THE PLACE OF THE DECLARATORY JUDGMENT IN CERTIORARI TERRITORY

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I INTRODUCTION

That proud and ancient remedy, the prerogative writ of certiorari,[1] has been in such a state of decline in recent years that leading English judges have been prepared to write it off and to attempt to fill the vacuum by allowing broad scope in public law matters to alternative remedies, notably the action for a declaratory judgment.

Thus Lord Denning, in *Barnard* v. *National Dock Labour Board*,[2] in rejecting a suggestion by counsel that "courts have no right to interfere with the decision of statutory tribunals except by the historical method of certiorari", said:

> . . . there is power to do so, not only by certiorari, but also by way of declaration, I do not doubt. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think, tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law, what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country.

A statement to similar effect by Lord Denning in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*[3] received the endorsement of Lord Goddard when the case went on appeal to the House of Lords:

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[1] References to certiorari are also largely applicable to its sister writ, prohibition. The principal point of distinction between them is the point of time at which each is appropriate — prohibition before a decision, certiorari afterwards. Other prerogative remedies may also be of use for the purpose of reviewing adjudicatory decisions. The specialised but constitutionally significant role of *habeas corpus* is well enough known not to need discussion here. *Quo warranto*, although abolished in England, may also be useful (e.g., in dismissal cases) either in conjunction with other remedies (*Durayappah* v. *Fernando* (1967) 2 A.C. 337) or by itself (*Ex p. R. (ex rel. Warringah Shire Council & Jones)*; *re Barnett* (1967) 87 W.N. (Pt. 2) (N.S.W.) 12). Mandamus, too, has an important function as a means of reviewing tribunal decisions, but is amply dealt with elsewhere and does not need reconsideration here. The main purpose of this article is to reconsider the scope of both the declaration and certiorari in the adjudicatory field, in the light of some recent case law.

[2] (1953) 2 Q.B. 18, 41.

[3] (1958) 1 Q.B. 554, 571.

> I know of no authority for saying that if an order or decision can be attacked by certiorari the court is debarred from granting a declaration in an appropriate case. The remedies are not mutually exclusive . . .[4]

Earlier, in a non-judicial context, Lord Denning had written:

> Just as the pick and shovel are no longer suitable for the winning of coal, so the procedure of mandamus, certiorari and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions and actions for negligence . . . The courts must do this. Of all the great tasks that lie ahead, this is the greatest.[5]

The action for a declaration in its relatively short history has been given great scope as a means of reviewing a wide range of governmental action, whether such action be classifiable as legislative, administrative or judicial.[6] It has proved itself, in this respect, a more versatile remedy than certiorari which (apart from other limitations to be noted later) was virtually confined to the judicial and quasi-judicial end of the spectrum.[7]

Furthermore, even in this adjudicative field, certiorari was confined only to exercises of power of a "public" nature and appears still to be so confined.[8] The declaration, by contrast, is available to challenge "private" adjudications by domestic bodies such as trade unions, professional associations, and the like.[9]

As the shortcomings of certiorari, in its own proper sphere, seemed to multiply in recent years the declaration was called in to fill the gap until it seemed that the older remedy was well on the way towards unlamented oblivion.

II DECLARATION DELIMITED

Occasionally, however, judges have raised awkward questions about the place of the declaration in "certiorari territory". Certiorari, after all, had developed over the centuries as a procedure specially designed to review the proceedings of any lower body exercising a "jurisdiction": that is, of inferior courts and, more recently, tribunals.[10] Although some judicial reservations

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[4] (1960) A.C. 260, 290.

[5] *Freedom Under the Law* (1949) 126.

[6] It is well discussed in such works as S. A. de Smith, *Judicial Review of Administrative Action* (2 ed. 1968) Ch. 11; I. Zamir, *The Declaratory Judgment* (1962); H. W. R. Wade, *Administrative Law* (2 ed. 1967) ch. 4; D. G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (3 ed. 1966) ch. 9; P. Brett and P. W. Hogg, *Cases and Materials on Administrative Law* (2 ed. 1967) 153-77. The advantages of the declaration over the prerogative remedies are also discussed in G. J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law" (1955) 18 *Mod. L.R.* 138; I. Zamir, "The Declaratory Judgment v. The Prerogative Orders" (1958) *Public Law* 341.

[7] In this article I use such terms as judicial, quasi-judicial, administrative and legislative, in referring to particular types of action, only in a broad sense: de Smith's discussion of classification (*op. cit. supra* n. 6, ch. 2) shows the varied meanings attributed to these terms in different contexts, and he describes this as a "highly acrobatic part of the law" in which "an aptitude for verbal gymnastics is obviously of advantage" (*id.* 80). Since his first edition appeared there have been further "acrobatics", so that what might formerly have been classified as "administrative" might now be treated as "quasi-judicial" or "judicial": e.g., *Ridge* v. *Baldwin* (1964) A.C. 40; *In re H.K. (An Infant)* (1967) 2 Q.B. 617; *Durayappah* v. *Fernando, supra* n. 1. Similarly I do not wish to be confined to a narrow use of the word "tribunal". I mean to include not only formal adjudicatory bodies but also individual Ministers, and other authorities or individuals in whom are vested public powers which must be exercised "judicially".

[8] *R.* v. *Criminal Injuries Compensation Board; Ex p. Lain* (1967) 2 Q.B. 864.

[9] E.g., *Lee* v. *Showmen's Guild of Great Britain* (1952) 2 Q.B. 329.

[10] Informative reference to the origins and evolution of certiorari "to quash" may be found in E. G. Henderson, *Foundations of English Administrative Law* (1963); de Smith, *op. cit. supra* n. 6 at 372-89; A. Rubinstein, *Jurisdiction and Illegality* (1965) 61-74.

about a similar use of the declaration may be attributable simply to conservatism, there have, in some of the judgments, been expressions of particular problems which may have some substance.

Problem (1): *Declarations and the Void-Voidable Issue*

One of these problems arises from the intrinsic nature of the declaration. Its function, it is said, is to declare—to declare the plaintiff's legal position. It is not a remedy designed to *alter* such position but simply to declare it as it already exists.

(*a*) *Ultra vires and jurisdictional error—void*

When the action under challenge is void or a nullity, by reason of the doctrine of *ultra vires* or jurisdictional error, the declaratory judgment is a perfectly appropriate proceeding to assert that fact. And when the nature of the action under challenge is legislative or administrative, the doctrine of *ultra vires*, broadly applied, is substantially the only ground on which a challenge may successfully be brought (in the absence of any statutory appeal procedure). So, for the purpose of challenging the legislative or administrative actions of authority, the declaration is indeed a valuable remedy and provides (with the injunction) a means of judicial review in an area largely outside the scope of certiorari and prohibition.[11]

By contrast, when the nature of the action under challenge is judicial or quasi-judicial—"certiorari territory" in the strict sense—there are at least three distinct doctrines on which the challenge may be based.

One of these grounds is jurisdictional error — the counterpart, in the adjudicatory field, of the doctrine of *ultra vires*.[12] Like *ultra vires*, jurisdictional error renders a decision void or a nullity, and a declaration may be an appropriate form of proceeding to assert that fact.[13]

But it is also possible to challenge by certiorari a "tribunal" decision on the basis of an error of law within jurisdiction apparent on the face of the record and on the basis of breach of the rules of natural justice.

(*b*) *Non-jurisdictional errors of law—voidable*

It is clear that an error of law within jurisdiction on the face of the record does not render a decision null or void.[14] Yet it has been argued

[11] E.g., *Dyson* v. *A.-G.* (1911) 1 K.B. 410; (1912) 1 Ch. 158; *Brownsea Haven Properties Ltd.* v. *Poole Corporation* (1958) Ch. 574; *Crouch* v. *The Commonwealth* (1948) 77 C.L.R. 339; *Prescott* v. *Birmingham Corporation* (1955) Ch. 210; *Hall & Co. Ltd.* v. *Shoreham-by-Sea U.D.C.* (1964) 1 W.L.R. 240.

[12] The scope of the doctrine of jurisdictional error may not, however, cover the full range of "defects" which fall within what Benjafield and Whitmore, *op. cit. supra* n. 6 at 175-86, have termed "the broad sense" of the *ultra vires* doctrine. Thus the taking into account of irrelevant considerations will render administrative action *ultra vires*. Such a defect in the adjudicative field will, however, normally be regarded as an error of law within jurisdiction rather than an error going to jurisdiction. See, e.g., *R.* v. *Northumberland Compensation Appeal Tribunal; Ex p. Shaw* (1952) 1 K.B. 338. Lord Denning seems to have suggested that irrelevant considerations will amount to jurisdictional error if they go to "the very root of the determination": *R.* v. *Paddington Valuation Officer; Ex p. Peachey Property Corporation Ltd.* (1966) 1 Q.B. 380, 403-4. But even if this is so, a difference remains in that, to come within the doctrine of jurisdictional error, an irrelevant consideration must be the dominant factor in the decision, whereas no similar condition applies for the purposes of *ultra vires*.

[13] See, e.g., *Barnard* v. *National Dock Labour Board, supra* n. 2; *Vine* v. *National Dock Labour Board* (1957) A.C. 488; de Smith, *op. cit. supra* n. 6 at 537-39.

[14] *R.* v. *Northumberland Compensation Appeal Tribunal; Ex p. Shaw* (1952) 1 K.B. 338; *R.* v. *Industrial Appeals Court; Ex p. Henry Berry & Co. (Aust.) Pty. Ltd.* (1955) V.L.R. 156; *Anisminic Ltd* v. *Foreign Compensation Commission* (1967) 3 W.L.R. 382.

forcefully that a decision which is voidable only, and not null or void, remains a decision until quashed. As Russell, L.J. concisely put it: "When is a determination not a determination?"—only when it is beyond jurisdiction.[15] The appropriate procedures to quash a decision which is merely voidable are appeal (if the relevant statute provides for one) or certiorari. Until quashed, the decision may be regarded as setting up an estoppel by record which will be a complete answer to any other form of attempt to seek judicial review, such as an action for a declaration.[16]

Mr. D. M. Gordon made this point in commenting on *dicta* in *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*, both by Lord Denning in the Court of Appeal and by Lord Goddard in the House of Lords,[17] to the effect that a declaration would always be available as an alternative procedure to certiorari:

> Why do litigants take certiorari proceedings? Obviously for the same reason that they bring appeals—that they are confronted with an order or other adjudication that decides against what they conceive to be their rights. If they try to assert what they claim are their rights while the orders or adjudications stand, they are barred by the estoppel thereby set up. Both certiorari proceedings and appeals are taken to remove estoppels by record or quasi-record. Such an estoppel answers any form of collateral attack; and it can hardly be doubted that an action for a declaration of the invalidity of an adjudication is just as much a collateral attack as any other form of action. An adjudication by a competent tribunal can only be attacked directly; and certiorari and appeal are the only forms of direct attack.
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> The one effective retort that can be made to a defence of estoppel by record or quasi-record in a collateral action is that the alleged record has no legal force because it was made without jurisdiction and so is void. This was the retort that prevailed in the *Pyx* case in the House of Lords.[18]

Lord Denning himself had earlier shown an awareness of the same point of difficulty. In *Healey* v. *Minister of Health* the Court of Appeal held that it had no jurisdiction to declare that the plaintiff was a mental health officer in the face of an allegedly erroneous decision by the Minister that he was not. Lord Denning said:

> Suppose that the court did rehear the matter and decide in Mr. Healey's favour, and grant the declaration for which he asks, what would happen to the Minister's decision? So far as I can see, it would still stand unless the Minister chose of his own free will to revoke it. There would then be two inconsistent findings, one by the Minister and the other by the court. That would be a most undesirable state of affairs.[19]

The issue arose for decision in *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*.[20] Challenge was there made, by means of an action for a declaration (and after the six months time limit for certiorari), to

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[15] *Id.* at 413.

[16] See Brett and Hogg, *op. cit. supra* n. 6 at 174-77, and the works by Wade (at 112) and de Smith (at 539-40) also there cited. And see Rubinstein, *op. cit. supra* n. 10 at 116-20.

[17] Cited *supra* nn. 3, 4.

[18] D. M. Gordon, "Certiorari and an Action for a Declaration of Invalidity as Alternative Remedies" (1959) 75 *L.Q.R.* 455 at 456.

[19] *Healey* v. *Minister of Health* (1958) 1 Q.B. 221, 228.

[20] (1964) 1 W.L.R. 226.

a decision of the National Insurance Commissioner that the applicants were not entitled to unemployment benefit. The basis of the challenge was an alleged error of law within jurisdiction. The members of the Court of Appeal (Sellers, Danckwerts and Davies, L.JJ.) refused the application, *inter alia*, on the basis of this problem:

> Apart from certiorari there is no machinery for getting rid of the decision of the National Insurance Commissioner and, what is more important, no way of substituting an effective award on which the claims could be paid. It would be out of harmony with all authority to have two contrary decisions between the same parties on the same issues obtained by different procedures, as it were, on parallel courses which never met or could meet and where the effective decision would remain with the inferior tribunal and not . . . the High Court. I conceive that to be the case here and it seems to me to lead to a conclusion against the jurisdiction of the High Court in this particular matter.[21]

The problem can be expressed in this way. Judicial review may be "constitutive" or "declaratory". If what is needed is a remedy to change a legal situation, for instance to quash a voidable decision, then a "constitutive" remedy is required. Appeal and certiorari are constitutive. But a declaration is purely declaratory and can undermine, directly, only a void decision—in other words, one which is already invalid *ab initio*.

The logic seems unimpeachable. But it is a logic to which judges have not always adhered. Certiorari itself has been pre-eminently associated with jurisdictional defects, and its role in this situation can only be declaratory—the decision being void or a nullity, there is nothing to quash.[22]

Furthermore, even declarations have been given on the grounds of non-jurisdictional errors of law. In *Taylor* v. *National Assistance Board*[23] an applicant for legal aid was granted a declaration that her contribution had been assessed on a wrong legal basis. Lord Merriman, P.[24] relied strongly on Lord Denning's statement in *Barnard* v. *National Dock Labour Board*[25] in overruling an argument that certiorari, not declaration, was the appropriate remedy. The decision was reversed by the Court of Appeal[26] (affirmed by the House of Lords[27]) solely on the ground that there had been no error. But, not surprisingly, Lord Denning in the Court of Appeal[28] took the opportunity to endorse Lord Merriman's view as to the appropriateness of the declaration.

In *Munnich* v. *Godstone Rural District Council*[29] the Court of Appeal took the view that proceedings for a declaration were appropriate to assert

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[21] *Id.* at 237 (*per* Sellers, L.J.). Yet on interlocutory proceedings before a differently constituted Court of Appeal, Denning, M.R. and Upjohn, L.J. had thought the matter appropriate for determination by a declaration. Diplock, L.J. agreed, but with reservations: *Punton* v. *Ministry of Pensions and National Insurance (No. 1)* (1963) 1 All E.R. 275; (1963) 1 W.L.R. 186.

[22] Rubinstein, *op. cit. supra* n. 10 at 81-94; Brett and Hogg, *op. cit. supra* n. 6 at 104-5. *Cf. Barnard* v. *National Dock Labour Board, supra* n. 2 at 38-39 (*per* Singleton, L.J.); *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1938) 59 C.L.R. 369, 392 (*per* Dixon, J., as he then was).

[23] (1956) P. 470.

[24] *Id.* at 494-95.

[25] *Supra* n. 2.

[26] (1957) P. 101.

[27] (1958) A.C. 532.

[28] (1957) P. at 111.

[29] (1966) 1 W.L.R. 427.

that enforcement notices under the Town and Country Planning Act, 1947, s.23 were bad in law, and notwithstanding that the notices had been treated as valid bases for penalties in proceedings for breach of the notices. In the event the Court took the view that the notices were valid, and a declaration was refused. But Lord Denning said:

> The courts have in recent years been ready to use the machinery of declaration far more than they used to, and it has proved most useful; see, for instance, *Francis* v. *Yiewsley and West Drayton Urban District Council*[30] and *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government.*[31] But it must not be carried too far. If this were a case where a defendant was seeking to reverse a finding against him on the facts, we should not entertain it for a moment. We should then take guidance from Lord Devlin in *Connelly's* case:[32] "It is absolutely necessary that *issues of fact* that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. . . . No system of justice can guarantee that every judgment is right, but it can and should do its best to ensure that there are no conflicting judgments in the matter." Those words are specially apt when the issue is one of fact. But when property rights come into question, it may be different. A criminal court is not the best of tribunals to deal with vexed questions of rights of property. . . . Mr. Bridges says that this case is different because the plaintiff was given the opportunity to appeal on the point of law and did not. That is true. But this is a matter of discretion. And I would not be prepared to throw out this case simply on the ground that the matter had already been adjudged in the magistrates' court.[33]

What, then, can be concluded from these cases? Does any problem in using the declaration to assert a non-jurisdictional error of law boil down simply to a difference of opinion in the English Court of Appeal, with Lord Denning and the "liberals" pitted against the "conservatives"? Yet even Lord Denning had recognised a problem in *Healey* v. *Minister of Health.*[34] Danckwerts, L.J. was with him in the *Munnich Case*, but was also a member of the bench which decided *Punton (No. 2).*[35]

Is there, then, any distinction to be made among these cases so that only in some situations will a declaration not be available to review non-jurisdictional legal errors?

Professor S. A. de Smith[36] feels that it makes little difference whether the declaration sought is a declaration of the plaintiff's legal rights or a declaration that some tribunal's decision as to those rights is invalid, and that the critical question may rather depend on the *utility* of the declaration—that is, on whether the tribunal has power to rescind or vary its determination (as it had in *Taylor's Case*, but not in *Punton (No. 2)*) or whether the declaration would preclude the tribunal or another person from acting upon that determination. The *Punton (No. 2) Case* may also be explicable partly on the basis that what the applicants there sought were declarations as to the invalidity of adverse determinations when a favourable determination was a precondition

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[30] (1958) 1 Q.B. 478.
[31] *Supra* n. 4.
[32] *Connelly* v. *Director of Public Prosecutions* (1964) A.C. 1254, 1353.
[33] (1966) 1 W.L.R. at 434-35.
[34] See *supra* at n. 19.
[35] *Supra* n. 20.
[36] *Op. cit. supra* n. 6 at 538-40.

to the coming into existence of the "rights" being asserted (see Problem (3) below).

But the logic behind the reasoning in the *Punton (No. 2) Case* and of D. M. Gordon remains persuasive. If the declaration is purely declaratory, it can have no *direct* effect on valid but voidable determinations and, thus, may be of less use than certiorari to challenge such determinations.

But it may be capable of some *indirect* effect if the decision that a determination is erroneous may lead the tribunal itself to act in accordance with that declaration. The declaration remains declaratory but may be useful in leading the tribunal to take any necessary constitutive action, if that course is open to it.

That course was apparently not open to the National Insurance Commissioner in the *Punton (No. 2) Case,* and this fact led the Court of Appeal to the view that it had no *jurisdiction* to give a declaration. In other cases, where that course was available to the tribunal, the Court of Appeal has taken the view that it does have jurisdiction to grant a declaration. Yet there is no guarantee even in such a situation that the tribunal will revoke or vary its determination or refrain from acting on it.

In this context, then, the declaration, while remaining declaratory, is capable of having a valuable *indirect effect* on an erroneous determination. If the courts do have jurisdiction to grant a declaration in respect of action which is voidable only, notwithstanding the fact that the declaration by itself cannot quash such action, it seems only rational to say that the jurisdiction exists in all cases. The fact that a particular tribunal has no power to vary its own determination would be better treated as a factor leading the court, in its discretion, to decline to exercise its jurisdiction, rather than (as it became in the *Punton (No. 2) Case*) a factor excluding jurisdiction altogether. The ineffectiveness of granting a particular remedy is, after all, treated as a matter of discretion rather than of jurisdiction in regard to the prerogative writs.[37]

It is submitted, then, that even if the *Punton (No. 2) Case* was correctly decided, the reasoning was unnecessarily wide for the purpose. It would be more in accordance with principle and with other decisions to base the refusal to grant a declaration in such a situation on discretion rather than lack of jurisdiction. And to suggest that a declaration will never be available for the purpose of reviewing a non-jurisdictional error of law seems too sweeping a statement to be justified by the present state of the authorities.

There may be problems in this area, but they are probably of smaller dimensions than to exclude the declaration altogether. Whether the declaration *should* be used for non-jurisdictional errors, or whether such use would extend judicial review too far, is a matter of judicial and governmental policy. But as long as certiorari is available for review of this type of defect,[38] there seems no reason why the declaration should be excluded.

But until the matter receives further clarification, the lawyer would be well advised to use caution before choosing an action for a declaratory judgment as his sole means of asserting that a determination is invalid because of some non-jurisdictional error of law.

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[37] For recent Australian expressions of this view see *R.* v. *Anderson; Ex p. Ipec-Air Pty. Ltd.* (1965) 113 C.L.R. 177, 201 *per* Taylor and Owen, JJ. (mandamus); *Banks* v. *Transport Regulation Board* (1968) 42 A.L.J.R. 64, 71 *per* McTiernan, J. (certiorari).

[38] So too, now, is *habeas corpus; R.* v. *Governor of Brixton Prison; Ex p. Armah* (1968) A.C. 192.

(c) *Denial of natural justice—void or voidable?*[39]

The effect on a decision of a breach of the rules of natural justice has been a matter of some uncertainty, and has recently come to the forefront of judicial and academic attention.

Professor H. W. R. Wade has argued strongly that breach of the rules is simply one form of *ultra vires*, being nothing more nor less than breach of implied statutory conditions for the exercise of certain types of power.[40] The current state of the law as to the implication of the rules of natural justice, since *Ridge* v. *Baldwin* and *Durayappah* v. *Fernando*,[41] can provide some support for this view — the courts once again presume that Parliament intended that the more drastic types of power should be exercised only in accordance with those rules unless Parliament has given some indication to the contrary.

At any rate, whether the rules of natural justice belong to the domain of *vires* or jurisdiction, or whether they constitute a separate type of reviewable defect,[42] there is authority to suggest that breach of the rules makes a decision void, at least for some purposes.

There have been numerous Australian instances, for example, of review being allowed of decisions in breach of both rules of natural justice, notwithstanding the presence in the legislation of a privative or "no-certiorari" clause purporting specifically to exclude review.[43] The view adopted is that such breach either deprives the body of jurisdiction or is sufficiently analogous to jurisdictional error to attract the sort of reasoning by which a decision may be reviewed for *ultra vires*/jurisdictional error despite a "no-certiorari" clause.[44] This reasoning is clearly not available to allow review of a decision for a non-jurisdictional error of law in the face of a "no-certiorari" clause.[45]

More to the point is the question of the remedies by which courts have allowed breach of the rules of natural justice to be asserted. An action for trespass on the basis of a breach of the hearing rule *(audi alteram partem)* succeeded in *Cooper* v. *Wandsworth Board of Works*,[46] thus clearly suggesting that the administrative conduct giving rise to the action lacked any statutory authority.[47] And declarations themselves have been held available on the basis of breaches of the hearing rule by statutory bodies[48] (as well as by domestic bodies).

The House of Lords in *Ridge* v. *Baldwin* did discuss the question of

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[39] This whole question has been considered in the light of recent case law by H. W. R. Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 *L.Q.R.* 499, (1968) 84 *id.* 95, and by M. B. Akehurst, "Void or Voidable? — Natural Justice and Unnatural Meanings" (1968) 31 *Mod. L.R.* 2, 138.

[40] Wade, *supra* n. 39, (1968) 84 *L.Q.R.* at 101-15. See also the *Anisminic Case*, *supra* n. 14 at 395 (*per* Diplock, L.J.).

[41] Both cited *supra* n. 7.

[42] There are historical grounds for regarding breach of the rules of natural justice as a separate category of reviewable defect, i.e., as an error in fact reviewable by writ of error and making a decision voidable, not void: see D. M. Gordon, "Certiorari and the Revival of Error in Fact" (1926) 42 *L.Q.R.* 521. Modern legal developments may, of course, have established a different situation.

[43] *R.* v. *Chairman of General Sessions at Hamilton; Ex p. Atterby* (1959) V.R. 800; *R.* v. *Will & Toon; Ex p. Visona* (1960) Qd. R. 123; *Ex p. Northern Rivers Rutile Pty. Ltd.; re Claye* (1965) N.S.W.R. 135; *Ex p. Blakewell; re Hately* (1965) N.S.W.R. 1061; *R.* v. *Justices of Rankine River; Ex p. Sydney* (1962) 3 F.L.R. 215.

[44] E.g., *Ex p. Wurth; re Tully* (1954) 55 S.R. (N.S.W.) 47.

[45] *Anisminic Ltd.* v. *Foreign Compensation Commission*, *supra* n. 14.

[46] (1863) 14 C.B. (N.S.) 180.

[47] *The Case of the Marshalsea* (1612) 10 Co. Rep. 686.

[48] E.g., *Cooper* v. *Wilson* (1937) 2 K.B. 309; *Ridge* v. *Baldwin*, *supra* n. 7; *Kanda* v. *Government of Malaya* (1962) A.C. 322.

whether a breach of the hearing rule made a decision void or voidable but divided on the issue so as to leave the matter in some doubt. But the Privy Council in *Durayappah* v. *Fernando*[49] read *Ridge* v. *Baldwin* in such a way as to reach a conclusion that breach of the rule made a decision voidable. Much earlier it had been held that a breach of the bias rule made a decision voidable: *Dimes* v. *Grand Junction Canal Co.*[50]

If denial of natural justice is therefore now to be regarded as making a decision voidable only, does it necessarily follow that a declaration is not available to review administrative action on such ground?

It is submitted that this conclusion does not follow, for several reasons:
(i) Court of Appeal decisions already noted have indicated that a declaration may be available to review non-jurisdictional errors of law, defects which clearly make a decision voidable only. And, although a declaration cannot quash, it may, in certain circumstances, still have value. If the declaration is available to review decisions which are voidable in this sense, then there is no reason why it should not be available to review decisions in breach of natural justice.
(ii) But even if the *Punton (No. 2) Case* correctly establishes that non-jurisdictional errors of law may not be challenged by means of an action for a declaration, it is still possible that breach of natural justice may. For the Privy Council in *Durayappah* v. *Fernando,* in ruling that such breaches would make a decision voidable, gave a special meaning to "voidable" in this context. (There is nothing in the opinion to indicate that "voidable" in the context of non-jurisdictional errors of law is to be understood in any but the traditional sense.)

This new *Durayappah* sense of "voidable", in regard to a decision reached in breach of the hearing rule,[51] is to the effect that such a decision is voidable but only at the instance of "the party affected". As against a person with such *locus standi,* however, when he successfully challenges the decision it is to be regarded as void *ab initio* (whereas the traditional understanding of "voidable" would have it that invalidation operates only from the time of the review court's decision). On the other hand, a plaintiff who lacked standing as a "party affected" (even though he might be an "affected non-party") would not be entitled to challenge such a decision by means of a declaration or even certiorari.

This aspect of the Privy Council decision is open to criticism and does appear to confuse what have previously been treated as two quite separate aspects of judicial review. Questions of *locus standi* have hitherto been confined to the matter of availability of particular remedies — here the Privy Council transposes such questions into the matter of the effect of defective action, with results which can only cause confusion.[52] Furthermore to confine the availability of certiorari (the principal remedy sought in *Durayappah* v. *Fernando)* to "the party affected" goes against previous authority, which has generally been liberal in according standing for the writ to "persons aggrieved" (whether parties or non-parties to the challenged action)[53] even where the

[49] *Supra* n. 7.
[50] (1852) 3 H.L.C. 759. Wade, *supra* n. 39, (1968) 84 *L.Q.R.* at 106-8, attempts valiantly to confine this decision to its particular circumstances.
[51] It is not clear whether it applies also in regard to the bias rule.
[52] As is forcefully indicated by Wade, *supra* n. 39, (1967) 83 *L.Q.R.* 499 at 503 ff.
[53] E.g., *R.* v. *Manchester Legal Aid Committee; Ex p. Brand (R.A.) & Co.* (1952) 2 Q.B. 413; *R.* v. *Paddington Valuation Officer, supra* n. 12.

ground is breach of the rules of natural justice.[54]

But as long as *Durayappah* v. *Fernando* stands as binding authority for Australian courts, it does at least serve to make clear that as against a person who does have standing as prescribed, a decision in breach of natural justice is void *ab initio* if he chooses to challenge it. This would remove any conceptual barrier to the use of the declaration on this ground (while at the same time erecting a less significant but restrictive barrier in terms of *locus standi).*

(iii) The third reason for not despairing of the declaration as a remedy for breach of natural justice turns on the proposition that a decision may be voidable for some purposes but void for others. This proposition sounds untidy and can cause confusion, but it may be the only basis on which many of the illogicalities in this area of the law can be explained.[55] At any rate, it seems too late in the day now to argue that a declaration will not be available to challenge decisions made in breach of natural justice.[56] So either such decisions are void for this purpose (if not for others), or the remedy of the declaration is not confined for conceptual reasons to void decisions.

(iv) Lastly, the decisions in *Dimes* v. *Grand Junction Canal Co.*[57] and *Durayappah* v. *Fernando,* to the effect that action taken in breach of the rules of natural justice is not void, may simply be wrong, as Professor Wade argues.[58]

So it is submitted that breach of the rules of natural justice (whatever the effect on the challenged action) may be asserted in an action for a declaration, subject, at present, only to the strict view of *locus standi* adopted in *Durayappah* v. *Fernando.* But this possible restriction on standing would not be confined to the declaration and would be shared equally by certiorari.

Problem (2): Locus Standi — Legal Rights

Locus standi has several faces, and another aspect of the "standing" question may present a separate barrier peculiar to the use of the declaration to challenge tribunal decisions, even in cases where it is clear that the alleged defect would render the decision a nullity.

The *locus standi* requirements for the equitable remedies of declaration and injunction[59] have always been stricter than those for certiorari and prohibition. So, whether or not the applicant for a declaration must—or can—show that he is a "party" affected by the challenged decision, he must satisfy the court that he is sufficiently *affected.*

The leading authority on this point is *Boyce* v. *Paddington Borough Council.*[60] The individual may have standing to seek an injunction or a declaration (a) where the challenged action involves a violation of *public rights* together with either (i) an interference with some private right of his own, or (ii) special damage peculiar to himself; or (b) where the challenged action involves a violation of his private rights.[61] Or, to put the formula

[54] E.g., *R.* v. *Hendon R.D.C.; Ex p. Chorley* (1933) 2 Q.B. 696. And see generally de Smith, *op. cit. supra* n. 6 at 428-32; G. Nettheim, "The Privy Council, Natural Justice and Certiorari" (1966-67) 2 *Federal L.R.* 215.

[55] This is the conclusion reached by Akehurst, *supra* n. 39, and it does have the virtue of saving him from some of the more devious reasoning entailed in Wade's articles also there cited.

[56] See *supra* at n. 48.

[57] *Supra* n. 50.

[58] *Supra* n. 39.

[59] See de Smith, *op. cit. supra* n. 6 at 466-67, 472-76, 525-26.

[60] (1903) 1 Ch. 109 (Buckley, J.); (1903) 2 Ch. 556 (C.A.); (1906) A.C. 1 (H.L.). See also *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332.

[61] See Benjafield and Whitmore, *op. cit. supra* n. 6 at 219-23, 232-34.

another way, he has an option of relying either on an interference with his private rights or on an interference with public rights plus special damage peculiar to himself.

Although it is suggested that the "special damage" requirement is probably looser for declaration than for injunction,[62] there are limits.[63] However, when the nature of the action being challenged is legislative or administrative, it will frequently be possible for an applicant for a declaration of invalidity to contend that the action does affect public rights and does cause him some special damage.[64]

This option will seldom be available when the challenged action is a decision of a tribunal (or Minister, etc.) in a case concerning a specific individual or individuals. In this adjudicatory field it will be difficult to contend that any decision affects "public rights".[65] Accordingly, for the most part, the applicant will have to rely, for standing, on being able to show the court that his "private rights" are affected.

If the applicant was a party to the challenged decision this may present no problem[66] (but see later). If, on the other hand, he is only an "aggrieved non-party" he may be denied standing even if the decision is a nullity. It seems that he must be able to show that the decision (or other challenged action) affects some *legally enforceable* right of his own.[67]

Such thinking appears to underlie the recent decision in *Gregory* v. *London Borough of Camden*.[68] The Council granted planning permission in respect of certain land. Adjoining landowners sought a declaration that the permission was *ultra vires* and hence a nullity. But Paull, J. held that they lacked standing for a declaration as their legal rights had not been affected by the decision. He suggested that they might have had standing had they proceeded by way of certiorari.[69]

Problem (3): Locus Standi — Vested Rights

Another aspect of the same requirement that the applicant for a declaration should be able to show that a challenged decision affects some legally enforceable private right of his own (if it does not infringe "public rights" and cause him "special damage") is the point that the private right must be legally enforceable in the sense of "vested". Thus, even if the applicant was a party to the challenged decision, and affected by it, if the purpose of the proceeding which led to the decision is not such as to affect some *pre-existing* legal

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[62] *Id.* 233-34. See, e.g., the *Dyson* and *Prescott Cases*, *supra* n. 11.

[63] *Anderson* v. *The Commonwealth* (1932) 47 C.L.R. 50; *Cowan* v. *Canadian Broadcasting Corporation* (1966) 56 D.L.R. (2d) 578; *Logan Downs Pty. Ltd.* v. *Federal Commissioner of Taxation* (1965) 112 C.L.R. 177; *Real Estate Institute* v. *Blair* (1946) 73 C.L.R. 213.

[64] Otherwise, of course, the Attorney-General has standing to seek a declaration as to invalidity of action that violates public rights.

[65] It has been suggested that any *ultra vires* act by a public body *ipso facto* infringes public rights for this purpose; see, e.g., *Helicopter Utilities Pty. Ltd.* v. *Australian National Airlines Commission* (1962) N.S.W.R. 747. But whether this line of reasoning would be applied to "tribunal" decisions, so as to give *locus standi* for a declaration or injunction to a person whose private rights were not affected, remains open to question.

[66] E.g., *Barnard* v. *National Dock Labour Board*, *supra* n. 2.

[67] This restrictive approach to *locus standi* to protect private rights has recently been affirmed in the Court of Appeal by Lord Denning himself in regard to injunctions: *Thorne* v. *British Broadcasting Corporation* (1967) 1 W.L.R. 1104, 1109, although this was a case in which the statute provided for criminal proceedings as the exclusive remedy.

[68] (1966) 1 W.L.R. 899; (1966) 2 All E.R. 196.

[69] As in *R.* v. *Hendon R.D.C.; Ex p. Chorley*, *supra* n. 54.

right of the applicant but is, rather, to bring some *new* legal right into existence, then the decision may not be challengeable by an action for a declaration, whether the alleged defect would make it void or voidable, and whether the applicant was a party to that proceeding or not.

This possibility is illustrated by the Court of Appeal decision in *Anisminic Ltd.* v. *Foreign Compensation Commission.*[70] The proceedings began as an application for a declaration but, obligingly, the Court of Appeal treated it as an application for certiorari.[71]

The Company was challenging, as a nullity, the Commission's determination that it was not entitled to compensation from a fund established by the Egyptian Government in respect of property sequestrated during the 1956 Suez incident.

The appeal was decided on the basis that the alleged error was not on a question going to jurisdiction with the result that a "no-certiorari" clause in the Foreign Compensation Act, 1950, made the Commission's finding final.

But Diplock, L.J. expressed his doubts whether, even had the Commission's determination been a nullity, it could have been challenged by means of an action for a declaration, in view of the peculiar nature of the Commission's functions.

> The jurisdiction of the High Court to give declaratory judgments is limited to declaring the existence of *legally enforceable rights or liabilities.* This will in many cases afford an alternative procedure for questioning a determination of an inferior tribunal on the grounds that it was made without jurisdiction and is therefore a nullity. Thus if it purports to impose on a person a liability enforceable by the executive branch of government, its enforcement will inevitably interfere with that person's common law rights. In such a case, instead of waiting for his common law rights to be infringed he may take the initiative by bringing an action . . . for a declaration that the purported determination is a nullity.[72]

But (Diplock, L.J. continued) the appropriate defendant would be the person entitled to enforce that purported liability, and this would seldom be the tribunal itself; the only remedy against the *tribunal* would be certiorari.[73] He went on to refer to the circumstances of the situation before him:

> Similar difficulties would seem to me to lie in the way of any action for a declaration brought by a claimant to a right created by statute in respect of a purported determination by an inferior tribunal that he is not entitled to such right, when the tribunal's determination that he is entitled to the right is a condition precedent to the enforcement of it by him. So long as there has been no determination that the claimant is entitled to the right there is nothing capable of giving rise to any cause of action against the person against whom the right would be enforceable; and if the inferior tribunal's purported determination of non-entitlement is a nullity, this still leaves nothing capable of giving rise to any cause of action against the person against whom the right would be enforceable,

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[70] *Supra* n. 14. (It may also have been an element in the decision of Phillimore, J. in *Punton* v. *Ministry of Pensions and National Insurance (No.2)* (1963) 1 W.L.R. 1176.)

[71] (1967) 3 W.L.R. at 397, 412.

[72] *Id.* 412.

[73] See also *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (1945) 71 C.L.R. 545, 571-72 (*per* Latham, C.J.); *cf.* 584-85 (*per* Williams, J.). And see de Smith, *op. cit. supra* n. 6 at 538.

> and thus capable of being the subject matter of a declaration against him. The conduct of the inferior tribunal itself in making the purported determination, whether it is a nullity or not, is not capable of giving rise to any cause of action against it on the part of the claimant. His only remedy against it would be by certiorari and mandamus.[74]

This final remark is borne out by the decision in *R.* v. *Criminal Injuries Compensation Board; Ex Parte Lain*[75] in which the Queen's Bench Divisional Court (Lord Parker, C.J., Diplock, L.J. and Ashworth, J.) held that certiorari would be available in a remarkably similar situation.

But perhaps this view is too narrow. It is based, as Professor de Smith points out, "on the assumption that declaratory relief ought to be restricted to cases where there already exists a legal right or immunity calling for judicial protection",[76] and such a "private law" approach to the declaration has been abandoned in regard to domestic tribunals[77] and in regard to the non-adjudicatory actions of public authorities.[78] Even in the adjudicatory sphere, declarations have issued in respect of adverse decisions by licensing bodies.[79] So it is submitted that too much weight should not be attached to the *dicta* in the *Anisminic Case*.

III THE LIMITS ON DECLARATION ASSESSED

It is not my intention to exaggerate the difficulties of the declaration or to argue against its use as a means of challenging tribunal decisions. One may set against the restrictive views referred to above more liberal statements by judges of the highest eminence.[80]

No judge (in England, at least) would now doubt that there is an important place for the declaration in "certiorari territory", as a means of allowing judicial review of tribunal decisions. There are few, if any, grounds for believing that the leading cases on the scope of the declaration were incorrectly decided.

It is only limited portions of certiorari territory which *may* (not must) be out of bounds to the declaration. To recapitulate, there seems little doubt in English law that any person whose legal rights are affected by a tribunal decision which is null and void may assert that voidness by an action for a declaration, whether he was a party to the decision or not.

It has been questioned, however, whether an applicant whose legal rights are affected by a decision which is voidable only may ever obtain a declaration to that effect (subject to the *Durayappah* sense of "voidable" which, in regard to breaches of natural justice, would confine this disability only to "non-parties" to the challenged decision). And the requirements for *locus standi* (in the absence of any violation of "public rights") may preclude a person, whether party or non-party, from challenging a decision, whether void or voidable, which does not affect any legally enforceable right of his own. Nor,

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[74] (1967) 3 W.L.R. at 413.
[75] *Supra* n. 8.
[76] *Op. cit. supra* n. 6 at 538.
[77] E.g., *Nagle* v. *Feilden* (1966) 2 Q.B. 633.
[78] E.g., the *Dyson* and *Prescott Cases, supra* n. 11.
[79] E.g., *Hall & Co.* v. *Shoreham-by-Sea U.D.C., supra* n. 11; *Mixnam Properties Ltd.* v. *Chertsey U.D.C.* (1965) A.C. 735; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* (1948) 1 K.B. 223.
[80] See the quotations at the commencement of this article, citations being given in nn. 2-5 inclusive.

it has been suggested, can he get a declaration to challenge a decision which simply fails to *confer* on him rights which he otherwise did not have.

These problems may have some substance, though doubts have been expressed about most of them. But they have arisen and they may arise again. And (*contra* Lord Denning) the applicant may well have no choice but to fall back on certiorari. At best, he should at least be aware of the pitfalls which certain judges have thought to exist, before relying on a declaration as the procedure for challenging a tribunal decision.

Australian Law and the Toowoomba Bogey

In Australia even less use has been made than in England of the declaratory judgment for the purpose of challenging tribunal decisions.

One significant reason is the 1945 decision in *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth*[81] in which members of the High Court expressed views which raised serious doubts about the availability of the declaration to challenge tribunal decisions.

The Company applied for declarations as to the invalidity both of a decision of the war-time Women's Employment Board and of the regulations under which the decision was made. The High Court held that the regulations and the decision were valid.

But Latham, C.J., with whose reasons McTiernan, J. agreed, stated quite explicitly that the decision of an independent tribunal acting under statutory authority cannot be challenged in an action claiming only a declaration that the decision is invalid.[82] *Cooper* v. *Wilson*[83] was distinguished on the basis that "the challenge to the decision was plainly incidental to the establishment of the plaintiff's right for the money alleged to be due". *Andrews* v. *Mitchell*,[84] relied on in *Cooper v. Wilson*, was similarly disposed of.[85] It was conceded that the authorities had established that an action would lie for a declaration that *legislation* was invalid at the suit of a person who was, or probably would be, affected by such legislation.[86] But there was no authority for challenge to the validity of *decisions of a tribunal* in an action for a declaration only.[87] The Chief Justice pointed out that other proceedings were available to the applicant, for instance prohibition or defence to a prosecution under the challenged decision.[88]

In the case before him there was "no actual or threatened infringement of any right of the plaintiff" and so "the plaintiff has no cause of action in respect of the decision of the Board".[89] It was, however, conceded that if the Attorney-General had, in exercise of his power under the regulations, made a claim against the applicant, the Court *might* have granted a declaration, but against the Attorney-General, not the Commonwealth.[90]

Rich, J. did not discuss the issue. Dixon, J. (as he then was) said little more than: "I doubt if a suit against the Commonwealth for a declaration of

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[81] *Supra* n. 73.
[82] *Id.* 569-72.
[83] *Supra* n. 48.
[84] (1905) A.C. 78.
[85] (1945) 71 C.L.R. at 571.
[86] *Id.* 570.
[87] *Id.* 571.
[88] *Id.* 569-70.
[89] *Id.* 571.
[90] *Id.* 571-72. This point about the appropriate defendant in such a case is similar to the point raised by Diplock, L.J. in the *Anisminic Case, supra* n. 14 at 412-13.

rights is an appropriate proceeding for ascertaining the operation of an industrial decision of the character of that now in question".[91]

> The views of Williams, J. on the matter were even more clearly restrictive: . . . a decision of the Board is of an executive quasi-judicial character. A body exercising such functions, which acts in excess of its legal authority, is subject to the controlling jurisdiction of a superior court exercised by the prerogative writs of certiorari or prohibition: *R.* v. *Electricity Commissioners*.[92] But the issue of these writs is discretionary, and a subject is not entitled in an action instituted as of right to obtain a declaration which would have the same effect. I can see no distinction in principle between the question whether an action for a declaration can be substituted for the relief which can be obtained by the issue of these writs and whether such an action can be substituted for any other prerogative writ, and it has been held that a declaratory judgment cannot be given where the only proper remedy open to the plaintiff is an application for a writ of mandamus (*Baxter* v. *London County Council*)[93] or for an information in the nature of a *quo warranto* (*Everett* v. *Griffiths*).[94]

Williams, J. went on[95] to support Latham, C.J.'s attempt to distinguish *Cooper* v. *Wilson*. However he considered that, just as the alleged invalidity of the decision could have been raised as a defence to an action by the Attorney-General for moneys payable under the decision, so "an employer could take the initiative and sue the Commonwealth for a declaration that the decision is void".[96]

The *Toowoomba Foundry Case* has caused difficulties. It has been read as authority for the proposition that a declaration will not be available to challenge the decisions of a statutory tribunal, that is, that it will not be available in circumstances where certiorari or prohibition could be used. Williams, J. certainly seems to be explicit on this point, although his later concession seems inconsistent with this view. The tone of some of the utterances is distinctly conservative.

But what was said on the matter was *obiter*, anyway, and is also ambiguous. It has been suggested that the essential point being made was that the Commonwealth was the wrong defendant in such proceedings.[97] Latham, C.J. (with whom McTiernan, J. agreed) seems to make this point,[98] and it might also explain Dixon, J.'s brief comment:[99] though Williams, J. states that the Commonwealth might well be the defendant.[100]

An alternative interpretation would be that what the judges were really saying is simply that events must have reached a stage at which the person seeking a declaration *would* have a cause of action, or *would* be in a position to raise the alleged invalidity of the tribunal's decision as a defence in any proceedings brought against him; in other words, that the action is not

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[91] (1945) 71 C.L.R. at 575.
[92] (1924) 1 K.B. 171 at 204-7.
[93] (1890) 63 L.T. 767.
[94] (1924) 1 K.B. 941. Zamir, *supra* n. 6 (1958) at 342-43, convincingly argues that the two cases last mentioned cannot now be taken as good law.
[95] (1945) 71 C.L.R. at 583-84.
[96] *Id.* 584-85.
[97] Brett and Hogg, *op. cit. supra* n. 6 at 173.
[98] (1945) 71 C.L.R. at 570, 572.
[99] *Supra* n. 91.
[100] See *supra* at n. 96.

premature, that there is a matter in dispute and *locus standi* in the applicant; and that these requirements might be stricter when the challenge is made to tribunal decisions rather than to legislation. In the case, no attempt had been made to enforce the decision against the plaintiff company.[101]

At any rate, the *Toowoomba Case* ante-dates such important English decisions as *Barnard* v. *National Dock Labour Board*, the *Pyx Granite Case*, *Ridge* v. *Baldwin* and others which clearly recognize a role for the declaration in challenging tribunal decisions.[102]

It is submitted that the *Toowoomba Case* has too long cast doubt on this use of the declaratory judgment in Australian law, and that it is highly probable that the reservations expressed in the judgments would not now be adhered to or, at least, would be confined within a fairly narrow compass.

The New South Wales Anomaly

Another and separate impediment to the use of the declaration generally as an administrative law remedy in Australia appears now to have been removed. This was the continued and imperfectly bridged separation of law and equity in the most populous and litigious state, New South Wales.

The effect of the New South Wales legislation up until the end of 1965, as interpreted by the courts in such cases as *Tooth & Co. Ltd.* v. *Coombes*,[103] *David Jones Ltd.* v. *Leventhal*[104] and *Hume* v. *Monro (No. 2)*[105] was that it was not possible to obtain a declaration as to common law rights unless the applicant could also make out a case for equitable relief. This seriously impeded development of the declaration as an administrative law remedy.

The Law Reform (Miscellaneous Provisions) Act, (N.S.W.) 1965, s.15, appears to have overcome this problem by inserting a new s.10 in the Equity Act, (N.S.W.) 1902-1965.[106]

Subsection (2) of the new s.10 specifies, "without limiting the generality of the jurisdiction conferred by" the new formula in subsection (1), the types of matters as to which declarations may be given, namely, interests, powers, rights, liabilities and duties (a) in or in respect of any real or personal property, and (b) arising under partnerships and various other types of legal documents specified in sub-paragraphs (i) to (vi), or under (vii)—

> any Act or any ordinance, rule, regulation or other instrument having effect under any Act or by reason of any executive, ministerial or administrative act done or purporting to be done in pursuance of any Act or of any such ordinance, rule, regulation or other instrument.

The omission of any reference to judicial or quasi-judicial acts may or may not be significant.

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[101] A similar approach can be seen in the majority judgments in *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (1954) 90 C.L.R. 24. That case was a challenge to the validity of legislation only, not of any adjudication. See generally de Smith, *op. cit. supra* n. 6 at 522-25.

[102] In *Mutual Life and Citizens' Assurance Co. Ltd.* v. *A.-G. (Qld.)* (1961) 106 C.L.R. 48, the High Court itself endorsed use of the declaration in respect of proceedings before the Queensland Industrial Court on a point of jurisdiction. And see *Patton* v. *A.-G. (Vic.)* (1947) V.L.R. 257; *Mudge* v. *A.-G. (Vic.)* (1960) V.R. 54; *S.S. Constructions Pty. Ltd.* v. *Ventura Motors Pty. Ltd.* (1964) V.R. 229.

[103] (1925) 42 W.N. (N.S.W.) 93.

[104] (1927) 40 C.L.R. 357.

[105] (1943) 67 C.L.R. 461.

[106] See A. T. Scotford, "Declaratory Judgments in New South Wales" (1967) 5 *Sydney L.R.* 454, and cases there cited.

At any rate, it is reasonable to assume at this time that neither in Australian law in general, nor in New South Wales law in particular, is there any significant reason to believe that the declaration has any less scope than its counterpart in English law.[107]

But this brings us back to the position where, despite high-level endorsement of the declaration by English judges, and despite certain clear and obvious advantages which it offers as a public law remedy, sufficient shadows still cluster around its use in challenging tribunal decisions to justify caution before the lawyer selects it as his sole remedy in this area.

IV CERTIORARI RESURGENT

Until very recently, however, the possible alternatives (in the absence of any statutory appeal provision) were even more clearly circumscribed.

Certiorari and prohibition, in particular, were still chained to the famous statement of Lord Atkin in *R.* v. *Electricity Commissioners*:

> Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.[108]

This was read as exhaustive of the scope of prohibition and certiorari (though it was conceded that they were also available on grounds other than excess of jurisdiction, namely error of law on the face of the record and denial of natural justice).

As a result, it was accepted that the writs would issue only in respect of a body of persons whose authority was legal in the sense of *statutory;* whose authority was to determine questions, not simply to investigate or advise or recommend; whose authority was only to determine questions affecting *rights,* not licences or lesser interests; and who were under a *duty to act judicially* as a result of a clear indication in the legislation that the power should be exercised in a "judicial" manner — such indication could seldom simply be implied from the nature of the power itself but must be found "superadded" to it.[109]

Fortunately, in the space of the past few years these somewhat technical limitations on the utility of certiorari appear to be fast falling away.

The requirement of a "super-added" duty to act judicially has been disclosed as heresy in *Ridge* v. *Baldwin* as far as English courts are concerned, and discarded, as far as Australian courts are concerned, by the Privy Council decision in *Durayappah* v. *Fernando*. As a result it now seems certain that, once again, the courts will proceed on a presumption that certain types of power (as indicated in *Durayappah's Case*) must be exercised judicially (that

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[107] See *id.* 464, 470-71, suggesting that under the new N.S.W. law the declaration may conceivably have even wider scope than it has in England.

[108] *Supra* n. 92 at 205.

[109] This last point was made (*obiter* and alone) by Hewart, L.J. in *R.* v. *Legislative Committee of the Church Assembly; Ex p. Haynes Smith* (1928) 1 K.B. 411. The subsequent history of the limitation was ably traced by Lord Reid in *Ridge* v. *Baldwin, supra* n. 7 at 74-79. See generally discussion and cases cited in Benjafield and Whitmore, *op. cit. supra* n. 6 at 201-7. A recent illustration of this approach can be seen in *B.P. Australia Ltd.* v. *Gold Coast City Council* (1967) Qd. R. 307, a decision of the Queensland Full Supreme Court (Hanger and Wanstall, JJ., Skerman, J. dissenting). See also *R.* v. *Governor of Metropolitan Gaol; Ex p. Tripodi* (1962) V.R. 180.

is, in accordance with the rules of natural justice) and, thus, *prima facie* come within the scope of certiorari, unless Parliament has shown a clear intention to the contrary.[110]

The requirement of a statutory source of authority before certiorari may lie has now been discarded by the Queen's Bench Divisional Court in *R. v. Criminal Injuries Compensation Board; Ex Parte Lain.*[111] The Board had been set up, not by statute, but under prerogative executive powers in accordance with a government White Paper, the only statutory element in the scheme being a grant-in-aid to cover moneys which the Board might award as compensation to victims of criminal violence. Certiorari was sought in *Lain's Case* to quash a decision that the applicant was not entitled to certain sums by way of compensation, the ground of the challenge being an alleged error of law within jurisdiction. The Queen's Bench Divisional Court[112] held that there had been no such error. But the judges also asserted that they had jurisdiction to consider the case, that certiorari would lie to tribunals established other than by statute, just as it had always lain against inferior courts, irrespective of whether their authority was derived from statute or prerogative power. The essential element was rather that the body be of a public as distinct from a private or domestic character.[113]

The same case also opened up the Atkin formula in other aspects; notably because of the argument advanced by the Board that its power was not a power to *determine* questions affecting *rights* but only to give an applicant an opportunity to receive "the bounty of the Crown". The Court rejected this contention by declaring that Lord Atkin's statement should not be read as exhaustive of the scope of certiorari and that the writ would lie in respect of an exercise of power which did not by itself affect legally enforceable rights. *R. v. Manchester Legal Aid Committee; Ex Parte Brand*[114] was referred to as authority.[115]

According to the majority view, then, certiorari should be freed from any attachment to "rights" in the narrow sense (just as it is being asserted that the declaration may only be available to protect such "rights"). Lord Parker, C.J. and Ashworth, J. were prepared to discard any reference to "rights" altogether. The Lord Chief Justice's restatement of the Atkin formula was that "the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially."[116] Ashworth, J.'s view was similar.[117] Diplock, L.J. was not prepared to abandon all reference to "rights" in his consideration of the issue, but found sufficient involvement of rights for the purpose of certiorari in the mere fact that a decision of the Board would render "lawful and irrecoverable a payment to a subject which would otherwise be unlawful and recoverable".[118] This is in marked contrast to the same judge's insistence,

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[110] See Nettheim, *supra* n. 54; *id.* Note (1967) 41 *A.L.J.* 128; and the *Warringah Shire Council Case, supra* n. 1.

[111] *Supra* n. 8.

[112] Lord Parker, C.J., Diplock, L.J. and Ashworth, J.

[113] (1967) 2 Q.B. at 880-81 (*per* Lord Parker, C.J.), 884, 886-87 (*per* Diplock, L.J.), 891-92 (*per* Ashworth, J.).

[114] *Supra* n. 53.

[115] (1967) 2 Q.B. at 881-82 (*per* Lord Parker, C.J.), 885-89 (*per* Diplock, L.J.), 892 (*per* Ashworth, J.).

[116] *Id.* 882.

[117] *Id.* 892.

[118] *Id.* 889.

in *Anisminic Ltd.* v. *Foreign Compensation Commission*,[119] that a declaration would not be available in such a situation.

More recently still, the High Court of Australia, in *Banks* v. *Transport Regulation Board*,[120] has held that a tribunal decision is not outside the scope of certiorari simply because it affects a licence rather than a right, thus distinguishing *Nakkuda Ali* v. *Jayaratne*[121] in which the Privy Council had suggested the contrary. In addition, the High Court held that certiorari would lie to quash the Board's *ultra vires* revocation of a cab-driver's licence, notwithstanding the fact that the Board's order required (and had received) the approval of the Governor in Council.

The legacy of *Ridge* v. *Baldwin* and *Durayappah* v. *Fernando*, in exorcising Lord Hewart's "superadded" duty to act judicially from the Atkin formula, cannot be ignored. The long-term impact of *Lain's Case* in re-opening that formula is less easy to judge at this time, but in *Banks' Case* the High Court has interpreted it liberally. There is now no doubt that the purely technical limitations with which certiorari has been hedged about, and which led Lord Denning and others to espouse the advantages of the declaration so enthusiastically, have virtually evaporated.

Conclusion

Certiorari, then, appears certain not to fade away but to remain important as a procedure for challenging actions of a judicial or quasi-judicial character. *Ridge* v. *Baldwin* and *Durayappah* v. *Fernando*, by expanding the concept of action which is subject to "a duty to act judicially", will bring a much greater range of governmental acts within its scope.

The declaration has an important part to play, especially outside "certiorari territory", as a means of reviewing legislative or administrative action, and the actions of domestic bodies. But it can also be used to review tribunal decisions and its very independence from any classification of powers (even the "duty to act judicially" as re-defined) is itself an advantage. In addition, it possesses other features by way of procedural simplicity and flexibility which may give it ultimate primacy. But the problems that may beset it in certiorari territory — the void-voidable issue, stricter *locus standi* requirements, and the question of "rights"—should be noted, if only for the purpose of urging judicial correction or legislative elimination.

If certiorari does prove to have recovered its ancient vigour and scope, there will, naturally, be less need for the declaration to fill any gap, though it is valuable to have a choice of remedies in this sphere.

COMMENT

From a broader point of view, however, it is surely unacceptable that the scope of judicial procedures so important to the citizen should still be subject to such differing interpretations from one time — or from one judge — to another. The scope of certiorari and the declaratory judgment (as well as of other non-appellate review procedures) should be clarified, and clarified on liberal lines. Most of the restrictive rules that have been deployed in this

[119] *Supra* n. 14 at 412-13.
[120] (1968) 42 A.L.J.R. 64.
[121] (1951) A.C. 66.

area serve no purpose whatsoever other than, in many cases, to perpetuate injustice. Neither history nor utility justify them. They further complicate an area of technical "lore" which can offer nothing more than intellectual satisfaction of a barren type to those few who learn to thread their way through the maze.[122] The arbitrary rules governing the movements of chess pieces at least have some overall purpose and coherence, and do not involve the rights and interests of human beings.

Why cannot the procedure for obtaining the prerogative writs be made more simple and flexible? Why should certiorari and prohibition be confined to actions by "public" as distinct from "domestic" bodies?[123] Why should we perpetuate the dependence of judicial review (in different ways, for different remedies) on "rights" being affected? Why should certiorari territory still be delimited by a "duty to act judicially", "superadded" or not? What harm would be caused by conceding *locus standi*, for all purposes, to any "aggrieved" or "affected" person, whether party or not, subject only to the court's discretion whether to allow the remedy sought? Why should mandamus not go against the Crown? And why should we have to play with the "void-voidable" distinction at all?

Some improvement is evident in recent English case law. But judicial progress is evolutionary, and evolution is necessarily slow. Judges are still tangling with the same problems that gave their predecessors difficulty three centuries ago. To rely on the survival of the fittest and the decline and fall of the unadaptable among different forms of action might seem to accord with the laws of nature. But the laws of man require rational justice for man, not in the next millennium, but now.

Legislation is needed, preceded by full inquiry involving not only lawyers but administrators as well (though not in a dominant position!). The first concern should be to establish the proper *scope* of judicial review consonant with the preservation of necessary administrative discretion, and consonant also with such other forms of review (administrative, political) as may be appropriate. It will, of course, be difficult to draw clear boundaries,[124] and to *define* such boundaries in terms that will receive constant and satisfactory interpretation in the courts. But nothing could be more difficult than the current concepts of "jurisdiction", "questions of law" and so on which are currently employed variably in various contexts. Those aspects of administrative action which are not appropriate for judicial review ("merits", "discretion" and the like) should be made clearly subject to administrative review, perhaps through an appellate administrative tribunal.

The second concern should be to rationalise review *procedure*, to provide by statute for appeal where appropriate, and in addition, to merge what is of value in the prerogative and equitable remedies into one or two simple procedures of broad scope. English law needs something much more far-reaching than the Franks Committee. Australian administrative law has

[122] A work on a scale like de Smith's *Judicial Review of Administrative Action* should simply not be necessary. Nor should articles such as this.

[123] In *Groenvelt* v. *Burwell* (1700) Ld. Raym. 454, certiorari was said (by Holt, C.J.) to lie at least against those private bodies whose powers have a public aspect. A similar public feature in the actions of a domestic body explains the recent English Court of Appeal decision (on *locus standi* for injunction and declaration) in *Nagle* v. *Feilden* (1966) 1 All E.R. 689.

[124] See, e.g., the discussion by C. P. Harvey, A. B. K. Brohi, and others in R. A. Woodman (ed.), *Record of the Third Commonwealth and Empire Law Conference* (1966) 107-165.

hitherto lacked even a Franks Committee,[125] let alone a Lord Denning.

In the meantime it is gratifying to note the recent successes of English judges in reclaiming abandoned territory. The recent *Banks' Case* suggests that Australian judges may be no less bold. It is to be hoped that they will be given more help (and less hindrance) than they have had in the past from Australian governments in the vital task of keeping administrative action within legal bounds.

POSTSCRIPT

Since the above article was submitted for publication there have been several developments of relevance to its themes.

The St. Leonards Case

One is the important and carefully considered judgment delivered on 23rd December, 1968, by Crisp, J. of the Tasmanian Supreme Court in *The Warden Councillors and Electors of the Municipality of St. Leonards* v. *Brettingham-Moore*.[126] Several municipalities sought declarations that the Municipal Commission's reports as to local government reorganization were void and of no effect, on various grounds. Crisp, J. held for the plaintiffs in interlocutory proceedings in lieu of demurrer. His judgment touches on many aspects of judicial review but, *inter alia,* he treated the *Toowoomba Case*[127] as authority only for the proposition that a declaration will not be available in respect of a tribunal decision where there is no actual or threatened infringement of the plaintiff's rights. And he considered that Lord Diplock's views on the use of the declaration, expressed in the *Anisminic Case,* were narrower than the cases would justify.

Anisminic in the Lords

The second, and a major development, is the decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*.[128] Lord Reid, Lord Pearce and Lord Wilberforce held, reversing the Court of Appeal, that the alleged defect in the Commission's determination did make it a nullity, so that the "no-certiorari" clause was ineffective to preclude judicial review. Lord Pearson agreed with them in principle and dissented only in taking the view that the Commission had made no error. Lord Morris, also dissenting, agreed substantially with Lord Diplock in the Court of Appeal. Of the majority, Lord Pearce and Lord Wilberforce applied the concept of "jurisdiction" in a sense broad enough to include misconstruction of legislation causing the tribunal to take wrong considerations into account. By contrast, Lord Reid applied the concept of "jurisdiction" in a narrow sense, along similar lines to Lord Diplock and D. M. Gordon, but went on to assert that an error did not have to be jurisdictional in this sense to make a decision a nullity: certain types of error made in the course of proceedings validly undertaken might also produce this effect. On either approach, the range of errors capable of making a decision a nullity is greatly extended so as to leave little need for an

[125] Though something of value may well emerge from the investigation of these matters by the N.S.W. Law Reform Commission and similar bodies in other jurisdictions.
[126] As yet unreported.
[127] *Supra* n. 73.
[128] [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208.

independent review doctrine of non-jurisdictional errors of law on the face of the record. The declaration would thus be available to challenge most of the errors likely to be committed in adjudicative proceedings on the basis that the decision is a nullity, by-passing the complexities of the case law noted under Problem (1)(b).

Similarly the *Anisminic* judgment is relevant on Problem (1)(c). Lord Reid, Lord Pearce and Lord Wilberforce were definite that breach of the rules of natural justice would make a decision a nullity. (Lord Pearson simply agreed generally with the principles expressed by them.) Lord Morris also seems to share this view, which is particularly significant in that it was the ambiguity of his "casting vote" on the same issue in *Ridge* v. *Baldwin* which led the Privy Council in *Durayappah* v. *Fernando* to treat him as making a majority in *Ridge's Case* for the proposition that denial of natural justice makes a decision voidable only. So, although the views on the matter in the *Anisminic Case* are *obiter* only, the fresh light cast on *Ridge* v. *Baldwin* helps to undermine much of the basis for the Privy Council decision on this point in *Durayappah* v. *Feranando*.

If the *Anisminic Case* is followed as establishing review doctrine along these lines, then the conceptual difficulties in the way of using the declaration to review tribunal decisions may be virtually eliminated. The possible impediments discussed as Problems (2) and (3) may, however, still have to be resolved.

The Law Commission Report

The third development to be noted may ultimately be the most important, particularly in view of the Comment which concludes the article. The English Law Commission in May, 1969, published a report on Administrative Law[129] in which it recommended that a wide-ranging inquiry be conducted by a Royal Commission or by some other body consisting not exclusively of lawyers. It noted that recent judicial decisions "have brought about notable developments and clarifications of this branch of the law", but added that there remains a need "to consider to what extent the courts would be assisted by a legislative framework of principles more systematic and comprehensive than has so far been evolved by case law. Furthermore, there are procedural and institutional aspects of administrative law calling for consideration which may require changes beyond the scope of legal development by the courts". Among the questions suggested for inquiry are: "(A) How far are changes desirable with regard to the form and procedures of existing judicial remedies for the control of administrative acts and omissions?"; "(B) How far should any such changes be accompanied by changes in the scope of those remedies . . .?"; and "(E) How far should changes be made in the organization and personnel of the courts in which proceedings may be brought against the administration?" (On this last question it is of interest to note the First Report of the Public and Administrative Law Reform Committee of New Zealand and the consequent Judicature Amendment Act, 1968).

For all their valiant efforts, it looks as though the courts need outside help to escape the technical legacies of the past, to consign the forms of action finally to their graves, and to achieve and apply "a developed system of administrative law" which, if it has not been needed in the past, is needed critically today.

[129] *Cmnd.* 4059.