an unanimous decision of the Supreme Court, held that the petitioner's right to equality before the law, guaranteed under and in terms of article 12 (1) of the Constitution, had been violated. The Supreme Court was of the view that the respondent, Inspector General of Police, had not produced any evidence, and most probably had none, to support his suspicion, subsequently proved to have been without any foundation, that the petitioner was harbouring a fugitive from justice. The search of the petitioner's residence could not be justified in the absence of any evidence to demonstrate that the suspicion, entertained by the police, was reasonable.

This decision of the Supreme Court underscores the importance attached to the no evidence rule. Thus, if a decision-maker makes a decision, in the absence of evidence to support such a decision, he or she could, in appropriate circumstances, violate an individual's constitutionally protected right to equality before the law.
VIII. Conclusion.

An abuse of power can arise when a decision-maker either acts irrationally (unreasonably) or illegally. It is of vital importance that the courts are in a position to check possible abuses of power as and when they arise. The *ultra vires* doctrine provided a rubric for the purpose of deciding upon the legality of actions of administrative agencies and decision-makers but found it difficult to accommodate principles of substantive review.

Judicial review has progressed today far beyond the narrow confines of the *ultra vires* rule and moved in the direction of a fully fledged rights based review. In the circumstances, administrative decisions are now subjected to scrutiny, not only in terms of whether they satisfy the requirements of black letter law, epitomised by the *ultra vires* rule, but also in terms of whether more fundamental principles such as justice, fairness and respect for human rights have been satisfied. It is in this context that substantive review assumes such importance and prominence.

Illegality, in the strict sense although important, no doubt, for the protection of a person's rights does not adequately provide for the development of a rights culture. The supervisory jurisdiction exercised by the courts, circumscribed by the *ultra vires* doctrine, is neither adequate nor sufficient for this purpose. A liberal democracy, based upon the rule of law, requires a far more activist role to be played by the judges. The efficacy and vibrancy of such a democracy depends upon the manner in which minority rights are
protected in the process of articulating majority goals and aspirations.

It is in this context that judges are called upon to play a very important role when reviewing the legality of the actions of administrative agencies and other decision-makers in circumstances where it is alleged that an abuse of power has been committed. A rights culture cannot be developed if review for illegality is based upon mere formal illegality (i.e., illegality *stricto sensu*) alone; it is both essential and necessary that review be based upon substantive illegality as well. Review for substantive illegality gives the judiciary the opportunity to protect and promote fundamental constitutional values and, thereby, helps to advance a rights culture which, in our view, is a precondition necessary for the existence of a vibrant democracy.

I. Introduction.

The ouster of jurisdiction represents an attempt made by the legislature to circumscribe judicial intrusions into the activities of state agencies. Yet, the courts have successfully resisted such attempts to limit the scope of their powers and have sought, in the process, to expand the frontiers of judicial review by being increasingly rights conscious. In this chapter we argue that attempts made by the judiciary to outflank the legislature, in circumstances where, express or implied, ouster (exclusion or privative) clauses are present, are intrinsically salutary and necessary for advancing rights consciousness and the rule of law. Additionally, ouster clauses seek to outflank the right of access to the courts, which is now regarded as a fundamental human right, and should not, therefore, be countenanced.

In an attempt to achieve certain objectives, best illustrated by the green light theory (which favours administrative law as an instrument of government as opposed to being an instrument for the control of power), governments seek to control the influence of the courts. This is because the courts, with their ‘legalistic’ values are often regarded

\[\text{\footnotesize{1 See, e.g., Harlow, Carol and Rawlings, Richard, Law and Administration [London: Butterworths, 2nd edn., 1997], chapter 3.}}\]
as obstacles to advancing a government's social and economic policies. Additionally, they tend to be regarded as undemocratic (because judges are unelected) and unrepresentative (because judges cannot be regarded as microcosms of society).

The modern state has to regulate many areas of activity if it is to achieve certain economic and social goals. The justification for such intervention, which inevitably results in circumscribing the zone of individual autonomy, is the compelling public interest that demands such regulation. The economic goals that a state seeks to achieve by regulation include the restriction of monopolies, the regulation of public goods and other externalities, addressing co-ordination problems, exceptional market conditions that demand state intervention and macro-economic issues. The non-economic goals, on the other hand, are sought to be advanced by regulation so as to achieve distributive justice, paternalistic objectives or enhance community values. In recent times regulation has also been used so as to facilitate the pursuit of private interests. In addition to this national governments have striven to promote their policies.

It is in this context that the modern state seeks to circumscribe judicial intervention that would militate against the achievement of effective regulatory objectives. The recognition of the fact that modern society cannot exist on laissez-faire principles alone is an imperative in today's economic context. It is, therefore, necessary

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2 ibid., at p. 74.


4 ibid., at p. 55.
for the state to intervene in economic and non-economic activity so as to achieve certain overriding social objectives that may outtop individual rights. However, in order to achieve certain core economic and non-economic objectives, the proposition is sometimes advanced that it is necessary to quell the zeal of the courts. The ouster clause is a convenient device that can be used by a state to achieve broad policy objectives.

Jones and de Villars,\(^5\) referring to the rationale for privative clauses in Canada, state:

"Even with its inherent common law limitations, judicial review has sometimes been seen by the legislators as being too interventionist, which has resulted in statutory limitations being imposed on the power of the superior courts to review administrative action, usually by means of privative clauses. This legislative action has not occurred because the legislators do not support the rule of law, or because they want statutory delegates to act unlawfully and beyond their jurisdiction. Rather it results from a perception that the strict adjudicative approach of the courts is inappropriate for decisions that may involve partly policy making and partly adjudication, or may be based on other considerations that would not appear on a court record. Too high a level of judicial review can defeat the whole point of creating an administrative tribunal: to have speedy and informal resolution of issues perhaps by a specialized and expert body that can inject elements of custom and public policy into its decisions."

It is not our intention to advance the broad proposition that the state does not need to intervene in core economic and non-economic activity. It is conceded that such intervention may be both desirable and necessary in certain circumstances. What we find objectionable, however, is the attempt to stifle the role of the judiciary as a bulwark between the citizen and the state. The judiciary has been performing its function for long enough, and it is responsible enough, to ensure that individual rights are weighed against

the interests of the community when adjudicating upon a dispute. The judiciary is the most suitable organ of the state to perform this function and attempts to prevent it from doing so can have no place in a society which has as its objective the advancement of the rule of law. It is for this reason that we, as a matter of principle, argue that the ouster of judicial review has no place in a modern democracy.

In this chapter we will examine the main theoretical justifications for and against the ouster of judicial review, the legal nature and significance of the different types of ouster clauses, and analyse the judicial response where attempts have been made to circumscribe its role. Our analysis, that follows, is based on the fundamental premise that the ouster of judicial review cannot be countenanced in a modern democracy that seeks to advance rights consciousness and the rule of law.

II. Theoretical Justifications for the Ouster of Judicial Review.

It is extremely difficult, on the basis of any rights analysis, to justify the preclusion of judicial review by legislative fiat. It has, however, been pointed out that if the legislature is sovereign, then, the courts must give effect to legislation enacted by it; at the heart of such reasoning lies the assertion that the judiciary consists of the weakest limb amongst the organs of the state. Therefore, it cannot seek to outflank the legislature that seeks to carry out its democratic mandate. If the legislature has, in its wisdom, decreed that no judicial review should be available, then, it must be so. Writers
such as Laski, Robson, and Jennings were of the view that the widening of the sphere of government resulted in the need for delegated legislation so that the business of the modern state could be conducted efficiently. Privative clauses or ouster clauses were, therefore, a natural extension of this idea. Thus, the individualist notion of the rule of law, based on laissez-faire philosophy, had to give way to a different focus in public law which favoured a functionalist style of government: the emphasis was on governmental power rather than on individual rights.

The notion of strong government implies, as a necessary corollary, that the judiciary should be weak. Lord Steyn, reviewing the position of the judiciary in the United Kingdom, argues that the judiciary is the weakest and least dangerous arm of government. He states that:

"The relationship between the judiciary and the legislature is simple and straightforward. Parliament asserts sovereign legislative power. The courts acknowledge the sovereignty of Parliament. And in countless decisions the courts have declared the unqualified supremacy of Parliament. There are no exceptions. Parliamentary sovereignty is the ultimate principle of our constitution. And the judiciary unreservedly respects the will of Parliament as

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expressed in statutes. The task of the judges in a case involving a statute is simply to construe and apply the statute. 

Thus, if the premise is to be accepted that Parliament is competent to legislate on any subject that it pleases, and if Parliament be free to prevent individuals from seeking the intervention of the courts, then, it may be argued that an ouster clause should be permitted to achieve its objective.

The theoretical justification for the ouster of the jurisdiction of the courts, from inquiring into the legality of administrative action, is founded upon the belief that decision-makers should be insulated from judicial intrusion; in other words, that they should have complete autonomy, in the process of decision-making, within the sphere of their influence. This approach is justified on the footing that there should be certainty in the process of decision-making; decision-makers should not be afraid to make wrong choices; they must be able to act promptly; the courts do not have the expertise and skill to make or evaluate decisions of this nature; and, the compelling need to utilise resources to the best advantage of the state.

The rationale for adopting a restrictive approach to judicial review springs from the need to ensure that administrative agencies are not hampered in their attempts to achieve a just distribution of resources when attempting to attain certain economic and

\[\text{\textsuperscript{11}} \text{ibid., at p. 85.}\]
non-economic goals. The attempt to exclude the power of judicial review or to restrict its scope has been justified on the basis that it is necessary to advance the rule of law. In 1959 the International Congress of Jurists sought to clarify what it understood by the rule of law. Clause 1 of its report states:

"The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality."\(^{12}\)

The courts, it has been argued, seek to circumscribe attempts by the legislature to achieve full development of the human personality (in terms of the above definition of the rule of law). As a result of equating civil and political rights with socio-economic and cultural rights an individual's autonomy can be restricted, in a significant manner, and the state could still argue, in terms of the New Delhi declaration, that it does so to advance the rule of law. This view has been criticised by Raz as being a "perversion of the doctrine of the rule of law."\(^{13}\) He argues that "when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated."\(^{14}\)

Yet, the argument against a wider role for judicial review is summarised succinctly by Andhyarjina, who states:


\(^{14}\) ibid.
"It is plain that the judiciary is the least competent to function as a legislative or administrative agency. For one thing, courts lack the facilities to gather detailed data or to make probing enquiries. Reliance on advocates who appear before them for data is likely to give them partisan or inadequate information. On the other hand if courts have to rely on their own knowledge and research it is bound to be selective and subjective. Courts also have no means for effectively supervising and implementing the aftermath of their orders, schemes and mandates."\(^{15}\)

Thus, the exclusion of judicial review may be justified on the basis that the courts lack the ability, capacity and expertise to supervise the functions of legislative or administrative agencies. As a result, it has been suggested that judicial review should be circumscribed in appropriate circumstances. The attempt to oust judicial review by legislative fiat through the use of a privative clause is, perhaps, a demonstration by the legislature of their response to this issue.

**III. Theoretical Arguments Against the Ouster of Judicial Review.**

It is extremely difficult, on a rights based analysis, to justify any attempt to circumscribe judicial review. At the core of such an assertion lies the need to protect and advance individual rights and to circumscribe the role of the state. The notion of the sovereignty of Parliament is so well entrenched in the United Kingdom because the judiciary has recognized it to be so. In countries which have a written constitution, such

as Sri Lanka and India, the constitution regulates the relationship between the different organs of government and the constitution, alone, is supreme.

The modern welfare state inevitably results in a vast bureaucracy which must be regulated and checked if individual rights are to be protected. Ross Cranston, giving a powerful justification for the regulation of bureaucracies, states:

"The paradox of social welfare bureaucracies is that although they might be ostensibly devoted to the wider public interest and to the interests of intended beneficiaries, frequently they appear to neglect these interests in what they do. In certain circumstances their behaviour is in even starker contrast with the assumptions which are said to be at their base, for they act in a manner which seems deliberately to trample on the interests, rights and liberties of their clientele. Consequently, a good deal of the effort of community groups, law centres and others is devoted to having social welfare bureaucracies measure up to the standards which are supposedly inherent in their operation. While these efforts have had success, in many cases they, too, have found social welfare bureaucracies to be remote, unresponsive and sometimes downright oppressive."

It is, therefore, imperative that the courts should step in to control the exercise of power, by governmental agencies, so as to ensure that individual rights are safeguarded, and the rule of law advanced. If government becomes over-powerful, without adequate checks on the exercise of power, then, there is a real danger that individual rights are threatened. This, it is submitted, is not conducive to advancing rights consciousness and the rule of law.

According to Hayek the distinguishing feature of a free country, in comparison

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to one under arbitrary government, is the presence, in the former, of the rule of law.\textsuperscript{17} In order to advance the rule of law Hayek argues that "the discretion left to the executive organs wielding coercive power should be reduced as much as possible".\textsuperscript{18} He points out that:

\begin{quote}
"While every law restricts individual freedom to some extent by altering the means which people may use in the pursuit of their aims, under the Rule of Law the government is prevented from stultifying individual efforts by ad hoc action. Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts."
\end{quote}

Hayek's argument is, in essence, that official discretion should be exercised within narrow confines and that any attempt to expand the frontiers of such discretion should be resisted, if it be desired to advance the rule of law.

According to Dworkin's preferred conception of the rule of law the content of laws should be evaluated in order to ascertain their compatibility with the moral rights possessed by individuals.\textsuperscript{20} Dworkin is of the view that there are, in fact, two distinct conceptions of the rule of law, each of which has its own adherents.\textsuperscript{21} One conception of the rule of law is the 'rule book' conception the other is the 'rights' conception. Those

\begin{itemize}
\item \textsuperscript{17} See, Hayek, F. A., \textit{The Road to Serfdom} [London: Routledge & Kegan Paul Ltd., 1944], at p. 54.
\item \textsuperscript{18} \textit{ibid.}
\item \textsuperscript{19} \textit{ibid.}
\end{itemize}
who advocate the former conception of the rule of law are of the view that "whatever rules are put in the book must be followed until changed. Those who have this conception of the rule of law do care about the content of the rules in the rule book, but they say that this is a matter of substantive justice and that substantive justice is an independent ideal, in no sense part of the ideal of the rule of law."\(^{22}\)

The 'rights' conception (favoured by Dworkin), on the other hand, is based on the premise that individual citizens have moral rights and duties \textit{inter se} and that they possess political rights against the state as a whole. The 'rights' conception of the rule of law "insists that these moral and political rights be recognized in positive law, so that they may be enforced \textit{upon the demand of individual citizens} through courts or other judicial institutions of the familiar type, so far as this is practicable."\(^{23}\)

Thus, a judge confronted with an ouster clause in a statute who seeks a way of circumventing it, so as to vindicate individual rights, is, in fact, guided by the 'rights' conception of the rule of law. The judge must take into account the background rights of the subject in arriving at his decision. The ouster clause, although demonstrating legislative intention, must be strictly construed so as to advance individual rights and, thereby, the rule of law. According to Dworkin,\(^{24}\)

"\textit{[T]he ideal of adjudication, under the rights model, is that, so far as is

\(^{22}\) \textit{Ibid.}\n
\(^{23}\) \textit{Ibid.}\n
\(^{24}\) \textit{Ibid.}, at p. 16."
practicable, the moral rights that citizens actually have should be available to them in court. So a decision that takes background rights into account will be superior, from the point of view of that ideal, to a decision that instead speculates on, for example, what the legislation would have done if it had done anything."

The importance of the role of the judiciary in advancing individual rights has been adverted to, albeit, extra-judicially, by Sir John Laws in a series of important articles.\textsuperscript{25} Laws's conception of the rule of law encompasses ideals such as freedom, certainty and fairness. According to Laws,\textsuperscript{26}

"The good constitution has to recognise and entrench a bedrock of rights, based on the principle of minimal interference. Good government of any political colour must pursue its own vision of the morality of aspiration, which is itself a function of power held on trust. Where its vision cuts across the rule of minimal interference, the courts have to say so."

It is submitted, therefore, that if the rule of law is to be advanced, a privative clause inserted in a statute should be construed narrowly. A privative clause should not be allowed to outtop individual rights because to do so would not be consonant with advancing rights consciousness and the rule of law. Additionally, as explained in the IV below, the ouster of judicial review results in the denial of the fundamental human right of access to the courts.


IV. Do Ouster Clauses Amount to a Denial of a Fundamental Human Right?

Ouster clauses seek to deny the fundamental human right of access to the courts. This is either explicitly or implicitly provided by a number of international human rights instruments. The right of access to a court of competent jurisdiction for the purpose of the vindication of one’s rights is widely recognised as a fundamental human right.

For instance, article 8 of the Universal Declaration of Human Rights (UDHR) declares:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

Thus, article 8 of the UDHR ensures that the right to an effective remedy for the vindication of a fundamental right is itself accorded fundamental right status. Thus, an ouster clause which seeks to prevent the vindication of a fundamental human right would fall short of the requirements of article 8. Article 10 of the UDHR ensures that a person is entitled to the right to due process. Article 10 is to the following effect:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

It is submitted that implicit in this right is the right of access to a competent and impartial tribunal. It is further submitted that an ouster clause which seeks to circumscribe the right of access to the courts would transgress this international human rights norm.
It is also significant that article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{28} declares that:

"Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

The ICCPR, therefore, postulates that an individual’s right of access to the courts is a right worthy of protection. An ouster clause, in effect seeks to outflank such a right because it results in the denial of an individual’s right of access to the courts.

Similarly, article 6 (1) of the European Convention on Human Rights (ECHR)\textsuperscript{29} has been interpreted so as to encompass the right of access to the courts.\textsuperscript{30} Although, article 6 (1) of the ECHR, unlike article 8 and 10 of the UDHR and article 2 (3) of the ICCPR, does not explicitly recognize the right of access to the courts, European Union jurisprudence has evolved significantly and article 6 (1) is now interpreted so as to implicitly encompass the right of access to the courts. The denial of the right of access

\textsuperscript{27} Universal Declaration of Human Rights (1948).
\textsuperscript{28} International Covenant on Civil and Political Rights (1966).
\textsuperscript{29} Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
\textsuperscript{30} See, e.g., Osman v. United Kingdom, (1998) 29 E. H. R. R. 245, at p. 315 (para. 147), where the European Court of Human Rights held that, in terms of article 6 (1) of the E. C. H. R., the right to institute proceedings in civil matters constituted one aspect of a “right to a court”.

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to the courts has been held to transgress the Convention right to a fair trial.\textsuperscript{31}

In \textit{Golder v. United Kingdom},\textsuperscript{32} the European Court of Human Rights, for the first time, interpreted article 6 (1) of the ECHR so as to encompass the right of access to a court. In this case the applicant, detained in an English prison where serious disturbances broke out, was accused by a prison official of having assaulted him. The applicant wished to vindicate his rights by bringing proceedings for defamation against the prison official and, thereby, clear his name and protect his reputation. The prison rules, however, precluded such a course of action. The Court was of the view that article 6 (1) of the ECHR contained an inherent right of access to a court. However, the right was not unqualified. Pointing out that the right of access to the courts was an important human right, the Court said:

"In civil matters one can scarcely conceive of the rule of law without there being a possibility of access to the courts.... The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally recognized fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles."

This principle has been further expanded in \textit{Keegan v. Ireland}.\textsuperscript{34} In this case, the applicant sought to impeach the decision to place his daughter for adoption but, as there was no procedure in Ireland by which this could be done, was unable to do so. The Government sought to argue that the applicant had an equally effective and efficacious

\textsuperscript{32} \textit{supra.}, note 31.
\textsuperscript{33} \textit{ibid.}, at paras. 34 - 35 of the judgment.
\textsuperscript{34} \textit{supra.}, note 31.
remedy inasmuch as he could take proceedings for guardianship or custody. The Court was of the view that these related to different aspects of family life and that the absence of a right to a court by which the decision could be impeached might lead to a violation of article 6 (1).

Article 13 of the ECHR, which provides for the right to an effective national remedy, for all rights protected by the Convention, is as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Thus, it is submitted that if an ouster clause seeks to preclude the right of challenging a protected Convention right, then, it would violate article 13.

In *Chahal v. United Kingdom*, the applicant Chahal, amongst others to be deported to India, complained that his deportation would expose him to a real risk of torture or inhuman or degrading treatment. He maintained that the only remedy available to them under articles 3, 5 and 8 the ECHR was judicial review and that the advisory panel procedure, pending deportation, was neither a 'remedy' nor 'effective'. The European Court of Human Rights ruled, unanimously, that there had been a violation of article 13. The Court said:

"The Court observes that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although

Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.\footnote{\textit{ibid.}, p. 472, at para. 145.}

It should also be noted that in most liberal democracies in the world the national constitutions or other national human rights instruments either explicitly or implicitly recognize the fundamental human right of access to the courts. In Canada, for instance, article 2 of the Bill of Rights\footnote{Canadian Bill of Rights (1960).} provides as follows:

"Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

\begin{itemize}
  \item[(d)] deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
\end{itemize}

The right to a fair hearing, for the determination of a person's civil rights and obligations, would necessarily encompass the right of access to a court. Thus, an ouster clause which seeks to deny the right of such access would, it is submitted, fall short of the requirements of article 2 (e).

V. An Appraisal of the Different Types of Ouster Clauses.

The Sri Lankan legislature attempted, albeit with limited success, to oust the jurisdiction of the courts in reviewing the legality of a decision of an administrative
agency. Section 22 of the Interpretation Ordinance No 21 of 1901,\(^{38}\) sought to clarify the applicable law when the expression 'shall not be called in question in any court' is used in a statute. Section 22, in essence, intended to make an application for judicial review more difficult to obtain. The relevant section is as follows:

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" , or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court or the Court of Appeal, as the case may be in the exercise of its powers under Article 140 of the Constitution of the Republic of Sri Lanka in respect of the following matters, and the following matters only, that is to say-

(a) where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and
(b) where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or the Court of Appeal, as the case may be, is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

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\(^{38}\) As amended by section 2 of Law No 18 of 1972.
Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution of the Republic of Sri Lanka to issue mandates in the nature of writs of habeas corpus.

However, the Sri Lankan courts, following a similar trend in the Commonwealth, have demonstrated a reluctance to accept ouster clauses which attempt to circumscribe their jurisdiction and have, therefore, construed them narrowly.  

Commonwealth legislatures have attempted to formulate different types of ouster clauses with limited success. We will examine, albeit briefly, some of these differently formulated ouster clauses.

(a) 'shall not be called in question' Clauses.

Subject to the principle laid down in Atapattu v. People's Bank the decisions of the Sri Lankan courts have been somewhat inconclusive. In Fernando v. Illukkumbura the Court of Appeal was called upon to interpret section 71 (3) of the Finance Act. According to this section the determination of the bank shall be final and conclusive and shall not be called in question in any court. Abeywira, J., was of the view that the decision of the respondent, People's Bank, not to acquire the premises in question, after


40 [1997] 1 Sri L. R. 208 discussed at VI (a) infra.


42 No 11 of 1963 as amended.
an inquiry, fell within the discretion of the bank, was purely administrative in character and influenced by policy considerations. It was, therefore, a decision falling within the purview of section 71 (3) of the Finance Act and could not be questioned in any court.\footnote{ibid., at p. 19.}

A similar principle had been laid down in the earlier case of \textit{Perera v. People's Bank Redemption Department}.\footnote{\cite{ibid., at p. 19.}}

In \textit{Amaradasa v. Land Reform Commission}\footnote{\cite{(1977) 79 (1) N. L. R. 505.}} the Supreme Court, by a majority, held that the petitioners were entitled to challenge the decision on the ground of breach of the principles of natural justice by prerogative writ in terms of section 22 of the Interpretation Ordinance as amended by Act No 18 of 1972. Sharvananda, J., favouring a restrictive interpretation of the ouster clause, said:

"\textit{It is of the utmost importance to uphold the right and indeed the duty of the Courts to ensure that powers are not exercised in breach of principles of justice when the exercise of such powers impinges on the basic rights of citizens.}"\footnote{ibid., at p. 544.}

Similarly, in \textit{Gooneratne v. Commissioner of Elections}\footnote{\cite[(1987) 2 Sri L. R. 165.]} the Commissioner of Elections refused to register the Eksath Lanka Janatha Pakshaya (ELJP) as a recognised political party. Section 7 (7) of the Parliamentary Elections Act\footnote{No I of 1981.} provides that an order

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\item \footnote{ibid., at p. 19.}
\item \footnote{\cite{ibid., at p. 19.}}
\item \footnote{\cite{(1977) 79 (1) N. L. R. 505.}}
\item \footnote{ibid., at p. 544.}
\item \footnote{\cite{(1987) 2 Sri L. R. 165.}}
\item No I of 1981.
\end{itemize}
\end{footnotesize}
made by the Commissioner on an application to register a political party shall be final and conclusive and shall not be called in question in any court. The Supreme Court held, however, that the decision of the Commissioner of Elections was vitiated by patent unreasonableness. Sharvananda, C.J., was of the view that an order that was invalid in law was no order at all, was made without jurisdiction, and was amenable to challenge in court despite an exclusionary clause. His Lordship observed that "[t]he House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* decided that a preclusive clause of the kind contained in Section 7 (7) of the Act cannot oust the jurisdiction of the court to declare void a determination or order based on an error of law on a jurisdictional matter." Sharvananda, C. J., further observed:

"If the order made by the [Commissioner of Elections] was invalid in law it was really 'no order' at all and so the court is not acting contrary to the statutory requirement that the order shall not be questioned. The exclusionary clause in section 7 (7) has no effect in excluding judicial review on the basis of ultra vires. Through an error of law, he has stepped outside his jurisdiction. The preclusive clause will not save such a decision from challenge."

In *Weeraratne v. Colin-Thome* the petitioner sought to impeach the findings of a Special Presidential Commission of Inquiry, appointed in terms of the Special Presidential Commissions of Inquiry Law No 7 of 1978. In terms of section 9 (2) of the said enactment any report, finding, order, determination, ruling or recommendation made by such a Commission "shall be final and conclusive, and shall not be called in question

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50 *supra.*, note 47, at p. 175.

51 *ibid.*, at pp. 175 - 176.

in any court or tribunal by way of writ or otherwise." Section 18 A of the enactment required an application made to the Court of Appeal to stand transferred to the Supreme Court where at least one member of the Commission is a judge of the Supreme Court or the Court of Appeal.

In Weeraratne, the petitioner challenged the findings of the Commission before the Court of Appeal; the application was, by operation of law, transferred to the Supreme Court. The application of the petitioner was, however, dismissed by the Supreme Court. The judgment of the Supreme Court, delivered by Justice Mark Fernando, clearly indicates that the court was only prepared to narrowly construe the ouster clause. Fernando, J., said:

"'Final and conclusive' [has] consistently been interpreted as excluding appeal, and as leaving unaffected judicial review on the ground of ultra vires and error on the face of the record...." 53

Fernando, J., held, therefore, that the petitioner was entitled to seek a review of the findings and recommendations of the Commission on the question of jurisdiction. 54 The conclusion reached by Fernando, J., in Weeraratne is consistent with trends in the Commonwealth.

In the leading case of Anisminic v. Foreign Compensation Commission 55 the litigation arose as a consequence of a claim made by Anisminic Ltd., to the Foreign

53 ibid., at p. 168.
54 ibid., at p. 169.
Compensation Commission, for compensation for the loss sustained by the company due to its properties being expropriated by the Egyptian authorities during the Suez crisis in 1956. After the hostilities had ceased the United Arab Republic paid a fixed sum of money, as compensation, to the United Kingdom government. The United Kingdom government established the Foreign Compensation Commission in terms of the Foreign Compensation Act 1950. The Commission was empowered to distribute the funds amongst claimants who could demonstrate that they had suffered loss through Egyptian expropriation.

Section 4(4) of the Foreign Compensation Act 1950 contained an ouster clause; it provided that no determination of the Commission was to be called into question in any court of law. A 1962 Order in Council required the Foreign Compensation Commission to satisfy itself in relation to certain matters, as a condition precedent, before it could allow any claims. In terms of article 4 of the Order in Council the Commission was to have treated a claim as established if it was satisfied that the applicant was the owner of the relevant property or the successor in title of such person. Consequently, the Commission, in interpreting this order, refused to grant Anisminic Ltd., any compensation. This situation arose because Anisminic Ltd., had sold its property to an Egyptian organisation, at a compulsory sale, and obtained a fraction of its real value. The Commission took the view that Anisminic Ltd., were British; its successor in title was not. This factor, in the opinion of the Commission, disqualified Anisminic Ltd., from being able to claim any compensation.
Ansiminic Ltd., challenged the validity of the Commission's determination and sought a declaration that the Commission's determination was a nullity because it had, in fact, misconstrued the terms of the Order in Council. The House of Lords held, by a majority, that the Commission had erred in law; it had misconstrued article 4 in such a manner as to render its determination a nullity. The majority of the House of Lords took the view that the ouster clause, contained in section 4 (4) of the Foreign Compensation Act 1950, did not protect an act which was a complete nullity. Lord Pearce took the view that "by 'determination' Parliament meant a real determination, not a purported determination."  

Lord Reid, advocating a strict construction of ouster clauses, said:

"It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court." 57

(b) Finality and No Appeal Clauses.

It is not uncommon for there to be attempts to exclude judicial review by a statutory declaration that a certain decision shall be 'final' 58 or 'final and conclusive'. 59 The courts have, however, placed a very restrictive construction on such finality clauses with the consequence that they have been rendered nugatory.

56 ibid., at p. 199.

57 ibid., at p. 170.

58 See, e.g., section 235 (8) of the Municipal Councils Ordinance, No 29 of 1947, as amended.

In *Land Commissioner v. Ladamuttu Pillai*\(^60\) the Privy Council was called upon to interpret, *inter alia*, the effect of section 3 (4) of the Land Redemption Ordinance, No 61 of 1942. This section provided as follows:

"The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment, and every such determination of the Land Commissioner shall be final."

Lord Morris, delivering the opinion of the Privy Council, addressing the issue as to whether the Land Commissioner's decision was final and conclusive, expressed the view that the ouster clause, contained in section 3 (4) of the Ordinance, did not place the decision of the Commissioner outside the pale of judicial scrutiny. His Lordship said:

"Their Lordships consider that any question of finality in the Land Commissioner's determination can only arise in regard to his exercise of individual judgment as to whether he should or should not acquire any land which he "is authorised to acquire under sub-section 1". His personal judgment can only be brought to bear upon the question as to whether or not he should acquire land that is covered by the wording of sub-section 1. The antecedent question as to whether any particular land is land which the Land Commissioner is authorised to acquire under the provisions of sub-section 1 is not one for his final decision but is one which, if necessary, must be decided by the courts of law.\(^61\)

The Privy Council, therefore, took the view that the ouster clause, contained in section 3 (4) did not preclude the court from inquiring into the legality of the exercise of power.

In *R. v. Medical Appeal Tribunal, ex parte Gilmore*\(^62\) the applicant sought to

\(^60\) *(1960)* 62 N. L. R. 169 (P. C.).

\(^61\) *ibid.*, at pp. 180 - 181.

\(^62\) *[1957]* 1 Q. B. 574.
impeach the validity of a decision of a Medical Appeal Tribunal which, in terms of section 36 (3) of the National Insurance (Industrial Injuries) Act 1946, was final. Referring to the ouster clause contained in the relevant statute, Denning, L. J., explained that the remedy of certiorari could only be excluded by very clear words. Thus, the words 'shall be final' were per se not enough; it was still possible to quash the decision for error of law, albeit the decision may be final as regards the facts.

The scope of ouster clauses was further circumscribed by the decision of the Court of Appeal in Pearlman v. Keepers and Governors of Harrow School\textsuperscript{63} where a declaration was sought, from the County Court, that the installation of central heating was not a structural alteration. This meant, in effect, that the rateable value of the property of Mr Pearlman should come down. The County Court refused the declaration sought; it held that the work carried out constituted a structural alteration. The decision of the County Court was one which was, by statute, declared to be final and conclusive. Mr Pearlman then successfully appealed to the Court of Appeal. Lord Denning, M.R., for the majority, held that the trial judge had committed an ultra vires error of law; it was an error that went to his jurisdiction and was, therefore, not protected by the exclusion clause. Adopting a broad sweep approach, Lord Denning expressed the view that any error of law committed by an inferior tribunal was jurisdictional. In any event his Lordship felt that the distinction between an intra vires error of law and an ultra vires error of law should now be discarded.

\textsuperscript{63} [1979] Q. B. 56.
Geoffrey Lane, L. J., however, did strike a note of caution; his Lordship maintained that there was still scope for errors of law that could be *intra vires*. This approach was favoured by the Privy Council (which did not agree with Lord Denning's view)\(^4\) and the High Court of Australia.\(^5\)

The *Pearlman* principle has also been considerably weakened by the judgment of the House of Lords in *Re Racal Communications Ltd.*\(^6\) In this case a High Court judge granted an order declining the authorization of inspection of a company's books on the basis that he did not think that the individual alleged to be guilty of wrong doing was an officer of the company. The relevant statute\(^7\) declared that an order made by a High Court judge was 'non-appealable.' Relying on the *Pearlman* principle the Court of Appeal reversed the decision of the High Court. The House of Lords, however, failed to agree with the reasoning of the Court of Appeal. According to the House of Lords, the jurisdiction of the Court of Appeal was wholly statutory; it did not have any common law right to exercise the power of review. Lord Diplock took pains to point out that judicial review was available as a remedy for mistakes made by inferior courts and tribunals only; a decision of a High Court judge could only be corrected by an appeal to an appellate court. However, if the relevant statute provides that the decision of the High Court shall

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\(^7\) Section 441 (3) of the Companies Act 1948.
not be appealable, then, it cannot be corrected at all.

In subsequent decisions the House of Lords has sought to draw a distinction between decisions made by inferior courts and those made by tribunals and other administrative agencies.\textsuperscript{68} Where inferior courts are concerned, there appears to be still scope for debate as to whether the error of law goes to jurisdiction.\textsuperscript{69} Where, however, tribunals and administrative agencies are concerned the \textit{Pearlman} principle appears to be still valid - any error of law would affect jurisdiction.

\textbf{(e) `no certiorari' Clauses.}

Unsuccessful attempts have been made to exclude judicial review by stating that a decision was not to be subject to an order of certiorari. Such `no certiorari clauses' have met the same fate as other types of ouster clauses. Thus, in \textit{R. v. Cheltenham Commissioners}\textsuperscript{70} Lord Denman, C.J., remarked that "[t]he statute could not affect our right and duty to see justice executed."\textsuperscript{71} In \textit{Colonial Bank of Australasia v. Willan}\textsuperscript{72} the Privy Council took the view that a 'no certiorari' clause, in effect, ousts \textit{certiorari}

\begin{footnotes}
\footnotetext[68]{See, e.g., \textit{R. v. Hull University Visitor, ex parte Page,} \citeyear{1993} A. C. 682; \textit{R. v. Visitors to the Inns of Court, ex parte Calder,} \citeyear{1993} 3 W. L. R. 287.}
\footnotetext[70]{\citeyear{1941} 1 Q. B. 467.}
\footnotetext[71]{\textit{ibid.}, at p. 474.}
\footnotetext[72]{\textit{(1874)} L. R. 5 P. C. 417.}
\end{footnotes}

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"except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of the manifest fraud in the party procuring it."\textsuperscript{73}

\textbf{(d) ‘no certiorari and prohibition’ Clauses.}

An attempt has been made in Australia to oust the right to judicial review by introducing a ‘no certiorari and prohibition’ clause, albeit, with little success. For instance, section 301 of the Industrial Relations Act 1991 of New South Wales is as follows:

\begin{itemize}
  \item [1)] Subject to the exercise of a right of appeal to the Full Industrial Court conferred by this Act, or any other Act, a decision of the Industrial Court (however constituted) is final and may not be appealed against, reviewed, quashed, or called in question by any court or tribunal.
  \item [2)] A judgment or order that, but for this section, might be given or made in order to grant a relief or remedy in the nature of a prohibition or certiorari may not be given or made in relation to a decision of the Industrial Court (however constituted).
  \item [3)] This section does not affect the operation of section 48 of the Supreme Court Act 1970.\textsuperscript{74}
\end{itemize}

The New South Wales Court of Appeal has, however, treated this ouster clause in the same manner that it treats a ‘no certiorari clause’ and drawn the conclusion that section 301 of the Industrial Relations Act 1991 only ousts non-jurisdictional judicial review.\textsuperscript{75}

Referring to the decisions of the New South Wales Court of Appeal, in relation

\textsuperscript{73} \textit{Ibid.}, at p. 442.

\textsuperscript{74} It should be noted that section 48 of the Supreme Court Act 1970 relates to case allocation to the Court of Appeal and includes applications for judicial review. The section, however, does not confer judicial review jurisdiction.

to section 301. Aronson and Dyer\textsuperscript{76} note that "[p]rohibition has never been available for non-jurisdictional error of law apparent on the fact of the record. It is therefore remarkable to treat a clause banning prohibition as if it meant nothing more than a "no certiorari" clause."

(e) 'as if enacted' Clauses.

In terms of the orthodox theory of parliamentary sovereignty it is said that the courts cannot question the validity of an Act of Parliament. Thus, attempts have been made, albeit unsuccessfully, to oust the right to judicial review by a special mechanism whereby a ministerial act is deemed to be an Act of Parliament.

In \textit{Minister of Health v. R, ex parte Yaffe},\textsuperscript{77} the House of Lords accepted the premise that if a ministerial act was deemed to be enacted, then, it was beyond the pale of challenge. However, the House of Lords did observe that such an ouster clause was limited to the extent that an \textit{ultra vires} order would still remain challengeable inasmuch as the enabling act would have contemplated only the making of valid orders. Consequently, any invalid order would be \textit{ultra vires} the enabling act.

Parliamentary legislation enacted in Sri Lanka has the same status as in the


\textsuperscript{77} \textit{[1931]} \textit{A. C. 494}. 

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United Kingdom. Thus, section 17 (1) (e) of the Interpretation Ordinance provides as follows:

"17 (1) Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules:

(e) all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the enactment of the Legislature; .......

There are, however, conflicting judicial dicta regarding the implications of section 17 (1) (e) of the Interpretation Ordinance. Some judges have taken the view that rules deemed to be enacted can be impeached if they are repugnant to an express provision of the principal enactment.

In Pinikahana Kahaduwa Co-operative Society Ltd. v. Herath, the main issue to be determined, by a specially constituted five judge bench of the Supreme Court, was whether a rule, published in terms of the powers purportedly vested under section 46 of the Co-operative Societies Ordinance, was intra vires the rule making powers of the said Ordinance. A majority of the Supreme Court decided that the rule published was intra vires the enabling enactment. However, Basnayake, C. J., who delivered judgment for the minority, expressed the view that the functionary exercising the rule-making powers must act within the vires of the enabling act. His Lordship observed thus:

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78 No 21 of 1901 as amended.


80 (1957) 59 N. L. R. 145.
"The enabling section prescribes the powers that the Legislature has granted to the subordinate law-making authority. It must act within the four corners of those powers if the rules are to have the effect given by sub-section (4), for it is in my opinion only rules made within the limits of the enabling power that are declared to be valid and effectual as though they were enacted in the Ordinance."  

Basnayake, C. J., was, therefore, clearly of the opinion that even though a rule is deemed to have the effect of law, it must be within the vires of the principal enactment if it is to be beyond the pale of challenge.

In *Ram Banda v. River Valleys Development Board*, the appellant sought to impeach the vires of a regulation made by the Minister under the Industrial Disputes Act inasmuch as the regulation was *ultra vires* the rule making powers conferred on the Minister. In the Supreme Court Weeramantry, J., held that the regulation was *ultra vires* the rule making power conferred on the Minister. However, his Lordship also held that the applicant had no right of access because the relevant part of the Industrial Disputes Act, which created Labour Tribunals, came into effect only after the applicant's services were terminated. Referring to the power possessed by the court, to review the validity of a regulation which was *ultra vires* the enabling enactment, Weeramantry, J., said:

"Maitland's observation nearly a hundred years ago that England was "becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been

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81 *ibid.*, at pp. 152 - 153.

82 *(1968)* 71 N. L. R. 25.

83 Regulation 16, Industrial Disputes Regulations, 1958.

84 No 43 of 1950, as amended by Act No 62 of 1957.
committed to them by modern statutes" seems therefore apposite also to this
country and to this time; and in this context all inroads made by such delegated
authorities upon the province of the supreme law-making authority must be
closely watched. Any trespass on this preserve is fraught with attendant danger
to the doctrine of parliamentary supremacy, however well intentioned in its
origin and well regulated in its exercise.

Thus, although Weeramantry, J., acknowledged the principle of parliamentary
sovereignty he did draw specific attention to the importance attached to the supervisory
jurisdiction of the courts, which was not to be treated lightly and jettisoned with ease.

The decision of Weeramantry, J., in Ram Banda v. River Valleys Development Board,
was overruled by the Supreme Court in the case of River Valleys Development Board v.
Sheriff. However, the line of reasoning adopted by Weeramantry, J., in Ram Banda v.
River Valleys Development Board, was approved by a three judge bench of the Court of
Appeal, which was the, then, highest court in Sri Lanka, in the case of Ceylon Workers'
Congr ess v. Superintendent, Beragala Estate. Siva Supramaniam, J., expressed the
view that the Court of Appeal was in agreement with the reasoning adopted by
Weeramantry, J., in Ram Banda's case and indicated that River Valleys Development
Board v. Sheriff was wrongly decided.

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University Press, 1908], at p. 412.
87 (1971) 74 N. L. R. 505.
88 (1973) 76 N. L. R. 1.
89 *ibid.*, at p. 9.
Thus, the Sri Lankan courts have circumscribed, in a significant manner, the extent to which an enactment, which deems an act of an administrative agency to be as if enacted, limits the scope of judicial review.

(f) Partial Ouster Clauses.

Where statutes seek to partially oust the right of judicial review, the judges have been more sympathetic towards such enactments. Thus, where a provision in an enactment specifies that an action of an administrative agency must be challenged within a specified time frame, then, the courts would be inclined to view such a requirement with sympathy.

It is submitted that this approach is justified, as an aggrieved person is given an opportunity to vindicate his or her rights if he or she has the desire to do so. However, if the time frame given, to vindicate a right, is too short, then, it can lead to injustice if such a provision is given judicial recognition.

It is submitted, however, that a partial ouster clause can be justified on the basis of the need to achieve certain policy objectives. There is nothing intrinsically objectionable in a time limit clause which results in precluding an application for judicial review after a given period of time. In any event, an application for judicial review must

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be brought without delay and the imposition of a time limit would not prejudice individual rights if a reasonable time frame, to challenge the validity of the action of an administrative agency, is permitted.

VI. The Response of the Judiciary.

The judiciary in many Commonwealth countries have devised various formulae to outflank the effect of statutory ouster clauses. In Sri Lanka, the Supreme Court has recently adopted the *Atapattu*\(^91\) principle. The High Court of Australia, on the other hand, has developed the *Hickman*\(^92\) principle. In England the *Anisminic*\(^93\) principle is still applicable. Each of these different approaches warrants some analysis.

(a) Sri Lanka - the *Atapattu* Principle.

In the case of *Atapattu v. People's Bank*\(^94\) section 71 (3) of the Finance Act\(^95\) provided that every determination of the Bank shall be final and conclusive and shall not be called in question in any court. It was contended, in this case, that, by virtue of section

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\(^92\) See, *R. v. Hickman, ex parte Fox and Clinton*, (1941) 70 C. L. R. 598.


\(^94\) *supra.*, note 91.

22 of the Interpretation Ordinance, a decision made by the People's Bank refusing substitution was beyond the pale of challenge and could not, therefore, be reviewed by the Court of Appeal.

Article 140 of the Constitution of Sri Lanka confers upon the Court of Appeal the power to issue writs of certiorari, prohibition, procedendo, mandamus and quo warranto.

Article 168 (1) of the Constitution provides as follows:

"Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, mutatis mutandis, and except as otherwise expressly provided in the Constitution, continue in force."

In Atapattu, Fernando, J., reasoned that the effect of this article in the Constitution was to "make the ouster clause operative only 'except as otherwise expressly provided in Article 140'." Thus, article 140 was subject to the provisions of the Constitution. It could, therefore, be reasoned that article 140 was subject to the written laws which article 168 (1) kept in force. This contention did not appear to find favour with Fernando, J., who clearly articulated the following general proposition of law, in terms of advancing rights consciousness:

"Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court "subject to the provisions of the Constitution" I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to

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96 As amended by Act No 18 of 1972.
97 Article 140 of the Constitution confers writ jurisdiction on the Court of Appeal.
98 supra, note 91, at p. 221.
undermine it (see also Jailabdeen v. Danina Unma). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124 and 126(3). That phrase refers only to contrary provisions of other written laws, which are kept alive by Article 168(1). Where the Constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to "any law".

There is another reason why this particular ouster clause is of no avail in these appeals. It purports to protect from review only a determination by the bank whether any premises should or should not be acquired; it does not purport to apply to distinct preliminary or incidental matters, such as the substitution of the parties.

It is submitted, therefore, that the judgment of Fernando, J., in the Atapattu case, is significant in terms of advancing rights consciousness in Sri Lanka. This approach, which is in favour of advancing the rule of law, appears to indicate that the Constitutional power of judicial review, conferred upon the Court of Appeal or the Supreme Court, as the case may be, outtops any other statutory ouster clause and, that, such an ouster clause cannot enjoy a higher status than the Constitutional norm.

The Atapattu principle indicates the new approach adopted by the Supreme Court of Sri Lanka when confronted with an ouster clause. This approach ensures that individual rights are protected and rights consciousness advanced. It is an approach which is intrinsically salutary and consonant with the rule of law.

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99 (1962) 64 N. L. R. 419 at p. 422.

100 supra., note 91, at pp. 222 - 223.
(b) **Australia - the Hickman**[^1] **Formula.**

Aronson and Dyer[^2] are of the view that in Australia "until relatively recently, all of the High Court cases interpreting ouster clauses had at least one point in common. They exhibited an extreme reluctance to concede any practical effect to such provisions. In theory, however, they displayed considerable differences." These two writers point out that some High Court judgments have demonstrated, in recent times, a line of thinking which is consonant with the objectives of the ouster clauses[^3]. The *Hickman* principle is, perhaps, considered to be one reason for this trend[^4] which is indicative of a desire, on the part of the High Court of Australia, to cut back on the scope for judicial intervention.

The *Hickman* formula, advocated by Dixon, J., was a compromise interpretation of those ouster clauses, whether of federal or state level origin, which were aimed at precluding jurisdictional review. Dixon, J., laying down the criteria to be followed when confronted with an ouster clause, said:

[^1]: *R. v. Hickman, ex parte Fox and Clinton, (1945) 70 C. L. R. 598.*


[^3]: *ibid.*

[^4]: *ibid.*, at p. 967.
"Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body."

However, the recognition accorded to an ouster clause, in terms of the Hickman formula, did not mean that it would be construed in a manner that transgressed the Constitution.

(c) The United Kingdom - the Anisminic Approach.

The United Kingdom has adopted the principles laid down in the Anisminic case when interpreting ouster clauses. The approach of the British courts has been discussed previously by us. Re Racal resulted in a reinterpretation of the Anisminic principle so as to overcome the problems created by the decision of the Court of Appeal in Pearlman. It resulted in the House of Lords redefining the scope of the Anisminic principle. The consequence of Re Racal has been that the application of judicial

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105 supra., note 91, at p. 615.
106 supra., note 92, at p. 968.
108 See discussion, supra., part V (a).
review in respect of inferior courts is different from that in relation to inferior tribunals.
The resultant outcome has been the circumscribing of the scope for judicial review.
Commenting on the change in approach, Wade notes that "the uniform application of
depending on the change in approach. Wade notes that "the uniform application of
judicial review to inferior courts and tribunals alike might with advantage have been
preserved, founded as it was on three centuries of history and good sense. Pearlman
could then have been right after all."\(^{112}\)

The Anisminic principle developed by the British judiciary clearly demonstrates
how the courts seek to protect individual rights in circumstances where such rights are
threatened. According to Griffith,\(^{113}\) "the decision of the House of Lords in Anisminic
Ltd v. Foreign Compensation Commission shows how, on occasion, the courts will resist
the strongest efforts of the government to exclude them from reviewing executive
discretion."

VII. Conclusion.

The general approach adopted by the judiciary, in the Commonwealth, when
confronted with an ouster clause has been one of resistance. This is because such ouster
clauses are considered to be encroachments upon the preserve of the judiciary, restrictive
in terms of advancing individual rights and inconsistent with the rule of law.

\(^{112}\) ibid., at p. 497.

1991], at p. 117.
Rozenberg,\textsuperscript{114} evaluating the increased judicial activism in Britain, especially during the long period of Conservative rule, states that "the reason for increased judicial activism is that the electorate chose to give one party some eighteen years of uninterrupted political power. Despite what were presumed to be their natural conservative inclinations, it seems that many judges felt it was up to them to redress the political balance." The judges were, therefore, attempting to redress a democratic deficit society.

The interpretation of an ouster clause is one area where the judiciary has to confront the executive and the legislature; it is an arena of open conflict. The legislature seeks to justify its actions on the basis of its representative character, democratic mandate and the compelling need to achieve certain broad social, economic and policy objectives. The judiciary, on the other hand, by favouring a narrow construction of attempts to oust their jurisdiction has, in effect, sought to protect a higher norm. It is influenced by the need to promote the rule of law and advance individual rights which are, perhaps, logically prior to social, economic and policy objectives. It should also be noted that advancing the rule of law is a mandatory requirement for the establishment of a democratic society.

The protection of the rule of law and the advancing of rights consciousness provides a very useful rubric against which the response of the judiciary, when

\textsuperscript{114} See, Rozenberg, Joshua, \textit{Trial of Strength} [London: Richard Cohen Books, 1997], at p. 86.
confronted with an ouster clause, can be evaluated. According to Jowell,\textsuperscript{115} "[t]he Rule of Law provides a principle which requires feasible limits on official power so as to constrain abuses which occur even in the most compassionate administrations." Thus, the judicial response to ouster clauses has resulted in whittling down the concept of parliamentary sovereignty and substituting, instead, a system of rights based review. This trend augurs well for the expansion of rights consciousness and the promotion of the rule of law. Dyzenhaus,\textsuperscript{116} evaluating the nature of an ouster clause, states as follows:

"In sum, privative clauses amount to a clear statutory command which judges find themselves compelled either to ignore or radically rewrite. The result is an apparent increase in judicial power because judges are no longer without exception bound by the clear statutory command of the legislature. But the compulsion is not one whose force is limited to judges wishing to preserve a role for themselves at the apex of the legal order. Legislatures must also acknowledge that the power they delegate is inherently limited by law. It follows that judges when they read down privative clauses are at one level respecting the intention of the legislature (a more abstract and long term intention) that there are inherent legal limits to official power."  

It is submitted, therefore, that legislation that seeks to oust the jurisdiction of the courts, from reviewing the validity of an action of an administrative agency, can rarely, if ever, be countenanced. Such ousters of jurisdiction can lead to the abuse of power and


result in the exercise of arbitrary and capricious power. It is important, therefore, that the courts are permitted to perform their constitutional role in curbing the unlawful exercise of power. A democratic society requires that administrative agencies exercise power in a manner that is consistent with the rule of law. It is of utmost importance that the courts are empowered to ensure that administrative agencies act according to law. The preclusion of judicial review threatens the very foundations of democratic society and it is nothing but right that the courts in the Commonwealth have resisted such challenges to their authority.

This thesis examined, in the preceding chapters, the extent to which rights consciousness can be used as a justification for judicial review. It is our view that the \textit{ultra vires} rule as a basis for judicial review, as discussed in chapter 2, is fundamentally flawed and that it is now opportune to look for alternative bases for judicial review.

Rights based review offers an innovative and exciting prospect because it has democratic credentials (if the conception of democracy is not one that is merely majoritarian in character). In this sense, such a basis of review would permit judges to rely on objective standards or norms when adjudicating upon the lawfulness of agency action. In this way it is possible to maintain judicial neutrality and, at the same time, ensure adequate minority interest protection.

The \textit{ultra vires} doctrine, as the basis of judicial review, confined the judicial function within a very narrow sphere; what was required was to determine the lawfulness of agency action in terms of the empowering statute or regulation without recourse to any other normative values other than those that the legislature was presumed to intend. In this sense, review involved an appraisal of the procedure and / or process by which a decision had been reached rather than an evaluation of the merits of a decision. It was for this reason that English law had for a long time, as a direct consequence of the \textit{ultra vires} doctrine, drawn a distinction between procedure and substance. Judicial review,
apparently, left untouched the substance of a decision except, perhaps, where \textit{Wednesbury} review took place.

Yet, judicial review in England, and in the other Commonwealth jurisdictions surveyed, has moved on from dealing purely with procedure to scrutinizing the substance of a decision. In other words review on the merits has become more common particularly in Australia, Canada, New Zealand, India and Sri Lanka. The United Kingdom does not appear to be too far behind; developments in human rights jurisprudence, in that country, are bound to be of enormous significance once the Human Rights Act 1998 comes into operation.

Sir Stephen Sedley,\textsuperscript{1} referring to the projected trends in human rights jurisprudence in the United Kingdom, envisaged by him for the next century, made the following observation:

"The path I hope we shall follow in this country is therefore not simply that of the European Convention with its inevitable limitations, but that of a juridical culture which does not imagine that the poorest citizen is made equal to the richest corporation simply by according both the same rights; which does not co-opt the powerless into the opposition of the powerful to the state; which perceives the role of power in determining who gets to drink first and longest at the well; and which understands above all that in every society fundamental human rights, to be real, have to steer towards outcomes which invert those inequalities of power that mock the principle of equality before the law." 

Sir Stephen had occasion to return to this familiar theme in his Hamlyn Lectures delivered in 1998.\textsuperscript{2} In his first Hamlyn Lecture, entitled ‘The Free Individual and the


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Free Society'. Sir Stephen argues that a free society governed by principle and by law, is a necessary and essential condition of personal freedom. In the third of his Hamlyn Lectures, entitled 'The Lion and the Ox', Sir Stephen considers the differences between merely formal and purely substantive equality in the search for justice and posits that the idea of a free society, as a condition of personal freedom, is an integral and relevant part of the United Kingdom’s legacy. He points out that law in a free and moral society “is concerned centrally with the abuse of power wherever it resides; and that justice has to be sought not in some crystalline outcome but as a process of principled negotiation through law of interests which may be no less legitimate for want of the status of tabulated rights.”

It is a central theme of Sir Stephen’s thesis that currently accepted international human rights instruments are neither universal in time nor space. He points out that human rights, by nature, are political and that the reason why the west seems able to lecture others on human rights norms is due to the fact that human rights, as we know them, are “historically and ideologically the property of the west.”

Irrespective of its historical and ideological origin the observance of international human rights norms are today widely accepted as being desirable. The observance of

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3 ibid., at p. 56.
4 supra., note 1, at p. 386.
5 There is, however, a powerful school of thought that suggests that international human rights norms must take into account cultural relativism and that western human rights norms may not be appropriate, nor desirable, for certain cultures. See, e.g., Steiner,
basic human rights norms is today no longer a matter which must be determined in the municipal plane but, on the contrary, assumes a supra-national dimension. The observance of international human rights norms are currently recognized, by most liberal democratic nations, as being everybody's business.\(^6\)

The importance attached to the observance of international human rights norms was adverted to by the House of Lords in *Pinochet (No 1).*\(^7\) (This decision was subsequently set aside by the House of Lords due to the fact that one of the judges that heard the appeal was disqualified from doing so as a matter of law.)\(^8\)

In *Pinochet (No 1)* the applicant for judicial review was a former head of state of Chile. He was accused by Spain of a number of crimes including genocide, murder, torture, the taking of hostages and the murder of Spanish citizens. These crimes were, allegedly, committed, between 1973 and 1990, while the applicant was the head of state of Chile. When proceedings were bought before the National Court of Madrid, the court held that it had jurisdiction to try the applicant and, therefore, issued an international warrant for his arrest. In 1998, the applicant entered the United Kingdom and, thereafter,

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\(^6\) It should be noted, however, that certain countries, which do not have a liberal democratic tradition and their people appear to favour a liberal democratic ideology – as far as human rights are concerned.

\(^7\) *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International and others intervening), [1998] 4 All E. R. 897.*

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Henry J. and Alston, Philip (editors), *International Human Rights in Context* [Oxford: Clarendon Press, 1996]. Sri Lanka and India, however, have a long democratic tradition and their people appear to favour a liberal democratic ideology – as far as human rights are concerned.
a Spanish magistrate, followed by the Spanish government, issued a request for his extradition.

In terms of the request for extradition, a warrant for the arrest of the applicant was issued by the metropolitan stipendiary magistrate, pursuant to section 8 (1) (b) of the Extradition Act 1989, on the basis that there was substantial evidence of human rights violations in the performance or purported performance of his official duties as head of state of Chile. These alleged offences were said to have been committed within the jurisdiction of the Spanish government. The Divisional Court allowed an application by Pinochet for judicial review by way of an order of certiorari to quash provisional warrants issued for his arrest. On appeal to the House of Lords, by the Commissioner of Police for the Metropolis and the Spanish government, it was decided, by a majority (with Lord Slynn of Hadley and Lord Lloyd of Berwick dissenting), that the appeal should be allowed.

The decision, although subsequently reversed, for quite different reasons, was widely regarded as an important development in human rights jurisprudence; it underscored the importance attached to the protection of fundamental human rights. It is for this reason that the judgment of the House of Lords warrants consideration. Lord Nicholls, referring to the importance attached to the observance of international human rights norms, in respect of the conduct of a head of state, said:

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4 R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte,(No 2) [1999] 1 All E. R. 577. The implications of this decision are discussed in chapter 4, part II (b).
“[I]t hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law.”9

Lord Nicholls, therefore, took great pains to point out that the maintenance of international human rights norms was not merely a matter for municipal law but, on the contrary, was everyone’s business.

Lord Steyn was of the view that the statutory immunity granted to a head of state was necessarily limited to the functions performed by him qua head of state. Thus, only proper functions performed in the capacity as head of state were likely to attract immunity and actions regarded by international law as being crimes against humanity, were not likely to be included. Alluding to the distinction between actions that attracted immunity and those that did not, Lord Steyn said:

“My Lords, the concept of an individual acting in his capacity as head of state involves a rule of law which must be applied to the facts of a particular case. It invites classification of the circumstances of a case as falling on a particular side of the line. It contemplates at the very least that some acts of a head of state may fall beyond even the most enlarged meaning of official acts performed in the exercise of the functions of a head of state. If a head of state kills his gardener in a fit of rage that could by no stretch of the imagination be described as an act performed in the exercise of his functions as head of state.”10

9 supra., note 7, at pp. 939 – 940.
10 ibid., at p. 945.
Lord Steyn, therefore, reinforced the view that the immunity granted to a head of state operated only in relation to actions which, in terms of international human rights standards, could be regarded as lawful or were part of the proper functions of a head of state.

\textit{Pinochet (No 1)} was set aside by the House of Lords in \textit{Pinochet (No 2)}\textsuperscript{11} due to the fact that one of the judges hearing the appeal was disqualified from doing so by operation of law. At the subsequent rehearing of the appeal, in \textit{Pinochet (No 3)},\textsuperscript{12} the House of Lords decided to allow the appeal in part. Consequently, the alleged offences for which Pinochet was liable to be extradited were limited in scope to those that occurred after 1988 – the year in which torture abroad became an offence in the United Kingdom.\textsuperscript{13}

Lord Browne-Wilkinson felt very strongly that allegations of torture could not, by any means, be condoned on the basis that they were state functions. His Lordship said:

"Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong ground for saying that the implementation of torture as defined in the Torture Convention cannot be a state function."

It is submitted that the decision of the House of Lords in \textit{Pinochet (No 3)}, although not as strong as \textit{Pinochet (No 1)}, has important implications for the advancing of international human rights norms. It appears that a violation of human rights, amounting to a crime

\textsuperscript{11} \textit{supra.}, note 8.
\textsuperscript{12} \textit{R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) (No 3), [1999] 2 All E. R. 97.}
\textsuperscript{13} \textit{See, section 134 of the Criminal Justice Act 1988.}
\textsuperscript{14} \textit{supra.}, note 12, at p. 113.
against humanity, cannot be condoned or in any way limited, solely, to the domestic
sphere. The observance of international human rights norms is everybody’s business and
it is, therefore, necessary for the courts to ensure that the relevant standards are observed
if the rule of law is to be preserved.

Britain, in line with other liberal democracies, has, at last, enacted a Bill of Rights
New Zealand model,\(^{15}\) effectively incorporates a substantial part of the European
Convention on Human Rights.\(^{16}\) A Bill of Rights for Britain had been advocated, for a
long time, by many including Lord Scarman,\(^{17}\) Lord Lester of Herne Hill\(^{18}\) and Michael
Zander.\(^{19}\)

The incorporation of a Bill of Rights in Britain will make it possible for that
country to give the lead in human rights rather than to merely have to follow orders made
by judges of the European Court of Human Rights in Strasbourg. This development is
long overdue and is consistent with the Labour government’s commitment towards
constitutional reform.\(^{20}\) As a result of the incorporation of the Bill of Rights it is highly

\(^{15}\) New Zealand Bill of Rights Act, 1990.

\(^{16}\) See, e.g., Sedley, Mr Justice Stephen, ‘A Bill of Rights for the United Kingdom: From

[London: Stevens & Sons, 1974].

\(^{18}\) See, e.g., Lester of Herne Hill, Lord, ‘European Human Rights and the British
Constitution’ in *The Changing Constitution* edited by Jowell, Jeffrey and Oliver, Dawn,


\(^{20}\) See, e.g., Wadham, John, ‘A British Bill of Rights’ in *Constitutional Reform* edited by
Blackburn, Robert and Plant, Raymond, [London: Longman, 1999], pp. 349 – 368;
probable that in Britain, as in New Zealand, the legal culture and discourse will change in a significant and irreversible manner.\textsuperscript{21}

Ronald Dworkin, in an essay published in 1990, argued very strongly in favour of a Bill of Rights for Britain.\textsuperscript{22} Dworkin, responding to the criticism that a Bill of Rights (which gives greater power to judges) may be undemocratic in character, states:

\begin{quote}
"Citizens of a democracy must be able to participate in government not just spasmodically, in elections from time to time, but constantly through informed and free debate about their government's performance between elections. Those evident requirements suggest what other nations have long ago realized: that Parliament must be constrained in certain ways in order that democracy be genuine rather than sham. The argument that a Bill of Rights would be undemocratic is therefore not just wrong but the opposite of the truth."
\end{quote}

It is submitted that Dworkin is right when he argues that a Bill of Rights is a necessity if democracy is to be meaningful in Britain. The protection and advancement of fundamental human rights is as important a part of promoting democratic values as is the right to vote and elect representatives at periodic elections. As discussed in chapter 7,\textsuperscript{24} the introduction of the Human Rights Act 1998 will have a significant impact on the United Kingdom's administrative law.

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\textsuperscript{22} Dworkin, Ronald, 'Does Britain Need a Bill of Rights?' in Freedom's Law [Oxford: Oxford University Press, 1996], pp. 362 – 372. This essay is now published as chapter 18 of Freedom's Law (a work in which Dworkin discusses the moral reading of the American Constitution).

\textsuperscript{23} \textit{ibid.}, at p. 363.

\textsuperscript{24} See, chapter 7, part IV (b).
Developments in human rights jurisprudence have not only been confined to the west. In recent times, there has been a massive expansion of the frontiers of judicial review in India and Sri Lanka in the direction of advancing human rights jurisprudence. The Indian Supreme Court, particularly, under the then leadership of Chief Justice Bhagwati, made giant strides to make justice and human rights accessible and meaningful to all.

The Indian Judiciary has long recognized that for a large number of people in a developing country, afflicted with poverty, economically impoverished or downtrodden, the only solution to make fundamental rights meaningful would be to restructure the prevailing social and economic order so as to enable them to realize their economic, social and cultural rights. Consequently, the Indian Supreme Court has greatly expanded the scope and ambit of its fundamental rights jurisdiction and given new meaning to the directive principles of state policy, found in that country’s Constitution. This has contributed in a significant manner towards the expansion of fundamental rights jurisprudence in India.

The court has pursued a policy of judicial activism and judges of the Supreme Court have visited prisons (so as to personally verify the conditions under which persons

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are detained), acted upon letters complaining about bonded labour and other human rights abuses (and, thereby, developed the court’s epistolary jurisdiction) and relaxed the rules of standing so as to make human rights accessible and encourage public interest litigation.28

The Sri Lankan Supreme Court has also attempted to follow its Indian counterpart and, in recent times, has significantly expanded the frontiers of its fundamental rights jurisprudence.29

Developments in human rights jurisprudence are, therefore, of vital significance in moving towards the ideal of a truly liberal democracy. There is a worldwide trend in this direction and it is universally acknowledged, albeit with some exceptions, that the promotion of human rights is intrinsically desirable. It is submitted that the protection of individual and group rights, as against the rights of the state, must rank as being logically prior to the notion of representative democracy. The mere fact that a given society has an elected legislature does not, by itself, allow any room for complacency. Indeed, most infringements of human rights are imposed by legislation – often enacted by elected

It is, therefore, of vital importance that a given society advances in the direction of a rights culture so as to maintain a healthy tension between minority rights (protected by an activist judiciary) and majority goals (advanced by the executive and an elected legislature).

Judicial review must not only be concerned with the protection of process rights alone. Whilst we do maintain that the protection of process rights are of significance, as illustrated by our discussion on natural justice (chapter 4) and legitimate expectations dealing with process rights (chapter 5), it is of equal, or perhaps greater, significance that substantive rights are also accorded protection. We have examined developments in respect of substantive rights in our discussion on substantive legitimate expectations (chapter 5), unreasonableness (chapter 6) and illegality (chapter 7). We have also examined the manner in which a rights culture can be enhanced by widening the right of access to the courts through the adoption of flexible rules of standing (chapter 3) and by giving ouster clauses a very narrow interpretation (or even, in effect, ignoring them) so that judicial review cannot be excluded (chapter 8).

Contemporary developments in administrative law, in the jurisdictions surveyed, have the potential to evolve in the direction of a sharper focus on human rights norms, when judging the lawfulness of administrative action, rather than being concerned with, merely, examining the scope and ambit of the empowering statute.


One of the problems, however, of adopting human rights norms, in judging the lawfulness of administrative action, is in respect of the relativism of human rights. Individuals have, amongst other things, physical, mental, ethnic, linguistic and cultural differences. Thus, it is difficult to envisage human rights norms that are truly universal in character. Additionally, human rights norms are not static over time. A detailed consideration of these issues is, however, beyond the scope of this work.

It is sufficient for our purpose, however, that the jurisdictions surveyed have a common heritage; they are committed to the protection of human rights and democracy and they acknowledge that the latter cannot be advanced without a commitment towards the former. It must be conceded, however, that the human rights that are promoted in these jurisdictions, as discussed above, are those which are ideologically the property of the west.

Thus, in order to advance rights consciousness, it is inevitable that there will be some tensions between the executive and legislature, on one hand, and the judiciary on the other. This friction between the different organs of government is both desirable and necessary for the protection of human rights and enhancing democratic values. The

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consequence of such a tension is that the people are saved from autocracy, and possible tyranny.\textsuperscript{33}

Thus, in order to further democracy and the rule of law it is necessary to expand the frontiers of rights consciousness and the principles of good administration. Where procedural rights are concerned, administrative law has made satisfactory progress. It is where substantive rights are concerned that there is scope for further development. Lord Scarman alluded to this, in 1990, when he said:

"The substantive grounds for judicial review do need, however, expansion and elaboration, and it is time that they were seen as instances of a general principle which can embrace new grounds as and when they can be seen to be a just requirement of the law." \textsuperscript{34}

Thus, it is time for judicial review to move on from procedure to substance so that democracy may become more meaningful and our civilization come of age. Judicial review must, indeed, mirror social change. Rights consciousness as the basis of judicial review will ensure that objective norms will be used as common denominators when judging the lawfulness of official action.

The legislature, the executive and the judiciary each has a part to play in a given society. There must be tension between each of these organs of government so that individual autonomy is respected and infringements of such autonomy limited to a minimum. It must be acknowledged that an individual is born into a society with certain rights and that it is society’s duty to ensure that those rights are, in fact, protected. The

development of rights culture by way of judicial review will help in some meaningful
manner to achieve such an objective.

34 Scarman, Lord, 'The Development of Administrative Law: Obstacles and
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