The Law Commission

Working Paper No 40
Remedies in Administrative Law
11 October 1971

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REMEDIES IN ADMINISTRATIVE LAW

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REMEDIES IN ADMINISTRATIVE LAW

I. INTRODUCTION

1. In May 1969 we made a Submission to the Lord Chancellor,[1] under section 3(1)(e) of the Law Commissions' Act 1965, recommending that a broad inquiry be made into administrative law by a Royal Commission or a committee of comparable status.[2] The Lord Chancellor decided that the time was not ripe for such a full-scale inquiry. Instead, he requested us, under the same section, to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure.[3] This limited investigation, the subject of this Working Paper, is without prejudice to any future decision as to whether the more fundamental, wider inquiry envisaged in our Submission should be held.

2. Preparatory to our Submission we had circulated an Exploratory Working Paper[4] briefly setting out what appeared to us to be the main lines of criticism of English administrative law. Among these was the view that the judicial remedies for the control of administrative action are in urgent need of reform. So we asked the question:

> "(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?"

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1. Law Com. No. 20.
2. ibid., para. 10.
3. H.L. Debs., Vol.306, cols. 189-190, 4 December 1969.
4. Law Commission Published Working Paper No. 13, also published as Appendix A to Law Com. No. 20.

The virtually unanimous response of those who commented on our Paper was that such changes are very desirable. In this Paper, we propose, first, to set out the existing law with regard to the remedies for the control of the administration, secondly to summarise its defects and, thirdly, to suggest how the form and procedure of judicial control might be improved.

3. We must, however, point out at the start of this Paper that we are here only concerned with the form and procedure of remedies for the judicial control of administrative action. We are not concerned with the problems posed in Question (B) of our Exploratory Working Paper:

> "How far should any such changes [with regard to procedures of existing remedies] be accompanied by changes in the scope of those remedies
>
> (i) to cover administrative acts and omissions which are not at present subject to judicial control, and
>
> (ii) to render judicial control more effective, e.g., with regard to the factual basis of an administrative decision?"

Many commentators on the Exploratory Working Paper thought that the consideration of Question (A)[5] really involved consideration of Question (B) as well; we have expressed agreement with this view.[6] Nevertheless, our terms of reference require us, where possible, to draw a distinction between reform of the form and procedure of remedies, and reform of their scope.

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5. See para. 2 above.

6. Law Com. No. 20, para. 9.

4. We have not found this an easy task, and when in doubt on a particular topic we have included rather than excluded it from the Paper. Our general approach has been to treat all those rules which restrict the scope of any particular remedy compared with other remedies as rules relating to form and procedure. Thus, to take one example, which will be discussed at length later,[7] it seems probable that in some circumstances an applicant will be refused a declaration for lack of standing to sue when he could have obtained certiorari. Because the requirement of standing, or locus standi as it is usually called, will bar an aggrieved citizen from obtaining one remedy, but not necessarily another one, it seems to us that these requirements are an aspect of the law relating to the form and procedure of remedies. The scope of remedies, on the other hand, is a problem which arises, for example, when administrative action is not controllable in the courts by any remedy at all; with this aspect of administrative law we are not concerned.

5. In this Paper, therefore, we do not make proposals on the question whether review by the High Court should be extended to cover latent errors of law not going to the jurisdiction of the tribunal; the present restriction to errors on the face of the record is one applicable to all remedies. This distinction seems to be supported by the wording of Question (B) (i), cited in paragraph 3 above; this clearly contemplates that any extension of the remedies affecting administrative action into areas which at present are wholly immune from judicial review falls outside Question (A). Neither can we be concerned in this Paper with questions relating to the depth of the inquiry which can be undertaken under any of the existing remedies, e.g., whether the courts should be entitled to consider the lack of substantial as opposed to a total lack of evidence for a particular finding. This was an issue which

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7. See paras. 57-58 below.

was specifically referred to in Question (B) (ii) cited in paragraph 3 above. For similar reasons we doubt if our terms of reference strictly cover the question whether damages should be awarded for administrative acts or omissions which, although wrongful, do not fall within the category of wrongs remediable by an award of damages against a private person and where there is no right to an award of damages for a breach of statutory duty. This latter problem was separately dealt with in Question (C) of our Exploratory Working Paper. But in the last section of this Paper we refer to this problem if only because it may be thought that it is not really satisfactory to attempt to reform the judicial remedies without considering it.

6. Finally, we do not think that we can be concerned in this Working Paper with the question whether the courts in which issues of administrative law are decided should be reorganised or new courts instituted. This matter was dealt with in Question (E) of our Exploratory Working Paper.[8] Thus, in this Working Paper we have not made proposals for any fundamental changes in the constitution of the courts which are to hear applications for the new remedy we are proposing. We refer to this question later.[9] Nor in these circumstances have we considered whether the existing procedure for the control of administrative acts and orders should be replaced or supplemented by a full investigatory procedure, according to which a Registrar of the Court might make an investigation of the plaintiff's case or even come to a preliminary finding on it. For this reason our proposals are not as radical as those of the Society of Conservative Lawyers[10] or of "Justice".[11] In the latter's Report it was recommended that

8. See para. 136 below.

9. See paras. 136-138 below.

10. Conservatives Think and Care for You, (1970), Pt. 1.

11. Administration under Law, (1971), paras. 82-6.

that a Registrar with staff should be attached to a new Administrative Division of the High Court to determine on his own investigation whether the plaintiff had a prima facie right of action. The Conservative Lawyers' proposals were more radical; they recommended that the Registrar could not only investigate the plaintiff's case but also order the particular administrative authority to give him redress. Under their recommendations the case would only go before the Court if the Registrar failed to secure adequate redress on appeal from his decision, or if he thought the case more suitable for the normal adversary procedure. Although we have not felt able to consider these possibilities, we have at least raised the question whether the court hearing the application for judicial review might not have limited investigatory powers.[12]

7. In preparing this Paper we have had the great advantage of discussing the problems which it raises with a Consultative Panel the membership of which is set out in Appendix "A". We would wish to record our deep appreciation of the assistance which they have given us.

8. We should emphasise that the proposals set out in Part IV of this Paper represent only our tentative views. We would welcome comment or criticism directed either to their principles or application as well as alternative suggestions for dealing with the problems with which this Paper is concerned.

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12. See para. 103 below.

II. THE PRESENT LAW

1. THE PREROGATIVE ORDERS

(a) Certiorari and Prohibition[13]

The Scope of Certiorari and Prohibition today

9. Certiorari will lie to quash a decision that has already been made. It is available where an inferior court or administrative tribunal or authority has acted in excess or abuse of jurisdiction or contrary to the rules of natural justice. It will also lie where there is error of law on the face of the record. Prohibition lies to prevent such bodies from acting or continuing to act in excess or abuse of jurisdiction or contrary to the rules of natural justice. The classic statement of the modern scope of these orders is to be found in Atkin L.J.'s judgment in R. v. Electricity Commissioners, ex p. London Electricity Joint Committee Company Ltd. He said:

> "...the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. 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."[14]

It has now been decided that it is not necessary that an administrative decision affect the enforceable rights of an individual for it to be open to challenge by

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13. The procedural and other rules relating to these two orders are so similar that they may most conveniently be discussed together. Their history is described in de Smith, Judicial Review of Administrative Action, 2nd ed., 1968, Ch. 8.

14. [1924] 1 K.B. 171, 205, C.A.

certiorari.[15]

10. Certiorari and prohibition will not lie to control the jurisdiction of non-statutory private or domestic tribunals. Control over them would not be compatible with the essentially public nature of the prerogative orders.[16] It is also clear that these orders will not be granted where delegated legislation is challenged; it will be seen later that the scope of the action for a declaration is not limited in these respects.[17] Doubts whether certiorari was an appropriate remedy to challenge administrative decisions reached after taking into account illegitimate considerations[18] now seem to be resolved in favour of allowing the prerogative orders to issue.

"The duty to act judicially"

11. In several cases decided in the 1950's the requirement laid down in Atkin L.J.'s famous dictum of "a duty to act judicially" was interpreted strictly; it was said that the applicant for certiorari or prohibition had to show something more than a duty on the part of the

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15. R. v. Criminal Injuries Compensation Board, ex p. Lain [1967] 2 Q.B. 864, D.C.; cp. Jayawardane v. Silva [1970] 1 W.L.R. 1365, where the Privy Council held that certiorari did not lie to challenge the decisions of the Collector of Customs in Ceylon, because his decision (whether an offence had been committed and whether to impose a forfeiture or penalty) was only preliminary and became enforceable only when and if the Attorney General instituted criminal proceedings.

16. cp. R. v. Aston University Senate, ex p. Roffey [1969] 2 Q.B. 538, where the Divisional Court were prepared to grant certiorari in respect of a chartered university. The point in the text was not argued or taken.

17. See para. 50 below.

18. See Baldwin & Francis Ltd. v. Patents Appeal Tribunal [1959] A.C. 633, 694-5.

administrator or administrative body to decide questions affecting him.[19] The line of authority restricting the scope of the prerogative orders was considerably weakened by the decision of the House of Lords in Ridge v. Baldwin.[20] Lord Reid made it clear that it was unnecessary to show any superadded element of "a duty to act judicially"; it was to be inferred from the nature of the administrator's power and the nature of the rights of the subject which might be affected by that power. Sometimes, however, the courts still seem to insist on the presence of some judicial flavour if certiorari is to be granted.[21] On the other hand, in some recent cases the courts have indicated that the requirement of "a duty to act judicially" has gone.[22]

12. Thus the position remains confused. As one commentator has put it, "the judicial element may sometimes be as intangible as the grin of the Cheshire cat; but ... attempts to expunge it are apt to be as unrewarding as the arrangments for decapitation in Wonderland".[23]

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19. e.g., Nakkuda Ali v. Jayaratne [1951] A.C. 66, P.C.; R. v. Metropolitan Police Commissioner, ex p. Parker [1953] 1 W.L.R. 1150, D.C. In these and other cases where certiorari was refused on this ground, the administrative authority's decision was challenged for breach of the rules of natural justice. It may be that if ordinary excess or jurisdiction had been involved, the court would have come to a different result and granted certiorari. Indeed it is rarely clear whether the court has refused relief because (i) the rules relating to natural justice are not applicable, or (ii) the prerogative orders will not lie in the circumstances.

20. [1964] A.C. 40.

21. See, in particular, Vidyodaya University Council v. Silva [1965] 1 W.L.R. 77, P.C.; R. v. Criminal Injuries Compensation Board [1967] 2 Q.B. 864, 882 (Lord Parker C.J.) and p. 890 (Ashworth J.); Durayappah v. Fernando [1967] 2 A.C. 337, P.C.; Jayawardane v. Silva [1970] 1 W.L.R. 1365, P.C.

22. See Schmidt v. Secretary of State for Home Affairs [1969] 2 Ch. 149, 170, C.A. (Lord Denning M.R.); R. v. Gaming Board for Great Britain, ex p. Benaim and Khaida [1970] 2 Q.B. 417, 430, C.A.

23. de Smith, op. cit. (n. 13 above) p. 405.

Practice and Procedure

13. The procedure for applying for the prerogative orders is governed by Order 53 of the Rules of the Supreme Court. There are two stages. First, the applicant must apply ex parte for leave to apply for the order. This ex parte application must be accompanied by a statement of the grounds on which relief is sought supported by verifying affidavits. It must be made to a Divisional Court of the Queen's Bench Division, except in vacation when it may be made to a single judge in chambers. If leave to apply for the order is granted, then it may, if the court or judge so directs, operate as a stay of the proceedings in question (i.e. a temporary suspension of the effect of the decision challenged or a temporary prohibition on the making of a decision) until final determination of the issue; this is in effect a form of interim relief.

14. The application for the order itself must be made by originating motion to the Divisional Court, except in vacation when it may be made by originating summons to a single judge in chambers. The notice of motion or summons must be served on all persons directly affected; this must be recorded in an affidavit which must be filed before the motion or summons is entered for hearing and which, if necessary, must state the reason why service has not been effected on persons directly affected. Copies of the statements in support of the application for leave must be served with this notice of motion or summons; copies of the affidavits must be supplied on demand and payment of the proper charges. Generally no grounds can be relied on or relief sought at the hearing of the motion or summons except those contained in the statement, but the statement may be amended at the discretion of the court hearing the application. Moreover, further affidavits may be used to deal with new matter arising from the other party's affidavits as long as the party putting in the further affidavits gives notice of his intention to do this. Order 53, rule 5 provides that on the hearing of the application any person

who wishes to be heard in opposition and appears to the court to be a proper person to be heard shall be heard although he has not been served with notice of the motion or summons.

15. The effect of this two-stage procedure - first, the application for leave to apply and secondly, the application for the order itself - is to eliminate frivolous or obviously untenable claims at an early stage. In this way, the application for leave to apply serves the same object as Order 18, rule 19, which enables the court in an ordinary civil action to strike out any pleading or indorsement of a writ on the ground that it discloses no reasonable cause of action. The difference is that in ordinary civil actions it is for the defendant to show that the action is frivolous or discloses no reasonable cause of action, while it is the applicant for the prerogative orders who has to show that he has a prima facie claim for judicial review. That the two-stage procedure has the effect of removing a large number of such claims is shown by the fact that in the five years, 1965-69, over 20% of applications for leave to apply for certiorari were refused.[24] Moreover, the two-stage procedure itself may deter the making of frivolous applications for leave. It can, therefore, be argued that the two-stage procedure has much to commend it in that the person or body whose decision is challenged frivolously is not put to the expense and trouble of contesting the application for leave which is ex parte.

16. There is no proper interlocutory process, and hence no provision for the discovery of documents.[25] This is not

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24. 54 out of 248 applications for certiorari have been rejected at the first stage over this period, 1965-69. For the same period 21 out of 38 applications for prohibition were refused, and 57 out of 171 applications for mandamus. See the Civil Judicial Statistics for those years.

25. See Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, 43, C.A. (Denning L.J.).

the case, as we shall see,[26] in the action for declaratory relief. Further, although by Order 38, rule 2(3) the court has power to order cross-examination of the deponents of affidavits, in practice it permits cross-examination only in very exceptional circumstances.[27]

17. Order 53 does not admit of any discretion to refuse to quash immediately on the ground that the grant of certiorari would lead to administrative chaos. But in R. v. Paddington Valuation Officer Lord Denning M.R. (with whom Danckwerts L.J. agreed) indicated that in order to avoid chaos, it is possible to postpone or suspend the grant of certiorari for a time - on the facts of the case, until the new valuation list for the rates had been prepared.[28] But Salmon L.J. in the same case quite clearly repudiated the suggestion.[29] Thus, certiorari is a blunt instrument. If the tribunal or other administrative authority has acted in excess or abuse of jurisdiction, contrary to the rules of natural justice or there is error of law on the face of the record, then the court, subject to this one doubt as to the power of suspension to avoid chaos (and of course its power to refuse relief in its discretion), must quash. The court does not substitute its own verdict, nor does it in so many words direct the tribunal or other deciding agency to come to any particular conclusion when the application

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26. See para. 60 below.

27. In R. v. Kent JJ. ex p. Smith [1928] W.N. 137, D.C., Lord Hewart C.J. said that there was no precedent for allowing such cross-examination in the previous fifty or sixty years. Possibly the only case where it has been allowed this century is R. v. Stokesley, Yorkshire, Justices, ex p. Bartram [1956] 1 W.L.R. 254, where the Divisional Court suspected that an attempt had been made to mislead it.

28. R. v. Paddington Valuation Officer, ex p. Peachey Property Corpn. Ltd. [1966] 1 Q.B. 380, 401-3, C.A.

29. ibid. at p. 419.

comes before it again.[30] Certiorari is a remedy on review, not on appeal. But, of course, the tribunal or agency will reach its decision in the light of the guidance provided by the court.[31]

18. Because of its special procedure certiorari cannot be applied for in conjunction with any non-prerogative remedy - a declaration, injunction or an ordinary action for damages. If for some technical reason certiorari is not available, the Divisional Court cannot grant any other form of relief; the applicant will have to start again in some other form of proceedings. This lack of flexibility is one of the gravest weaknesses of our administrative remedies; we return to this point again.[32]

Time-limits

19. Leave will not be granted to apply for an order of certiorari[33] unless the application for leave is made within six months of the proceedings which it is sought to challenge, or the delay is satisfactorily explained to the court.[34] Where the delay is longer than six months, the court will in fact only reluctantly allow the application

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30. Compare the powers of the court on an appeal from the Minister under ss. 180-1 Town & Country Planning Act 1962, to remit the matter to the Minister with the opinion of the court for rehearing and determination by him: R.S.C. Ord. 94, r. 12(5).

31. See R. v. Northumberland Compensation Appeal Tribunal, ex p. Shaw [1951] 1 K.B. 711, 724, D.C. (Lord Goddard C.J.).

32. See para. 72. But the court may grant leave to apply for certiorari in proceedings on appeal under section 9 of the Tribunals and Inquiries Act 1958 where the prerogative order is the appropriate remedy: See Chapman v. Earl [1968] 1 W.L.R. 1315, D.C.; Metropolitan Properties Co. Ltd. v. Lannon [1969] 1 Q.B. 577, C.A., even though in that case the six months' period for such applications was over.

33. Prohibition is not subject to this time-limit, but because of the very nature of the order, this problem does not arise.

34. R.S.C. Ord. 53, r. 2(2).

to succeed.[35] Moreover, as we shall see when discussing the court's discretion to withhold relief, in some cases the court will refuse leave to apply even though the six months period is not yet over.[36]

20. It has sometimes been argued that the six months period is generous enough, and perhaps should be shortened.[37] Certainly it compares favourably with the similar period of limitation for review on the Continent.[38] As will be seen when we discuss statutory remedies,[39] there are admittedly cases in which it is necessary in the public interest to have a short time-limit for challenge in the courts; but outside these cases which are principally concerned with the compulsory purchase and development of land, the six-months limitation period might be thought too short. It is to some extent because of this restriction that the declaration has developed as a serious rival remedy for the control of the administration.[40]

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35. See, e.g., R. v. Secretary of State for War, ex p. Price [1949] 1 K.B. 1, 7, D.C.; but in R. v. Criminal Injuries Compensation Board, ex p. Schofield [1971] 1 W.L.R. 926 it seems that the Divisional Court granted a considerable extension of time.

36. See para. 24 below.

37. See Report of the Committee on Administrative Tribunals and Enquiries, (1957), Cmnd. 218, para. 114.

38. In France only two months is allowed after publication or notification to the plaintiff of the adverse decision; See Brown and Garner, French Administrative Law, 1967, pp. 83, 119.

39. See para. 62 below.

40. See Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, C.A.

Locus standi

21. The leading authority on locus standi in certiorari[41] is R. v. Surrey Justices, where an inhabitant of the parish concerned successfully applied to quash orders of the justices certifying that certain roads in the parish were no longer liable to be repaired at its expense. Blackburn J. giving the judgment of the court said:

> "In other cases where the application is by the party grieved ... we think it ought to be treated ... as ex debito justitiae; but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person."[42]

It is clear from the judgment read as a whole that even a person who is aggrieved may be refused the remedy in the court's discretion if, for example, his conduct has been such as to disentitle him to relief. The true position is, therefore, probably as follows: where the applicant is a stranger it is entirely for the discretion of the court whether he should be granted relief, while if he is "a person aggrieved", then he is entitled to the prerogative order unless there are special factors which the court in its discretion may take into account to refuse him certiorari.

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41. For prohibition there is some old authority that, if the defect of jurisdiction in the proceedings challenged is patent, the applicant may be a complete stranger and the court has no discretion to refuse the remedy: Worthington v. Jeffries (1875) L.R. 10 C.P. 379; London Corporation v. Cox (1867) L.R. 2 H.L. 239. The principle of these cases was more recently approved by Lord Goddard C.J. in R. v. Comptroller-General of Patents and Designs, ex p. Parke, Davis & Co. [1953] 2 W.L.R. 760, 764, D.C. But apart from this point, the same rules apply as in certiorari.

42. (1870) L.R. 5 Q.B. 466, 473.

22. Generally the courts have given a wide interpretation to "person aggrieved". Thus in R. v. Groom, ex p. Cobbold[43] the Divisional Court granted certiorari on the application of brewers, trade rivals of the man to whom the justices had given a provisional licence. Certiorari has also issued on this reasoning to an adjoining landowner and ratepayer objecting to a grant of interim development permission,[44] to a ratepaying company challenging the valuation lists (though their financial interests would be minimal),[45] and to a prospective defendant challenging the grant of a legal aid certificate to the plaintiff.[46] On occasion, however, the courts have shown a more restrictive approach. A recent example of this was in the Privy Council case, Durayappah v. Fernando[47] in which it was held that the mayor of a council, which had been dissolved in a manner contrary to the rules of natural justice, had no standing to challenge the order in the courts. But it may well be that the Board decided the issue on the assumption that the more restrictive

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43. [1901] 2 K.B. 157, D.C.

44. R v. Hendon R.D.C., ex p. Chorley [1933] 2 K.B. 696 (though here the points as a to locus standi made by counsel were not referred to by the members of the Divisional Court). This case should be contrasted with Gregory v. Camden L.B.C. [1966] 1 W.L.R. 899 (declaration refused).

45. R v. Paddington Valuation Officer [1966] 1 Q.B. 380, C.A.

46. R. v. Manchester Legal Aid Committee, ex p. R. A. Brand & Co. Ltd, [1952] 2 Q.B. 413, D.C. Because the courts have usually placed a broad construction on "person aggrieved" cases have rarely arisen in which a successful application for certiorari has been made by a person categorised as a "stranger".

47. [1967] 2 A.C. 337. And see also R. v. Bradford-on-Avon U.D.C., ex p. Boulton [1964] 1 W.L.R. 1136, 1145, D.C.

approach applicable to injunctions and declarations[48] also governed locus standi for the prerogative orders; secondly, it is possible that where the ground for challenging the decision is breach of the rules of natural justice, the requirement for locus standi are stricter than where ordinary excess of jurisdiction is alleged.

23. As we have emphasised, it is unusual for the courts in practice to be very exacting about the requirement of locus standi to apply for these prerogative orders. This is almost certainly because of the public nature of these remedies. It is otherwise when the courts are concerned with the use in public law of the injunction and the declaration - remedies which owe their origin to private law.

Discretionary grounds for refusing relief

24. The grounds on which a court in its discretion may refuse to grant certiorari and prohibition can be discussed briefly. Although strictly acquiescence cannot create a jurisdiction which does not exist, acquiesence in the conduct of the illegal proceedings or waiver of the tribunal's lack of jurisdiction may constitute a reason for the High Court refusing to grant certiorari.[49] The court may also refuse to order certiorari or prohibition because of the conduct of the applicant. This happened in Ex p. Fry.[50] The applicant, a fireman, sought to quash a disciplinary sentence - a mere caution - passed on him for refusing to obey a superior officer's orders. The Court of Appeal based their judgment on the court's discretion to refuse the prerogative orders where the applicant's conduct was

48. For locus standi in these remedies, see paras. 43 and 57 below.

49. R. v. Williams, ex p. Phillips [1914] 1 K.B. 608, D.C.

50. [1954] 1 W.L.R. 730.

foolish and unreasonable. The court took the view that the applicant should have carried out the instructions and lodged a complaint if he felt aggrieved. A further factor was the insignificance of the punishment meted out to him - a caution which was the least serious of the possible penalties. Finally an applicant who is guilty of unreasonable delay in pursuing his remedies, may be refused them even though the six months time-limit has not been exceeded.[51]

Exclusion of judicial remedies

25. An applicant for these prerogative orders is not necessarily obliged to have exhausted his rights of appeal within the administrative system, or even to have exercised any right of appeal to an ordinary court of law.[52] But if the matter in question has already become the subject of an appeal, the court will refuse to grant certiorari or prohibition.[53] The principles on which the court will exercise its discretion when the applicant could have resorted to another remedy were indicated in Lord Denning M.R.'s judgment in R. v. Paddington Valuation Officer. He said:

> "But if and in so far as they are attacking the valuation list itself and contend that the whole list is invalid (as they do), then I do not think they are confined to the statutory remedy for the simple reason that the statutory remedy is in that case nowhere near so convenient, beneficial and effectual as certiorari and mandamus..... I am therefore of opinion that the existence of the statutory remedy is no bar to this application."[54]

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51. See R. v. Stafford Justices, ex p. Stafford Corporation [1940] 2 K.B. 33, 46-7, C.A.

52. R. v. Wandsworth Justices, ex p. Read [1942] 1 K.B. 281, D.C.

53. R. v. Pereira [1949] W.N. 96, D.C.

54. [1966] 1 Q.B. 380, 400, C.A.

26. More complicated is the position where the statute not only provides a remedy, but also lays down that apart from that particular means, the administrative orders concerned shall not be open to challenge in the courts.[55] The courts have traditionally been reluctant to hold that their jurisdiction to control the legality of administrative action has been curtailed by statute, but it seemed after the decision of the House of Lords in Smith v. East Elloe R.D.C.[56] that this could be done by sufficiently clear words in the Act; there the Lords had held by a majority of three to two that the words, "shall not be questioned in any legal proceedings whatsoever", effectively prevented challenge after the six weeks period for statutory review allowed by the Act.[57] But the validity of this ruling is now doubtful in view of the recent decision of the House in Anisminic Ltd. v. Foreign Compensation Commission.[58] It was held there that a clause similarly worded to the one in the East Elloe case did not preclude judicial review by a declaration (and it would seem by certiorari if that had been asked for) where the tribunal whose finding was challenged had made an error going to jurisdiction. The earlier case was not overruled, and it is possible to argue that it is distinguishable on the ground that it

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55. There are many examples of this, among the most important of which are: Acquisition of Land (Authorisation Procedure) Act 1946, Sched. 1. para. 16; Housing Act 1957, Sched. 4, para. 3; Town & Country Planning Act 1962, s. 176.

56. [1956] A.C. 736.

57. Acquisition of Land (Authorisation Procedure) Act 1946, Sched. 1, para. 15. It may be noted that this case was not affected by the Tribunals & Inquiries Act 1958, s. 11. The section prevented total exclusion of challenge by certiorari and mandamus (though not declarations) in statutes passed before the 1958 Act, but did not affect those cases where the statute allowed review within a limited time period. The corresponding current section is s. 14 of the Tribunals and Inquiries Act 1971.

58. [1969] 2 A.C. 147.

involved a "time-clause", whereas in Anisminic the equivalent section of the statute prevented any review at any time. One commentator has written, however, that in the latter case the Lords "repudiated the East Elloe case.....Thus the way now lies open for challenging all sorts of planning, housing, compulsory purchase and other orders after the prescribed six weeks, on any of the many grounds which go to jurisdiction."[59]

27. The problems relating to statutory exclusion of judicial review are not, of course, confined to certiorari. It may, therefore, be thought that on the test we have suggested for limiting our terms of reference,[60] these problems are outside the legitimate scope of this Paper. From another point of view, however, it is difficult to see how an inquiry into the forms and procedures of the remedies for administrative action can be satisfactorily conducted if the availability of the remedies under the present law is in certain respects left in doubt; as appears from paragraph 26 there is considerable uncertainty as to the combined effect of time-clauses and exclusion clauses on judicial control of administrative action. Our provisional view is that we should look at the question of the exclusion of remedies and we, therefore, return to this subject in the appropriate section of the Working Paper.[61]

Summary

28. It may be useful to summarise the principal points made in the course of this discussion:

(1) Certiorari and prohibition will not lie to control the jurisdiction of private tribunals (paragraph 10).

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59. H.W.R. Wade, "Constitutional and Administrative Aspects of the Anisminic Case," (1969) 85 L.Q.R. 198, 207-8.

60. See para. 4 above.

61. See paras. 121-122 below.

(2) Despite the speech of Lord Reid in Ridge v. Baldwin, "the duty to act judicially" continues to raise difficulties as a possible requirement for the issue of the prerogative orders of certiorari and prohibition (paragraphs 11-12).

(3) There is a two-stage procedure for certiorari and prohibition (paragraph 13-15).

(4) There is no proper interlocutory process and no provision for the discovery of documents (paragraph 16).

(5) Cross-examination of the parties on their affidavits will only very rarely be permitted (paragraph 16).

(6) Certiorari will simply quash the proceedings below without the court substituting the correct verdict. It is possible that the courts have a discretion to suspend the grant of the remedy to avoid administrative chaos (paragraph 17).

(7) Certiorari and prohibition cannot be applied for together with other remedies (paragraph 18).

(8) The existing time-limit of six months from the date of the administrative order may in certain cases be unnecessarily short (paragraphs 19-20).

(9) The requirement of locus standi has on the whole been generously construed by the courts (paragraphs 21-23).

(10) The court may refuse relief, in its discretion, on the ground of the applicant's asquiescence in the proceedings below, his conduct or unreasonable delay (paragraph 24).

(11) It is not now clear to what extent the prerogative orders may be barred by "time-clauses" in statutes providing for one method of review only. Our provisional view is that we should examine exclusion clauses and time-clauses as an aspect of the law relating to the form and procedures of remedies (paragraphs 25-27).

(b) Mandamus

The Scope of Mandamus today

29. Mandamus is granted to compel the performance of a public duty owed to an applicant with a sufficient legal interest in its performance. Unlike certiorari and prohibition, there has been no suggestion that mandamus will only lie to compel the performance of judicial functions. Indeed, in suitable cases mandamus will lie to compel a borough corporation to make by-laws, a legislative function.[62] But like the other prerogative orders, mandamus will only issue to a public body; it will not, for example, lie to compel the performance of a company's obligations to its members.[63]

30. Mandamus is typically granted to compel the exercise of a duty imposed by statute. The duty imposed by the statute must be a legally binding one, not a mere declaration of responsibilities intended only to have political sanctions.[64] But mandamus will also be granted even though the statute does not in so many words impose a duty on the administrator; it will lie to compel the

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62. R. v. Manchester Corporation [1911] 1 K.B. 560, D.C.

63. R. v. Bank of England (1819) 2 B. & Ald. 620.

64. See, e.g., Coal Industry Nationalisation Act 1946, s. 1 (1)(b); Education Act 1944, s. 1(1).

the proper exercise of discretionary powers.[65]

The Effect of Mandamus

31. If the order of the court to perform the duty or exercise the discretion lawfully is not complied with, the court may, of course, proceed against the defaulter for contempt of court.[66] But instead it may direct that the act be done so far as practictable by the person applying for the order of mandamus at the expense of the defaulting party.[67]

Practice and Procedure: Time-limits

32. The procedure is very much the same as for the other prerogative orders.[68] In contrast to the six months time-limit in certiorari there is no express time-limit for applications for leave to apply for mandamus, except that normally an application for leave to apply for an order requiring quarter sessions to hear an appeal must be made within two months after the first day of the sessions at which the refusal to hear the appeal took place.[69] Otherwise, the application may be dismissed in the discretion of the court for unreasonable delay.

Locus Standi

33. In some cases the court has adopted a liberal position with regard to the applicant's standing. Thus in R. v. Cotham[70] certiorari and mandamus were granted to

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65. R. v. Vestry of St. Pancras (1890) 24 Q.B.D. 371, C.A.; Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

66. R.S.C. Ord. 52, rr. 1-3.

67. R.S.C. Ord. 45, r. 8.

68. See paras. 13-16 above.

69. R.S.C. Ord. 53, r.2(1).

70. [1898] 1 Q.B. 802, D.C.

the vicar of a parish, who contended that the transfer of a liquor licence by the justices was made without jurisdiction. The court there contented itself by stating that the applicant clearly had sufficient interest. In R. v. Paddington Valuation Officer[71] the Court of Appeal appears to have rejected counsel's argument that the requirement of locus standi in mandamus was stricter than in certiorari. Certainly the court was prepared to hold the property company "a party aggrieved" although its financial interest in having the valuation list quashed and remade appeared to be minimal.

34. On the other hand, some cases have taken a very much stricter view of the standing needed successfully to apply for mandamus. The leading case showing this approach is R. v. Lewisham Union[72] where a Metropolitan Board of Works, under a duty to put into effect their powers relating to the control and prevention of various diseases, including smallpox, were refused a mandamus to command the guardians of the poor of the district to enforce the provisions of the Vaccination Acts. Wright J. giving the judgment of the court, enunciated the following principle:

> "Certainly...I have always understood that the applicant, in order to entitle himself to a mandamus, must first of all shew that he has a legal specific right to ask for the interference of the Court."73

This formulation would seem to require that the applicant show the infringement of a private law right enforceable by an action for damages. In fact, however, even when

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71. [1966] 1 Q.B. 380.

72. [1897] 1 Q.B. 498, D.C.

73. ibid. at p. 500. In one recent case, R. v. Commissioners of Customs & Excise, ex p. Cooke and Stevenson [1970] 1 W.L.R. 450, the Divisional Court appears to have reverted to the strict view of locus standi expressed in this case. But the case may be better explained on the ground that the court disapproved of the applicants' motive - to put rival bookmakers out of business.

appearing to be guided by this formulation the courts have sometimes interpreted the locus standi requirement more generously. What in these cases appears to be necessary is that the applicant, either as an individual or a member of a special class or group, should show some "special interest" above and beyond that of the general public.[74] The best-known authority for this proposition is R. v. Manchester Corporation.[75] There the Manchester Corporation promoted a Bill in which a clause was inserted at the instance of the applicants, requiring the Corporation to prescribe in by-laws the distances at which trams could follow one another. The applicants who had frequently to settle claims for collisions in the city-centre applied for and obtained mandamus to order the corporation to make these by-laws.

35. Even if the liberal approach discussed in paragraph 33 above is the correct one, this does not mean that the courts will treat the problem of locus standi without due regard to the authorities and settled principles. As Lord Denning M.R. has said the court will not listen to a mere busybody interfering in matters which do not concern him. It is perhaps impossible to be more precise. The present position is such that one learned commentator has written:

> "It is to be hoped that an early opportunity wil arise for a restatement of the law on this confused topic."[76]

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74. This formulation is more or less that of Dr. S.M. Thio, (1966) Public Law 133, 146-7. See also the observations of Salmon L.J. and Edmund Davies L.J. in R. v. Metropolitan Police Commissioner, ex p. Blackburn [1968] 2 Q.B. 118, 145 and 149 respectively, C.A.

75. [1911] 1 K.B. 560, D.C.

76. de Smith, op. cit. (n.13 above) p. 574. See now R. v. Hereford Corpn., ex p. Harrower [1970] 1 W.L.R. 1424, D.C. (mandamus refused to applicants qua electrical contractors from whom in breach of their statutory duties, the local authority had omitted to invite tenders for the installation of electrical equipment, but granted to them qua ratepayers).

Discretionary grounds for refusing relief

36. The grounds on which a court in its discretion may refuse an applicant mandamus may be discussed briefly. To some extent they mirror those mentioned in our treatment of the other prerogative orders. Thus, mandamus may be refused because of unreasonable delay,[77] or the unreasonable motives of the applicant.[78] Another ground on which the order may be refused is that in the circumstances it would be futile or useless to make the order. But the order will not be refused if to comply with it is financially difficult for the respondents,[79] or if it is only probable (as distinct from certain) that the grant of the order will not help the applicant to achieve his objectives.[80]

37. The most important of these grounds concerns the effect of other remedies granted by statute upon the availability of mandamus. The rule was stated by Bankes L.J. in R. v. Poplar B.C., ex p. L.C.C. (No. 1) in the following terms:

> "In cases where the statute creating the duty has prescribed a form of remedy for a breach of that duty other than mandamus, then as a general rule the Court will not allow any other remedy to be pursued. There may also be cases where the party complaining may have some alternative remedy as convenient, beneficial and effectual as mandamus, and if so in its discretion the Court will not grant a writ of mandamus."[81]

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77. See R. v. Aston University Senate [1969] 2 Q.B. 538, 555 and559, D.C. A delay there of just over 6 months in the particular circumstances was enough to bar the grant of mandamus.

78. See R. v. Commissioners of Customs and Excise, ex p. Cooke & Stevenson [1970] 1 W.L.R. 450, D.C.

79. R. v. Poplar B.C., ex p. L.C.C. (No. 1) [1922] 1 K.B. 72, 84, C.A. (Bankes L.J.).

80. See R. v. L.C.C., ex p. Corrie [1918] 1 K.B. 68, 74, D.C. (Avory J.).

81. [1922] 1 K.B. 72, 84-5, C.A.

In the leading case, Pasmore v. Oswaldtwistle U.D.C.[82] the House of Lords declined to grant mandamus to the applicant who was complaining of the local authority's failure to make adequate sewers for draining the district. The House held that the plaintiff's remedy was to make a complaint to the Local Government Board under section 299 of the Public Health Act 1875. But mandamus will often be granted even though the applicant has not exercised a right of appeal.[83]

Mandamus and the Crown

38. We have left to the end our treatment of this most troublesome area of law. The rule is that, "a mandamus cannot be directed to the Crown or to any servant of the Crown simply acting in his capacity of servant."[84] The first limb of this rule has been justified on two grounds: first, because it would be incongruous for the Crown to issue a prerogative order to command itself, and secondly, because it would be wrong to expose the Crown to the risk of commital for contempt,[85] one penalty for disobedience to an order of mandamus. The first reason depends upon the peculiar historical origins of the prerogative writs; the second seems equally unconvincing, since there is no need for the Crown to be dealt with in the same way, as for example, a disobedient local authority or tribunal.[86] The immunity of Crown servants, as such, rests on the principle that one cannot enforce by indirect means that which cannot be

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82. [1898] A.C. 387.

83. de Smith, op. cit. (n. 13 above) p. 585.

84. R v. Secretary of State for War [1891] 2 Q.B. 326, 334, C.A. (Charles J.).

85. See R. v. Powell (1841) 1 Q.B. 352, 361.

86. Thus for ordinary civil proceedings the Crown Proceedings Act 1947 does not allow the normal process of execution of judgment: s. 25(4).

compelled directly, but this argument depends upon the validity of the Crown's immunity.[87]

39. On the other hand, if a duty is directly imposed upon a named Crown servant ("persona designata") and that duty is to be performed by him as such rather than in his capacity as adviser to the Crown, then mandamus will lie.[88] Thus, in R. v. Commissioners for Special Purposes of the Income Tax,[89] mandamus was granted to compel the Commissioners to issue orders for the repayment of the amounts of tax certified to be overpaid. It is difficult to see why the law should draw this distinction; it seems unreasonable that the availability of a remedy should depend on whether the duty is imposed upon the Crown or a named Minister or other Crown servant.

40. It may well be that the effect of this anomaly can be avoided by bringing an action for a declaration against the appropriate Government department, or if none, against the Attorney General, as allowed by the Crown Proceedings Act 1947.[90] But there seems to be no case in which the Crown has been declared subject to a duty. This is one of the aspects of the law of administrative remedies which might well be reconsidered.

Summary

41. (1) It has never been suggested that mandamus is limited to the enforcement of "judicial functions" (paragraph 29).

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87. de Smith, op. cit. (n. 13 above) p. 575 makes these points in more detail.

88. Both parts of the rule are important: it is possible for a duty to be imposed directly by statute on a Crown servant, but for it to be unenforceable by mandamus because the servants were to act as Crown advisers: R. v. Inland Revenue Commissioners, re Nathan (1884) 12 Q.B.D. 461, 472, C.A.

89. (1888) 21 Q.B.D. 313, C.A.

90. S. 17(3).

(2) The procedure is for the most part the same as that for certiorari; but there is no 6 months time-limit (paragraph 32).

(3) There is uncertainty with regard to the requirement of locus standi, which has been subject to various differing interpretations (paragraphs 33-35).

(4) Apart from the ground of locus standi, the court may refuse relief in its discretion:

(i) on the same grounds as on an application for certiorari;

(ii) where relief would be useless; (paragraphs 36-37).

(5) Mandamus does not lie against the Crown or against Crown servants, at least where they are acting in their capacity as advisers to the Crown. This restriction on the scope of the remedy has been subjected to some criticism (paragraphs 38-40).

2. INJUNCTIONS

The Scope of the Injunction today

42. The injunction is primarily a remedy in private law. It lies at the discretion of the court to enjoin a party from breaking his obligations - e.g., by breaking a contract or committing a tort such as trespass or nuisance. The court may also grant a mandatory injunction, requiring the party to do a particular act. These are rarely granted even in the private law sphere and in public law

are very uncommon.[91] Because there is no separate system of public law in this country, and because the ordinary law of the land, both substantive and adjectival, applies to public bodies and administrative authorities, as it does to the private citizen, the injunction will lie to prevent the administration breaking the law in much the same circumstances as it will lie to restrain an individual. Thus, in the famous case, Pride of Derby and Derbyshire Angling Assoc. Ltd. v. British Celanese Ltd.,[92] the two plaintiffs, the owners of a fishery in the Rivers Trent and Derwent and the riparian owner of considerable stretches of both rivers, claimed an injunction to restrain the pollution of those rivers. The three defendants were a commercial company (British Celanese Ltd.), a public corporation (the British Electricity Authority) and a local authority (Derby Corporation). Harman J. at first instance granted injunctions against all three defendants. Derby Corporation appealed, contending, inter alia, that an injunction should not issue in the circumstances of the case: their argument was that it would be inconvenient for the Corporation to be subject to an injunction, compliance with which would in effect be dependent upon the grant of a loan by the Minister to help reconstruct the city's sewerage system.

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91. The reason for this is that where a public body is under a statutory duty to act, the proper remedy for compelling performance is mandamus, rather than the mandatory injunction. The latter is only available when the statute is to be interpreted as conferring a right of action on the applicant: Glossop v. Heston & Isleworth Local Board (1879) 12 Ch. D. 102.

92. [1953] Ch. 149, C.A.

The Court of Appeal rejected this argument.[93] Lord Evershed M.R.'s remarks are particularly relevant:

> "The general rule [as to the grant of injunctions] which I have stated, in my opinion, applies to local authorities as well as to other citizens. Equally, of course, the court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful. So the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short."[94]

The injunction against Derby Corporation was in fact suspended for two years from the time of Harman J.'s order at first instance.

Locus Standi and Relator Actions

43. It is inherent in the nature of the injunction, which is a remedy for the protection of private legal rights adapted rather than modelled for the control of illegal administrative action, that there are severe limitations on a private individual's ability to employ it for the purpose of restraining the administration.

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93. A similar unsuccessful argument was put to the Court of Appeal in Bradbury v. Enfield L.B.C. [1967] 1 W.L.R. 1311. It was contended that administrative chaos would result if the council's comprehensive school scheme were held up. But this was doubted and in any case the Court indicated that it would be prepared to grant the injunction even if this point had been accepted: see Lord Denning M.R. at pp. 1324-5. cp. his approach in R. v. Paddington Valuation Officer [1966] 1 Q.B. 380, 401-3, where he indicated that he would have been prepared to suspend the order of certiorari.

94. [1953] Ch. 149, 181.

The classic statement of the requirements a plaintiff has to satisfy is contained in the judgment of Buckley J. in Boyce v. Paddington B.C.:[95]

> "A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with ..; and, secondly, where no private right is interefered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."

Thus it seems that if the plaintiff can show special damage arising from the interference with his public right, he need not establish that an actionable tort has been committed against him. It has further been suggested that the special damage need not be pecuniary.[96] There are even some cases where an injunction has been granted to persons who appear to lack locus standi on a strict interpretation of the above formulation.[97]

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95. [1903] 1 Ch. 109, 114. An earlier statement of this principle in very similar terms is to be found in Ware v. Regent's Canal Co. (1858) De G. & J. 212, 228 (Lord Chelmsford L.C.).

96. Zamir, The Declaratory Judgment, 1962, pp. 271-2.

97. e.g., the recent case, Bradbury v. Enfield L.B.C. [1967] 1 W.L.R. 1311, C.A., where an injunction was granted to restrain the implementation of a plan to reorganise schools on a comprehensive basis at the instance of nine plaintiffs, eight of whom were ratepayers, and one a limited company representing objectors to the scheme. But the point discussed in the text seems to have been completely ignored. In other recent cases, the courts have shown inconsistent views with regard to the locus standi of local authorities to claim injunctions in their own name under s. 276 Local Government Act, 1933: see Warwickshire C.C. v. British Railways Board [1969] 1 W.L.R. 1117, where the Court of Appeal held that the local authorities were entitled under that section to take proceedings on behalf of the inhabitants of their area without the need for the Attorney General's consent to a relator action: cp., taking the other view, Prestatyn U.D.C. v. Prestatyn Raceway Ltd. [1970] 1 W.L.R. 33 and Hampshire C.C. v. Shonleigh Nominees Ltd. [1970] 1 W.L.R. 865.

44. If a private individual has no standing to apply for an injunction he must ask the Attorney General to vindicate the public rights by instituting proceedings. These proceedings are known as relator actions; the Attorney General proceeds on the relation of the private person. In such a situation, the Attorney General becomes in effect the judge of the plaintiff's interest in bringing an action. Although the Attorney General has nominal control over the proceedings, and the action cannot, for example, be discontinued without his consent, in practice the relator retains control over its conduct.[98] The fact that the action is brought by the Attorney General does not affect the court's discretion to refuse an injunction. As Farwell L.J. said in A.-G. v. Birmingham, Tame and Rea District Drainage Board:[99]

> "It is for the Attorney-General to determine whether he should commence litigation, but it is for the Court to determine what the result of that litigation shall be."

45. It is possible to criticise with some justification the use of relator actions to surmount the problems of locus standi, on the ground that it is unsuitable for a Minister of the Crown to play any part, even if not a decisive one in the end, in determining whether illegal administrative action should be controlled. In practice, we gather that the practice of the Law Officers has been to grant consent to the institution of relator proceedings where an applicant has a prima facie case and has taken all reasonable steps to make use of appropriate remedies open to him in his own name. But it is still arguable that the present strict requirements determining the

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98. The details of the procedure are fully discussed in de Smith, op. cit. (n. 13 above) pp. 464-66.

99. [1910] 1 Ch. 48, 61, C.A.; *see also* A.-G. v. Bastow [1957] 1 Q.B. 514, 520-2 (Devlin J.).

availability of an injunction, as a public law remedy, should be removed; the court would have a general discretion to grant the remedy without reference to the question whether the plaintiff had been injured in his particular legal rights or had suffered special damage. It might be enough that the plaintiff was "a person aggrieved" by the action in the same sense as that term is used in certiorari. In the United States of America, as one commentator states, "the injunction as a means of reviewing administrative action has moved away from its historical foundations in equity and has become a general utility remedy for use whenever no other form of review proceeding is clearly indicated."[100] The equitable conditions of irreparable injury to the plaintiff and the absence of a suitable remedy at law are, for example, not insisted on.

Injunctions to restrain proceedings

46. In the realm of private law, there are some occasions in which an injunction may be granted to restrain the institution of judicial proceedings.[101] In public law, on the other hand, the courts have shown a reluctance to intervene by injunctions when one party threatens to take proceedings before a statutory tribunal instituted to determine the issue, even though it appears that the tribunal will be acting ultra vires. The reason for this is that the correct procedure in such a situation is to apply for prohibition.[102] However, this principle has not always been followed,[103] and it has, therefore, been said

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100. K.C. Davis, Administrative Law Treatise, Vol. 3, Ch. 23, p. 308.

101. See Snell, Principles of Equity, 1966, 26th ed., p. 724.

102. Stannard v. Vestry of Saint Giles, Camberwell (1882) 20 Ch.D. 190, C.A.

103. See Auckland v. Westminster Local Board of Works (1872) L.R. 7 Ch. 597; St. James' Hall Ltd. v. L.C.C. (1900) 83 L.T. 97, C.A.

that "there is some judicial support for the proposition that the courts have power to award an injunction inter partes in lieu of an order of prohibition to prevent the institution or continuance of proceedings in an inferior tribunal if the subject matter of the proceedings lies outside that tribunal's jurisdiction."[104] But there is obviously some doubt as to the true position.[105]

Injunctions against the Crown and Crown servants

47. It is provided by section 21(1)(a) of the Crown Proceedings Act 1947 that:

> "Where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction ... the court shall not grant an injunction ... but may in lieu thereof make an order declaratory of the rights of the parties."

It is further provided in section 21(2) that the court shall not grant an injunction against an officer of the Crown if the effect of granting that remedy would be to give relief against the Crown which could not have been obtained in proceedings against it. It will be remembered that it is possible to obtain mandamus against a Crown servant when a duty is imposed on him as persona designata for the benefit of the public;[106] but this is not so where an injunction is sought. The point was argued in Merricks v. Heathcoat-Amory and the Minister of Agriculture, Fisheries and Food, but was rejected by

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104. de Smith, op. cit. (n. 13 above) pp. 488-89.

105. If the injunction is claimed against a tribunal and not inter partes, then there is the further difficulty: who is the appropriate defendant?

106. See para. 39 above.

Upjohn J. He said:

> "It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification."[107]

It is difficult to see the justification for this immunity from the remedy. One argument might be that the Crown and its servants should never be obliged to desist from action which was thought wise in the public interest. But this argument cannot cover the activities of Crown servants in ordinary conditions; and in times of emergency the court would not issue an injunction in its discretion. Another argument is that the Crown should not be subject to a writ of sequestration or Crown servants liable for contempt of court, the normal penalties for disobedience to an injunction. But it would not be necessary to prescribe the same penalties for the Crown.[108]

48. Perhaps one unfortunate consequence of the existing law is that although declaratory relief is an adequate substitute for the final injunction, there is no relief equivalent to an interlocutory injunction. In International General Electric Co. of New York Ltd. v. Commissioners of Customs and Excise,[109] it was held by the Court of Appeal that as an order declaring the rights of parties must in its nature be a final order, it was not possible to obtain an

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107. [1955] Ch. 567, 575-6.

108. It may be noted that in Australia an injunction is available against the Crown and government servants: see Art. 75(v) of the Commonwealth Constitution, 1900.

109. [1962] Ch. 784.

order which corresponded to an interim injunction, or an interim declaration which did not determine the rights of the parties but which was only intended to preserve the status quo.[110] This seems to be a singular example of the triumph of logic over justice. But an action for a declaration can, at least if the Crown or Crown officers consent, come to trial very quickly.[111]

Summary

49. (1) An injunction will lie against an administrative authority to enjoin it from breaking the law in much the same circumstances that it will lie against an individual (paragraph 42).

(2) Administrative inconvenience if the injunction is granted will not militate against its grant; but the court in its discretion may decide to refuse the remedy or suspend its grant (paragraph 42).

(3) Generally an injunction will lie only to protect private rights of the plaintiff, or it may be claimed by a private individual if he has suffered special damage. In order to surmount these problems of locus standi, the Attorney General may claim an injunction to secure compliance with the law at the relation of a private individual (paragraphs 43-44).

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110. cp. the power of the High Court to issue interim orders suspending the operation of compulsory purchase or planning orders until the final determination of proceedings - Town & Country Planning Act 1962, s. 178.

111. See Marsh (B.) (Wholesale) Ltd. v. Commissioners of Customs and Excise [1970] 2 Q.B. 206.

(4) It is not clear to what extent the injunction can be used, as an alternative to the prerogative order of prohibition, to restrain the ultra vires proceedings of tribunals (paragraph 46).

(5) An injunction will not lie against the Crown or Crown servants. It is necessary to proceed by way of declaration; a consequence is that it is impossible to get interim relief against the Crown though an action for a declaration may in some circumstances be heard very quickly (paragraphs 47-48).

3. DECLARATIONS

The Present Scope and Effect of the Declaration

50. It would be an impossible task to list exhaustively the categories of cases in which a declaration will issue.[112] As one commentator has written, "the categories of cases in which declarations have been awarded in the field of public law cannot be defined with exactitude; and the categories are not closed".[113] Unlike the prerogative orders, certiorari and prohibition, a declaration will issue to challenge subordinate legislation.[114] The courts will readily grant declarations where administrative acts or orders are challenged. Thus, where a local authority granted a caravan site licence subject to conditions which it had no power to attach to the permission, a declaration was granted that the conditions were invalid.[115] Particularly

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112. See R.S.C. Ord. 15, r. 16.

113. de Smith, op. cit. (n. 13 above) p. 501.

114. See, e.g., Nicholls v. Tavistock U.D.C. [1923] 2 Ch. 18.

115. Mixnam's Properties Ltd. v. Chertsey U.D.C. [1965] A.C. 735.

important uses of the declaration have been to protect the rights of those with the status (normally under statute) of public employees when they have been unlawfully dismissed,[116] and to assert the right of individuals to pursue their trade or business,[117] or use their property, free from restrictions imposed or likely to be imposed illegally by public authorities.[118] Unlike certiorari and prohibition, a declaration will lie to declare decisions of domestic tribunals ultra vires.[119]

51. From the first modern cases,[120] it was clear that the availability of declaratory relief did not depend on the applicant having a cause of action independent of the application for a declaration. Immunity from a tax, rates or a contractual liability, or the privilege to carry out redevelopments on land free from planning restrictions can be asserted by an action for declaratory relief; in neither is there any independent cause of action. The plaintiff must assert an interest recognised by law.[121] The dignity of the court will not allow a declaration to be granted where the issue between the parties is of a purely academic or hypothetical nature and a real question has not been raised.[122]

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116. Cooper v. Wilson [1937] 2 K.B. 309, C.A.; Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, C.A.; Vine v. National Dock Labour Board [1957] A.C. 488; Ridge v. Baldwin [1964] A.C. 40. cp. Vidyodaya University Council v. Silva [1965] 1 W.L.R. 77, P.C.

117. Nagle v. Feilden [1966] 2 Q.B. 633, C.A.

118. Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260.

119. e.g., Lee v. The Showmen's Guild of Great Britain [1952] 2 Q.B. 329, C.A.

120. Dyson v. Attorney-General [1911] 1 K.B. 410, C.A.; Dyson v. Attorney-General [1912] 1 Ch. 159, C.A.; Guaranty Trust Co. of New York v. Hannay & Co. [1915] 2 K.B. 536, 558-562, C.A. (Pickford L.J.).

121. Cox v. Green [1966] Ch. 216 (no declaration will lie to assert that the applicant acted in accordance with the ethical rules of the B.M.A.).

122. See Lord Sumner in Russian Commercial and Industrial Bank v. British Bank for Foreign Trade [1921] 2 A.C. 438, 452.

52. The declaration has two roles. It may be used to make a simple declaration of the applicant's legal position, e.g., his rights under a contract or that he is free to use his land without regard to planning restrictions. This is sometimes referred to as the use of the declaration as an original remedy. It will be seen in paragraph 53 that in some cases the court's jurisdiction to grant declaratory relief in this sense is ousted because an administrative body is held to have exclusive jurisdiction over the issue; alternatively, although the court may have concurrent jurisdiction to grant a declaration, it may refuse to grant it in its discretion because the administrative remedy is equally convenient. The declaration has also a supervisory role; in this sense it is used to declare an illegal administrative decision null and void. Sometimes the court may grant declarations in both roles. Thus where an administrative authority acting without jurisdiction purports to deprive an applicant of his legal rights, the court may first declare the administrative decision to be of no effect - the declaration used as a supervisory remedy - and then, at least where the court's original jurisdiction had not been ousted, it may go on to declare the applicant's legal rights.[123] This is in contrast to

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123. This happened in Cooper v. Wilson [1937] 2 K.B. 309, C.A. The applicant was granted a declaration that his dismissal from the police force was invalid and and also that he was entitled to be repaid the rateable deductions that had been made from his pay during his service, an entitlement which he would have lost if he had been validly dismissed from the force. The combined jurisdiction to grant declarations in the original and supervisory role is discussed by Zamir, (1958) Public Law 341, 352, and by Warren, (1966) 44 C.B.R. 610, 638-641. See also para. 54 below.

the prerogative orders; the Divisional Court in certiorari proceedings will only quash the impugned order and will not substitute its own verdict on the merits.

53. A limitation on the availability of the declaration as an original remedy, a limit of profound importance, was revealed in the case of Barraclough v. Brown.[124] There the applicant was the secretary to river undertakers who had been given a statutory right to clear the river of sunken boats or barges and to claim expenses for this operation in a court of summary jurisdiction. The House of Lords held that he was not able to obtain a declaration in the High Court that he was entitled to these expenses. Lord Watson said:

> "The right and the remedy are given uno flatu, and the one cannot be dissociated from the other ... The Legislature has ... committed to this summary court exclusive jurisdiction ... and has therefore by plain implication, enacted that no other court has any authority to entertain or decide these matters."[125]

The High Court's jurisdiction to grant declaratory relief is not affected, however, if the rights or privileges claimed by the applicant are not granted by the statute which provides a remedy for their protection. In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government,[126] the plaintiff claimed declarations that the development which it proposed to carry out on its

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124. [1897] A.C. 615.

125. ibid. at p. 622. The principle stated here was followed recently in Re Al - Fin Corporation's Patent [1970] Ch. 160.

126. [1960] A.C. 260.

property was legal and that two Ministerial decisions refusing them permission to develop part of the property, and imposing conditions with respect to other parts were of no effect. It was argued for the Ministry that the Town and Country Planning Act 1947 provided the only procedure by which a landowner could ascertain whether permission for development was required and that the Minister's decisions under the Act were final. These contentions were firmly rejected by the House of Lords. Viscount Simonds distinguished Barraclough v. Brown in the following way:

> "The circumstances here are far different. The appellant company are given no new right of quarrying by the Act of 1947. Their right is a common law right and the only question is how far it has been taken away. They do not uno flatu claim under the Act and seek a remedy elsewhere. On the contrary, they deny that they come within its purview, and seek a declaration to that effect."[127]

54. But, if the tribunal given exclusive jurisdiction by the Act conferring the right has acted in excess or abuse of jurisdiction or in breach of the rules of natural justice, the High Court may declare the tribunal's decision void[128] by way of its supervisory jurisdiction. Moreover, it seems that the court may also declare that on a correct interpretation of the relevant statute the applicant is entitled to have his claim upheld.[129] No declaration stating the entitlement would have been granted by the High Court before the tribunal given

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127. ibid. at p. 287. See also Lord Jenkins at pp. 302-4.

128. See e.g., Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, C.A.; Ridge v. Baldwin [1964] A.C. 40.

129. Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147.

jurisdiction by the statute had passed upon the claim; but a declaration of entitlement may be granted if the tribunal in coming to its decision has made an error of law going to its jurisdiction. If this analysis is correct the position is reached that the High Court may in certain circumstances combine its supervisory and original jurisdiction to grant declarations although in the first place it had no original jurisdiction.

55. If however, the ground on which the inferior tribunal's decision is challenged is not jurisdictional error (including breach of the rules of natural justice) but error of law on the face of the record, the position is different. The supervisory jurisdiction to control the tribunal's decision by a declaration is not available in this case. This was shown in Punton v. Ministry of Pensions and National Insurance (No. 2).[130] The applicants had been refused unemployment benefit by the National Insurance Commissioner and asked for declaratons that the Commissioner had come to an incorrect determination in law and that they were entitled to the benefit claimed. The National Insurance Act 1946, laid down the conditions for the award of unemployment benefit, to which, of course, the applicants had no right outside the statute,[131] and also instituted the machinery for the determination of claims for an award of benefit. There was no question of the Commissioner in any way exceeding his jurisdiction; the only ground on which supervision could be claimed was error of law on the face of the record. The Court of Appeal refused to grant the declarations asked for by the applicants. One reason for this decision was that there was no ground for distrubing the trial judge's refusal to give the remedy in his discretion.[132]

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130. [1964] 1 W.L.R. 226, C.A. See also Healey v. Minister of Health [1955] 1 Q.B. 221.

131. So that there was no question of the principle in Pyx Granite applying.

132. See para. 59 below on the discretionary nature of declaratory relief.

But the Court of Appeal also held that there was no jurisdiction at all to give declaratory relief. Since the Commissioner's decision was admittedly intra vires, it was impossible to declare that there had been no decision. If a declaration had been granted, there would have been two inconsistent decisions, one of the Commissioner and one of the Court; since the Act provided that the decision of the Commissioner (or a lower officer or tribunal) was a necessary condition precedent to an award of benefit and there was no provision for a revision of his determination,[132] the declaration of the High Court would be of no avail to the applicants. It would have, as we have seen in the previous paragraph, been otherwise if the Commissioner's decision had been void for jurisdictional error, for then he would have come to no decision at all, and the applicant could have re-applied for benefit. It would also have been otherwise if the applicant had sought certiorari, for the effect of that is to quash the impugned decision.

56. There is little doubt that the non-availability of the declaration in this type of case constitutes a weakness in the law of administrative remedies. The result is that certiorari will lie in circumstances where a declaration with all its procedural advantages and more generous time-limits will not. This defect in the availability of the declaration has to some extent disturbed the optimism of those who favoured its expanded use as a weapon for controlling illegal administrative action.

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132. In Taylor v. N.A.B. [1956] P. 470, which was distinguished in Punton, the National Assistance Board made an error of law in construing the relevant statute and regulations; the Board was expressly empowered to revise its own determinations, so a declaration could be granted.

Locus standi

57. Although it is not necessary for the grant of declaratory relief that the plaintiff should have some other independent cause of action, this does not mean that there are no requirements to be satisfied regarding the plaintiff's standing to claim this relief. The rules mentioned in paragraphs 43-44 as governing this question for injunctions also apply to some extent to declarations. Thus, if the plaintiff has no legal right to protect or (it would seem from some cases) no special interest at stake, he must use the relator action to obtain a declaration. In some case the courts have granted a declaration at the application of a person whose legal rights were not in issue, though in none of them was the question of locus standi discussed.[133]

58. But a much-criticised recent case construes the requirement of locus standi strictly, and incidentally marks another contrast between the scope of declaration and of certiorari. In Gregory v. Camden L.B.C.[134] the borough council, as local planning authority, had given planning permission for a school to be built at the rear of the plaintiff's property. In fact the correct procedure had not been adopted and so the grant of permission

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133. e.g. in Prescott v. Birmingham Corporation [1955] Ch. 210, C.A., a ratepayer obtained a declaration that the corporation's free bus scheme for old-age pensioners was ultra vires. Also see Brownsea Haven Properties Ltd. v. Poole Corporation [1958] Ch. 574, C.A., where hotel proprietors challenged a one-way traffic order, and Lee v. Dept. of Education & Science [1968] 66 L.G.R. 211 where a governor, parent and assistant master at a school were granted a declaration that the time limited by the Secretary of State for Education for making representations in opposition to a comprehensive school scheme was too short.

134. [1966] 1 W.L.R. 899. The case is criticised by Gould, (1970) Public Law 358, 368-370, on the ground that the only relevant question when the declaration is used in a public law context is whether the applicant has a sufficient interest to have the decision declared void.

to build was undoubtedly illegal. But Paull J. held that the plaintiff, although he would no doubt be inconvenienced by the proximity of the intended school, had no legal standing to ask the court to declare the grant of permission void. The basis for this decision was that the declaration, unlike the prerogative orders, is a remedy for the protection of personal legal rights; the applicant had no legal rights to protect and therefore he lacked standing to challenge the grant of planning permission. If this approach is followed in the future, then a further limitation has been imposed on the usefulness of the declaration as a remedy in administrative law.

Other discretionary factors

59. The requirement of locus standi forms part of the principle that the court may refuse declaratory relief in the exercise of its discretion. It is sometimes said that the declaration is an equitable remedy. Certainly its remoter origins are to a great extent to be found in the old practice of the Court of Chancery, but now its exercise is not really controlled by the considerations which prevail when a court determines whether to grant an equitable remedy.[135] But sometimes the court will refuse a declaration for similar reasons to those which might lead it to refuse an injunction, e.g., because compliance with the terms of the declaration would be impracticable, or would lead to serious public (as opposed to mere administrative) inconvenience. It used to be argued that where a remedy by way of prerogative order might have been available, a declaration might be refused by the court. But this is clearly not the law at the present time.

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135. The court will not, for example, consider whether irreparable harm has been done. And, of course, there will generally be no question of an alternative remedy in damages.

Procedure

60. Declaratory relief is claimed under R.S.C. Order 15, rule 16. Since by Order 18, rule 15(1) the plaintiff must state specifically in his statement of claim the relief or remedy sought, it is doubtful whether a declaration could be granted if the plaintiff has not asked for this form of relief. Proceedings may be instituted in any Division of the High Court before a single judge or at Assizes and may be begun by writ or originating summons. The normal interlocutory procedure applies as in all civil actions. Thus it is possible to obtain discovery of documents, and oral evidence and cross-examination is, of course, allowed. There appears to be no time-limit on the institution of proceedings for declaratory relief. Finally, the application for declaratory relief may be combined, and often is in fact, with an application for an injunction or a claim for damages. This is in marked contrast to the prerogative orders which cannot be applied for in conjunction with other remedies.

Summary

61. (1) The declaration is not limited to cases where there has been a "duty to act judicially": it can be granted to declare the invalidity of administrative orders and delegated legislation (paragraph 50).

(2) Unlike the prerogative orders, it can be granted in respect of domestic tribunals paragraph 50).

(3) The availability of the declaration does not depend on whether the applicant has an independent cause of action, but he must assert a real interest recognised in law (paragraph 51).

(4) The declaration is not merely a supervisory remedy, but is also original in the sense that it may declare the applicant's rights without reference necessarily to any decision of an administrative authority (paragraph 52).

(5) The High Court will not grant a declaration where the right or privilege in respect of which it is sought has been conferred on the applicant by a statute which also provides a remedy for the protection of that right or privilege. But where the body which has jurisdiction to grant that statutory remedy has made an error going to jurisdiction, the High Court can declare that an error has been made, and will make further a declaration of the applicant's rights. It is otherwise if the ground on which the inferior tribunal's decision is challenged is error of law on the face not going to jurisdiction (paragraph 53-56).

(6) The decisions on locus standi conflict; in the most recent case, where the issue was fully argued, the court held that a declaration would only issue to an applicant who had a legal right to protect (paragraphs 57-58).

(7) The court may refuse declaratory relief, in its discretion, on a variety of other grounds (paragraph 59).

(8) The declaration is applied for in the same way and subject to the same procedure as ordinary civil actions. There is full interlocutory process. There is no time-limit on the institution of these proceedings; they may be brought in conjunction with an

application for an injunction or other non-prerogative remedies (paragraph 60).

4. STATUTORY REMEDIES

62. In the last thirty or more years it has become common for statutes to provide remedies for the control by the High Court of administrative orders and action. These statutes often provide that, apart from the prescribed method of challenge, the Minister's or other body's orders shall not be questioned in any legal proceedings whatsoever. The effect of such clauses on the availability of the prerogative orders has already been discussed.[136] It is sufficient at this point to say that the law is now in a state of considerable uncertainty; after the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission[137], it is not clear whether it is possible entirely to exclude review of administrative orders by certiorari or by declaration after the limited period of time allowed for challenge under the statutory procedure. In many cases there is much to be said for a short limitation period;[138] it is obviously unreasonable and against the public interest to permit challenge to a compulsory purchase order to be made years afterwards when the land concerned may already have been redeveloped. But in other cases it is not so clear why a short limitation period has been imposed. We would instance the fact that tree and building preservation orders under the Town and Country Planning Act 1962 cannot be challenged after six weeks. Because of this, and also the doubts as to the efficacy of time and exclusion clauses arising from the Anisminic decision,

136. See paras. 26-27 above.

137. [1969] 2 A.C. 147.

138. See H.W.R. Wade, (1969) 85 L.Q.R. 198, 208.

we think that this aspect of remedies in administrative law needs to be reconsidered.[139]

63. Here we are more concerned with the other aspects of statutory review, in particular to whom it is available and its procedure. For this purpose it may be useful to examine briefly the code laid down by the Town and Country Planning Act 1962 (as amended in some details by the Town and Country Planning Act 1968).[140] Section 178 of the 1962 statute (as amended) provides that any person aggrieved by a structure plan or local plan or by any alteration, repeal or replacement of any such plan may question the validity of any of these plans on the ground, primarily, that it was not made within the powers conferred by Part 1 of the 1968 Act by applying to the High Court within six weeks of the publication of the first notice of the approval or adoption of the plan. On an application the High Court has power, first, by interim order to suspend the operation of the plan wholly or in part, either generally or in so far as it affects any property of the applicant, until the final determination of the proceedings; secondly, it may wholly or in part quash the plan, again either generally or in so far as it affects the applicant's property, if it is satisfied that the plan is outside the powers conferred by Part 1 of the 1968 Act, or the applicant's interests have been substantially prejudiced by any failure to comply with the requirements of Part 1 of the 1968 Act.

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139. See para. 27 above.

140. See also Acquisition of Land (Authorisation Procedure) Act 1946, Sched. 1, para. 15 (compulsory purchase orders); Housing Act 1957, Sched. 4, para. 2 (clearance orders).

64. The first thing that may be noted is the valuable power to suspend the plan's operation by interim order. There is a similar power in the court so to order on an application for leave to apply for the prerogative orders; but on the other hand, the courts have come to the logical, if in practice unpalatable, conclusion that an interim declaration cannot be granted.[141] The second point to be noticed is that the requirement of "substantial prejudice" to the applicant's interest does not apply to an ultra vires order; only if the order is impugned on the ground that the correct procedural and formal requirements of the Act have not been complied with is it relevant.

"Person aggrieved"

65. It is the meaning of the words, "person aggrieved" which has given the courts most difficulty. This corresponds to the requirement of locus standi which we have discussed in relation to the judicial remedies.[142] The leading case is Buxton v. Minister of Housing and Local Government.[143] An appeal by a company against the refusal by the local planning authority to allow them to develop their land by digging chalk was allowed by the Minister. Major Buxton and other neighbours applied to the High Court under section 31(1) of the Town and Country Planning Act 1959 to quash the Minister's decision on the ground that the company's proposed operations would injure their land. It was held by Salmon J. that the expression, "person

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141. See para. 48 above.

142. See paras. 21, 33, 43 and 57 above.

143. [1961] 1 Q.B. 278.

aggrieved" in a statute meant a person who had suffered a legal grievance, and that as the applicants had had no statutory right to have their representations considered at the planning inquiry and as yet no common law right had been infringed, they were unable to challenge the Minister's decision. The judge remarked, obiter, that the words "person aggrieved" for certiorari do not necessarily mean the same as "person aggrieved" within the meaning of the 1959 Act.[144]

66. This case excited some criticism, and lately there has been some sign that the courts are prepared to adopt a more liberal approach. The remarks of Lord Denning M.R. in Maurice v. L.C.C.[145] perhaps provide a pointer to the correct construction of "person aggrieved." There he said, repeating his dictum in A-G of the Gambia v. N'Jie:[146]

> "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests".[147]

However, in Gregory v. Camden L.B.C.[148] Paull J. said that he was assisted by the decision in Buxton; certainly the more restrictive approach to locus standi in actions for declaratory relief exemplified by that case seems to correspond to the view taken by Salmon J. in Buxton.

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144. ibid. at p. 286. Salmon J. (at pp. 282-3) endorsed the criticisms of the phrase "person aggrieved" made by Lord Parker C.J. in Ealing Corporation v. Jones [1959] 1 Q.B. 384, 390.

145. [1964] 2 Q.B. 362, C.A.

146. [1961] A.C. 617, 634, P.C.

147. n. 145 above at p. 378: the remarks are only obiter for the words of the statute concerned, London Building Act 1930, refer to a person "who may deem himself aggrieved".

148. [1966] 1 W.L.R. 899, 908.

Procedure

67. Order 94 of the Rules of the Supreme Court lays down the procedure applicable to statutory challenge of orders or administrative action. The application must be made by originating motion and must state the grounds of application. The jurisdiction is exercisable by a single judge of the Queen's Bench Division. Evidence at the hearing of the motion is required to be given by affidavit, though the court may order oral evidence to be given and may permit cross-examination of the other party.[149] Any affidavit in support of an application must be filed in the Crown Office within 14 days of service of the notice of motion, and at the same time a copy of the affidavit must be served on the respondent. The latter then has 21 days in which to file any affidavit in opposition to the application, and at that time must serve a copy on the applicant. Generally the motion will not be heard until 14 days after that date.

Summary

68. The existence of special statutory remedies, with broadly similar purposes as the prerogative orders and the declaratory judgment, is evidence of the need felt for special procedures in a number of important areas of administration; this is, perhaps, shown by the more limited time periods for challenge, the less cumbersome procedure under Order 94, and the formulation of "person aggrieved". One of the most difficult questions in any attempted reform of administrative remedies is the extent to which special statutory procedures are to be affected by our proposals. This is one of the problems discussed later in the course of the Working Paper.[150]

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149. R.S.C. Ord. 38, r. 2(3).

150 See paras. 117-120 below.

III. SUMMARY OF DEFECTS OF THE PRESENT LAW

69. Hitherto we have looked at the remedies individually; it is now time to review them as a whole. There are those who have expressed satisfaction with the present position. Thus, the Franks Committee on Administrative Tribunals and Enquiries considered that the challenge to the jurisdiction of tribunals and inquiries should continue to be made primarily by the prerogative orders.[151] The Committee rejected the allegation that the procedure involved in seeking these remedies was unduly complex. We, however, do not take such a sanguine view of the present law.

70. The prerogative orders are bedevilled by a complex and restrictive procedure and practice. It is a weakness of the orders that discovery of documents cannot be obtained. Moreover it may be that a potential applicant who did not know of the illegality of the administrative action for some time after it was taken will be unable to use the orders after the lapse of six months. Again, it is not clear whether certiorari is only available when there is a duty on the part of the deciding authority "to act judicially", whatever that may mean. It is for consideration whether the courts should not be more ready to admit oral evidence and permit cross-examination.

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151. 1957, Cmnd. 218, paras. 114, 117.

71. None of these restrictions applies to declaratory relief or injunctions. Lord Denning wrote, extra-judicially:

> "Just as the pick and shovel is no longer suitable for the winning of coal, so also 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".[152]

But more than twenty years after that statement limitations of the declaration have become more apparent. As we have seen, it will not be granted to challenge the decision of a tribunal for error of law on the face of the record, at least where a declaration to that effect would be of no avail to the applicant. Moreover, on the most recent authority the requirement of standing is more strict for declarations (and much more for injunctions according to established authority) than for the prerogative orders.

72. The truth is, therefore, that the prerogative orders on the one hand, and the declarations and injunctions on the other, each have advantages and disadvantages compared to the other. Nothing except history justifies these distinctions. We have seen that it is not possible to claim them both in the same proceedings. The litigant may thus be confronted with a difficult choice. The position seems to us to be wholly unreasonable. Our survey of the present

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152. Freedom under the Law, 1949, p. 126.

law has led us to agree with the conclusions of Professor S.A. de Smith who in his evidence to the Franks Committee wrote:

> "Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals - remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action."[153]

We do not think there are many who now disagree with these remarks. More difficult is the question whether reform can be successfully or usefully achieved within the existing system, whether, for example, the procedural rules for certiorari could be improved without altering the fundamental nature of the prerogative orders, or whether a more radical approach is needed. It is to this question and incidental problems that we now turn.

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153. Minutes of Evidence to the Committee of Administrative Tribunals and Enquiries, Appendix I at p. 10.

IV. PROPOSALS FOR THE REFORM OF REMEDIES IN ADMINISTRATIVE LAW

73. In this section of the Working Paper we outline our proposals for the reform of remedies in administrative law. Our principal proposal is that there should be a single remedy for the judicial review of administrative action orders; we discuss this suggestion and the various incidental problems - such as locus standi, time-limits and exclusion clauses - which arise whatever form our pincipal proposal eventually takes. We then discuss an alternative approach which would assimilate the procedure of the prerogative orders to that of ordinary civil proceedings. Finally we look at the relationship of our proposals to actions for damages against the administration.

74. In the light of the defects in the present law, it seems to us that the following factors should guide us in making proposals for the reform of remedies in administrative law:

(i) The remedies' primary object is not to assert private rights, but to have illegal public action and orders controlled by the courts. This is evidenced in the present law by the history and incidents, particularly the liberal criteria for locus standi, of the prerogative orders.

(ii) There should be available to an applicant challenging the validity of illegal administrative action whatever form of relief is most appropriate in the circumstances. All the existing varieties of relief should be obtainable in the same form of proceedings. As we have seen, the evil of the present system is not that there are many different forms of relief, but that it is impossible to apply for them, or some of them, by the same procedure.

(iii) Any challenge to the legality of administrative acts and orders clearly involves and affects a wide range of interests - the interest of the person making the challenge, the interest of the administration and the interests of persons relying on the challenged order. In view of this consideration it may be that various features of any procedure for judicial review of administrative action should differ from those governing ordinary civil litigation; in particular it may be better to have a remedy which enables the matter to be disposed of quickly rather than a more elaborate procedure with full interlocutory process.

1. THE APPLICATION FOR REVIEW

75. Our provisional view is that there should be a single remedy and procedure for the judicial review of administrative actions and orders. The grounds on which administrative actions and orders are reviewed will not be affected by this new remedy;[154] our proposals are confined to the procedure of the new remedy, the varieties of relief which may be granted by the court and various incidental matters. The new remedy might be called, as is the principal remedy for judicial control of administrative action in the federal courts of the United States of America, "the petition for review".[155] Alternatively, as

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154. This point is more fully discussed below in para. 83.

155. The "petition for review" is the remedy available to challenge the majority of agency decisions. Its prototype is to be found in the Federal Trade Commission Act, 38 Stat. 720 (1914), 15 U.S.C.A., s. 45(c).

it may be thought that the word "petition" strikes the wrong note by denoting the seeking of a favour from the court, it might be called "the application for review". For this reason we prefer the latter term. Under this single procedure we envisage that the applicant would be able to ask for any form of relief at present obtainable for the control of administrative action in the High Court.[156] Thus the applicant seeking review might ask the court to quash the particular administrative decision or order, to enjoin the administrative authority from exceeding its jurisdiction or powers, to command the authority to act where it is under a duty to do so, or to declare the action or order invalid and of no effect. The court could grant the form of relief requested, or where this was not suitable in the circumstances, any other appropriate relief. In suitable cases the court might also on an application for review declare the legal rights of the applicant.[157] These basic proposals are similar to those recommended by the Ontario Royal Commission on Civil Rights and embodied in a Bill introduced in 1971.[158]

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156. We suggest, however, some modifications to the present position: see paras. 88-90 below.

157. This aspect of relief available in the court is discussed more fully below in para. 90.

158. Royal Commission: Inquiry into Civil Rights, Report No. 1, Vol. 1, pp. 326-9. We have recently received the Fourth Report of the New Zealand Public and Administrative Law Reform Committee (1971), in which it is recommended that there be an additional remedy for the review of administrative action to be called an "application for judicial review", under which all forms of existing relief be available. But this remedy would co-exist with and not supersede the existing remedies, which, however, the Committee envisage "would in time simply cease to be used". But it seems to us that there are difficulties in this approach: for example, any time-limit imposed by the new remedy could simply be evaded by the applicant claiming an ordinary declaratory judgment. This is not our approach; the application for review under our proposals, as under those of the Ontario Royal Commission, would be an exclusive and not an alternative remedy.

76. A question which we have found particularly difficult is the scope of the new remedy and procedure which we are proposing; is it to provide an exclusive remedy only for the direct review of administrative acts and orders, or should it further be the appropriate remedy when such an act or order is challenged collaterally? By collateral challenge, we mean a case where the plaintiff is claiming damages (or an injunction or declaration) for an actionable tort or breach of contract committed by a public authority and the legality of an administrative act or order is of necessity raised in those proceedings. For example, a plaintiff claiming damages for trespass to his land by a local authority may be met by a defence that the authority was acting in pursuance of a compulsory purchase order; the plaintiff makes a collateral attack on that order if his answer to that defence is that the authority was acting ultra vires.

77. It might further be argued that the remedy we are proposing would be the most suitable procedure where the applicant is claiming that some administrative decision does not affect his legal rights, whether conferred by common law, statute, or some previous administrative decision. For example, an applicant may seek a declaration that he is entitled to develop his property free from planning restrictions because special statutory rights to develop have been conferred on him, or that he has been given planning permission to develop his land and that this permission is unaffected by a later decision of the local planning authority to the contrary. These are cases where under the existing law the court would grant a declaration in its original jurisdiction.[159]

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159. See Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260; Lever Finance Ltd. v. Westminster (City) London Borough Council [1971] 1 Q.B. 222, C.A.

78. The legality of an administrative act or order may be raised as a defence to a criminal prosecution. In this case we have no doubt that the issue of administrative law must continue to be decided by the normal procedure applicable to a criminal prosecution. The question is whether the procedure should apply only to direct review proceedings, or encompass collateral challenge in other civil suits where an administrative law issue arises.

79. On this question one view is that the application for review should only be the appropriate remedy when an administrative act or order is challenged directly. In this role it would naturally supersede the prerogative orders, which would be abolished. But it would only in effect replace the injunction and declaration when those remedies are being used strictly as supervisory remedies, i.e. to restrain ultra vires proceedings or other illegal action and to declare administrative decisions void. The new remedy would not, for example, affect those cases where the applicant wishes to restrain the commission of a tort by a public authority even though the case necessarily involves a question of the legality of administrative action.[160] Nor would the application for review on this approach be the appropriate remedy where under the present law the court has original jurisdiction to grant declaratory relief.[161] Since in these cases the applicant is asserting his own legal rights, either at common law or conferred by statute, and seeking to protect them by an

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160. A good example of this is Broadbent v. Rotherham Corporation [1917] 2 Ch. 31 where the plaintiff, the owner of the property, obtained an injunction restraining the defendants from proceeding to carry out a demolition order until they had heard properly the plaintiff's application for postponement of the order.

161. See para. 52 above.

action for damages, an injunction or a declaration, there is less danger of frivolous claims than in direct review proceedings where anybody who satisfies the broad criteria for locus standi may challenge the administrative act or order. If this is so, it might be argued that there is little need for a special two-stage procedure.[162]

80. But it may be argued that it is unrealistic to draw a distinction between direct review proceedings on the one hand, and on the other collateral challenge in proceedings brought to assert a private law right or an action to declare legal rights without in form challenging an administrative decision. In some cases this point is underlined by the fact that the applicant claims both a declaration that a particular decision is void and damages.[163] In each case, it can be said, the real issue is one of public law - e.g., did the administrative authority concerned act within or outside jurisdiction? If it is one of the objects of the special procedure to enable points of administrative law to be decided by a specialised tribunal,[164] it might be thought inappropriate to leave some questions in this area to be decided by other members of the judiciary, perhaps in county courts, merely because they arise collaterally in tort or contract actions. Furthermore it would seem unsatisfactory if it were possible to evade the procedural requirements of the application for review, when in essence an issue of public

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162. For the proposed procedure for the new remedy, see paras. 97-105 below

163. See paras. 149-151 below for our proposals for those cases where the applicant wishes to have a decision quashed or declared void and also claims damages, e.g., for a tort committed in the illegal exercise of those powers.

164. See paras. 136-138 below for our proposals on the jurisdiction of the courts to grant the new remedy.

law is involved, by suing in tort or contract or by applying for a declaration in its original role. It might, therefore, be suggested that any case involving the legality of the exercise of the powers of public authorities should be channelled into the appropriate court by a Queen's Bench or Chancery Master, or a County Court Judge. The Master or Judge might grant the leave to apply for review which would avoid any delay consequent upon the change in procedure, or perhaps it might be provided that, subject to suitable provision for costs in the Rules of Court, the question whether leave should be granted should be remitted to the appropriate court.[164] The Master, County Court Judge, or, if the collateral proceedings were initiated by an application for review, the High Court Judge on the application for leave, would decide whether the procedure should be by affidavits or the ordinary civil procedure. This would apply equally to suits for damages for tort or breach of contract, an action for declaring legal rights, e.g., as to status and title as well as to a matters arising under contract or tort, if a question of the validity of the exercise of public powers is involved. It might also apply where the legality of an administrative act or order is raised as a defence to a civil action brought by a public authority.

81. If this alternative is followed, it would not be possible to evade the time-limits for bringing the application for review by applying merely for a declaration of legal rights without asking for a declaration that a relevant administrative decision is void.[165]

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164. See paras. 136-138 below for our proposals on the jurisdiction of the courts to grant the new remedy.

165. See para. 115 below.

Therefore, if the essence of the applicant's case is that a particular administrative decision is void, the Master or County Court Judge would not grant leave to apply for review if a declaration (or an injunction) was sought more than a year[166] after the particular decision was taken. This would not, however, be the case if the purpose of the collateral attack on the legality of an administrative decision was only to obtain damages.[167]

82. On balance we would provisionally propose that the application for review should be the appropriate remedy not only when an application is made to have a decision quashed or declared void, but in any case where the legality of a administrative decision is the principal question in issue. This proposal would ensure that all cases involving a question of public law are decided by a specialised tribunal, and would prevent evasion of the procedure which for the broad reasons stated in paragraph 74 we think should govern suits against the administration. But the proper scope of the special procedure for the review of administrative action is a difficult question on which we would welcome views.

83. It has sometimes been argued that if a fundamentally new procedure and remedy were to be introduced, there would be some danger that the courts would lose sight of the rules governing the legality of administrative action and orders - the principles of ultra vires and natural justice - which have been gradually developed over the last two or three centuries.[168] The question arises whether the substitution of the application for review for the prerogative orders will lead to this confusion. It might be suggested that it

166. See para. 112 below.

167. See para. 114 below.

168. H.W.R. Wade, (1958) C.L.J. 218, 233.

will be necessary to spell out the grounds for review under the new remedy, and this will have the effect of restricting the future development of the law. We appreciate the force of this argument, but consider that it is possible to introduce the new remedy while at the same time making it clear that the grounds for review of illegal administrative action are not to be affected. Nor in our view need the freedom of the courts to develop the principles of judicial review be affected. Rather it seems to us the reduction of the technical complexities of the remedies will enable the courts to concentrate on the real issues of administrative law - how much judicial control and of which administrative bodies?

84. The new remedy would be available to challenge all illegal public orders or action (in the absence of immunity from judicial control established by statute).[169] The present distinctions which determine the availability of the various existing remedies would disappear. The application for review would thus be available to secure any form of relief against ultra vires delegated legislation, invalid administrative orders, or reviewable decisions of inferior courts and tribunals. It should be provided that the court could order the quashing of an ultra vires administrative decision, whether or not the particular administrative body was under a "duty to act judicially" or not.[170]

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169. For exclusion clauses and the new remedy, see paras. 121-122 below.

170. We are, of course, not here concerned with the question whether "a duty to act judicially" is a condition of the application of the rules of natural justice: see n. 19 above.

85. The application for review will obviously lie to control all orders or acts made or done under statutory powers and will be available to control non-statutory public bodies. The distinction between these bodies and domestic tribunals and professional organisations is not always easily drawn in the existing law under which certiorari and prohibition are available to control the former only.[171] Under the present law some non-statutory public bodies, such as the Criminal Injuries Compensation Board and a chartered university, have been held amenable to control by the prerogative orders as well as bodies which exercise jurisdiction under statute, e.g., local authorities, government departments, ministers, and administrative tribunals. It is admittedly difficult to devise a formula which will embrace all those bodies subject to control by the new remedy, even if they are limited to those at present amenable to control by the prerogative orders. It may be that some particular bodies, such as the universities would have to be scheduled specifically if absolute certainty is to be achieved.[172] But this difficulty does not seem to be either insurmountable or of particular significance. The existing law is not clear on this point, so it is hardly an objection to the reforms we are proposing that it will be difficult to formulate precisely which bodies are to be subject to control by the new remedy. But more importantly, the vast number of administrative authorities and tribunals to be subject to review by the new remedy will clearly fall within its scope, for the remedy will lie to control all

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171. See para. 10 and n. 16 above.

172. Under the Local Authorities (Goods and Services) Act 1970, s. 1(5), the Minister of Housing and Local Government may by order made by statutory instrument provide that any person who is specified in the order or is of a description so specified shall be a public body for the purposes of the Act.

bodies which exercise jurisdiction and powers by virtue of statutory authority.

86. Although we have suggested in the preceding paragraph that the new remedy would not be available to control the decisions of domestic tribunals and professional associations, we would like at least to raise the question whether this should invariably be the case. There is a strong argument for allowing the application for review to control the decisions of associations exercising "a virtual monopoly in an important field of human activity".[173] In Nagle v. Feilden the Court of Appeal held that the applicant had an arguable case for claiming a declaration that the Jockey Club's practice of refusing women trainer's licences was void as against public policy. If the Jockey Club were a statutory body, certiorari would presumably have been an appropriate remedy and under our proposals the application for review would lie. It is difficult to see why the distinction between the exercise of statutory and non-statutory powers should make a difference in the appropriate remedy for the abuse of monopoly licensing powers. So as an alternative to the narrower approach in the preceding paragraph it might be suggested that the application for review should also lie to control the decisions of all bodies exercising in effect monopoly licensing powers or analogous powers, e.g., the conferring of professional qualifications, whether under statute or not. We are not suggesting that this broader proposal should affect the remedies for the control of trade unions.[174] The remedies

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173. See Lord Denning M.R. in Nagle v. Feilden [1966] 2 Q.B. 633, 644, C.A.

174. The grounds on which a trade union's right to regulate its membership are controlled and the procedure by which it is controlled are affected by the Industrial Relations Act 1971: see ss. 65, 101.

for the control of the decisions of social clubs and other private bodies would continue where appropriate[175] to be declarations and injunctions. We would welcome views, first, on the question whether the substitution of the application for review for the existing remedies will throw doubt on or hinder the development of the grounds on which the courts exercise control; secondly, as to the bodies against which the new remedy should lie.

2. THE INCIDENTS OF THE APPLICATION FOR REVIEW

87. In this section of the Working Paper we are concerned to discuss, and to make proposals on, the matters incidental to the new general remedy of the "application for review". Many of these matters, such as locus standi and time-limits, will fall to be considered whether it is eventually decided to propose reforms on the lines of the general remedy we have been discussing, or to adopt the alternative proposal which we consider later.[176] We have, however, thought it better to discuss these incidental matters in the context of a new general remedy, both for ease of understanding, and because our provisional view that a general remedy is the preferable approach to reform of the remedies in administrative law depends to some extent upon our treatment of these incidental problems. We draw attention to this latter consideration in our conclusions.[177]

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175. Since the jurisdiction of these bodies over their members is based on contract, control by the courts on the basis of natural justice and public policy will only be exercised when an existing member of the association is deprived of his membership or of his rights as a member.

176. See paras. 139-144 below.

177. Para. 143 below.

88. We have already mentioned the variety of relief which the courts will be able to grant the aggrieved applicant. We start this section of the Working Paper with some proposals for modifying and simplifying the present position with regard to the relief available to the applicant; in particular we make some proposals on the court's powers to make certain orders against the Crown, and to make interim orders. We then make some proposals on the details of the procedure for challenge under the new remedy, and the time-limit or limits within which the challenge may be made. The related problem of exclusion of judicial remedies, and the relationship of the new remedy with existing statutory provisions for the challenge of administrative acts and orders in the High Court are then considered. The difficult and important problem of locus standi to apply for review is discussed. Proposals are made concerning the court's powers to refuse relief in its discretion. Finally the question which court is the most suitable forum to entertain the new remedy is considered.

(a) The court's powers to grant relief under the new remedy

89. As we have indicated,[178] we think that the court on the application for review should have power to quash, enjoin, command and declare. The first power corresponds, of course, to the effect of the existing prerogative order of certiorari. We envisage that the enjoining order would cover the roles at present performed by the injunction in its true public law context and the prerogative order of prohibition. We have pointed out in our survey of the present law the uncertainty which exists as to the injunction's role in controlling the jurisdiction of

178. Para. 75 above.

administrative tribunals and authorities.[179] It seems to be unnecessary for there to be two varieties of relief which have basically the same purpose. We therefore propose to achieve some simplification by reducing them to the one order enjoining the administrative authority from acting unlawfully, whether this unlawful act involves taking jurisdiction over a matter which it has no jurisdiction to decide, or otherwise acting outside its powers.

90. The order commanding the administrative authority to act would, we envisage, be granted on the grounds on which the prerogative order of mandamus would issue.[180] Finally the court would have power to grant a declaration that the impugned administrative order or decision is invalid. The difficulties of Punton v. Ministry of Pensions and National Insurance (No. 2)[181] would not arise under the new remedy, in view of the court's power to quash the intra vires decision (for error of law on the face of the record) on the application for review. The court also, in its discretion, should have power to declare the applicant's legal rights or entitlement. As we saw when we surveyed the existing law,[182] the position may now have been reached that the reviewing court will declare that the applicant is entitled to some benefit, even though that court would have had no jurisdiction to make such a declaration before the appropriate tribunal had passed on the question in dispute. But this seems to be right: as long as the court has sufficient facts before it to come to a conclusion (or perhaps the facts are not in dispute), it is surely more convenient for the court to make a binding

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179. Para. 46 above.

180. See para. 29-30 above.

181. Para. 55 above.

182. In para. 52, 54 above.

declaration of rights when the parties are before it on the review proceedings rather than remit it to the deciding authority. But, as we will see later,[183] in some situations, the court will want to refer the matter back to the deciding authority, having declared its previous decision to be of no effect.

(i) Relief against the Crown and Crown servants

91. In our discussion of the present law we pointed out that neither mandamus nor an injunction is obtainable against the Crown or generally against Crown servants.[184] We were unable to discover any really convincing reasons for these immunities. In a number of Commonwealth countries injunctions or interdicts lie against the state; this was, moreover, the position in Scotland before the Crown Proceedings Act 1947 brought together English and Scottish law on this point. We see no reason in principle why the new enjoining and commanding orders - the equivalents of injunctions, including their interim form, and mandamus - should not be as obtainable against the Crown and Crown servants as they will be against any public authority which acts or threatens to act illegally, or alternatively fails to carry out its statutory duty.

92. It is argued that this would lead to the risk of Crown servants being committed for contempt or the sequestration of Crown property. This factor, however, has not prevented a contrary solution in those countries like

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183. Paras. 95-96 below.

184. Paras. 38-40 (mandamus), 47-48 (injunctions). We have not discussed the point that certiorari and prohibition are not available against the Crown itself, for this appears to give rise to no difficulties.

Australia where an injunction may issue to restrain the illegal acts of governments and state officers. But it might be possible specifically to exclude these ultimate sanctions for defiance of an order commanding or an order enjoining; in this context it is interesting to note that section 25(4) of the Crown Proceedings Act 1947 excludes the normal procedures for enforcement of civil judgments. So this argument does not carry conviction. Nor are we impressed by the argument that in some cases the issue of an injunction, or the new enjoining order, might hamper the Crown in times of emergency. The Crown would invariably take emergency powers where the occasion warranted it; in any event we see no reason why this point should provide an argument against the issue of suitable relief where the Crown has violated the law in times of peace. It may be that there are further reasons for the retention of the present immunities to which we have not given sufficient attention; but our present view is that in the absence of convincing reasons for retention of the Crown's present immunities, all forms of relief available under the application for review should be obtainable against the Crown.[185]

(ii) Interim Relief

93. When analysing the present law we drew attention to the extent to which interim relief is afforded under the prerogative orders and the "equitable" remedies.[186] We further pointed out that the statutory schemes of judicial control embodied in the Town and Country Planning Acts and similar legislation give the court power to suspend, for example, a structure or local plan by interim orders.[187]

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185. It may be that injunctions should be available against the Crown or Crown servants in ordinary tort or contract actions, whether or not they are governed by the new procedure.

186. See paras. 13 (certiorari), 48 (injunctions and declarations).

187. Paras. 63-64 above.

Our view is that the court should have full powers under the new remedy to grant a stay of the particular administrative proceedings or the enforcement of orders, and to grant other interim relief where suitable. A broad precedent which might be considered as a basis for formulating our proposal is to be found in Section 10(d) of the United States Administrative Procedure Act 1946,[188] which provides:

> ".... Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court ... is authorised to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

94. It should be emphasised that we are not proposing that any applicant should be entitled as of right to interim relief; the grant of such relief should be discretionary as it is in the American courts,[189] and is now in the English courts under the existing remedies to the extent that it is available. If our views as to the procedure for the application for review are adopted,[190] we think that an applicant for review should be able to claim interim relief in his application for leave to apply for review and the court should, if it sees fit, grant interim relief, when granting leave to apply. Procedurally, therefore, the availability of interim relief would be in the same position as under the existing law applicable to the prerogative orders.

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188. 60 Stat. 243 (1946), 5 U.S.C., s. 1009d.

189. See Jaffe, Judicial Control of Administrative Action, 1965, pp. 689-697.

190. See paras. 97-105 below for the procedure of the new remedy.

(iii) Other powers of the courts

95. We have said that in certain circumstances the applicant for review should be able not only to have the administrative decision declared of no effect by the court, but also get a declaration of his legal rights or privileges.[191] One of the most important aspects of declaratory relief, as it now exists, would therefore be retained. But in some cases the court may think that the right course is to remit the matter to the Minister, tribunal or other administrative authority to decide the issue rather than come to a conclusion itself on the merits of the dispute. This might well be regarded as the appropriate course where the ground of review was breach of the rules of natural justice; the court would probably take the view that the administrative authority should have a second opportunity to decide the question in accordance with these requirements. In other cases, too, the court may come to the conclusion that, though it has enough facts before it to hold that the administrative authority has decided an issue wrongly, for example, by having paid regard to irrelevant considerations, it does not have enough facts before it to grant a declaration of the applicant's rights. We, therefore, suggest that the court should have power to remit a question to the administrative authority, the prior decision of which has been reviewed, for re-hearing and determination by that authority.

96. We envisage that this power would be exercised at the discretion of the court. It may well be however that in some cases it would be thought right to remove this discretion and to compel the court to remit to the deciding authority. In this context it is interesting to note that rules have been made under section 9(3) of the Tribunals and Inquiries Act 1958 (now section 13(3) of the Tribunals and Inquiries Act 1971) compelling the remittance of the

191. Para. 90 above.

matter in certain cases (with the opinion or the direction of the court) for re-hearing and determination by the tribunal after an appeal to the High Court has been allowed.[192] A similar provision could be made in the new Act, which would enable rules to be made for particular questions compelling remittance of the matter after review of illegal administrative action. Indeed, in those matters already covered by Rules of Court in respect of appeals, it would be odd if similar rules were not made compelling remittance in the case of review; for the essence of appeal is that the appellate court can generally substitute its own verdict for that of the tribunal of first instance, and so, if remittance can be compelled in this case, then a fortiori it should be after proceedings on review. At this stage we do not feel able to make detailed proposals on the question whether and, if so, in precisely what circumstances the court must remit to the deciding authority, but we invite comments on this matter. Of course, in practice in many cases - particularly where the exercise of a discretionary power is reviewed on the ground that the authority took into account extraneous considerations or acted in bad faith - the court will not feel able to do more than quash the decision or declare it void, and command the authority to decide the question rightly according to law.[193]

(b) Procedure of the Application for Review

97. In the previous section of this Working Paper we outlined and compared the procedures on applications for the prerogative orders and declaratory judgments.[194] We saw

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192. See R.S.C. Ord. 94, rr. 10(4) and 12(5).

193. cp. Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

194. See in particular paras. 13-16 (certiorari) and 60 (declarations).

that each had advantages and disadvantages. We think that the procedure of the application for review should so far as possible combine the best aspects of the various existing remedies.

98. We suggest that the application for review should have the two-stage procedure which is a feature of applications for the prerogative orders under the present law. Our present view is that this provides a useful device for the discouragement of frivolous or wholly unfounded claims for judicial review. The court has to grant leave to apply before the authority or tribunal, the decision of which is challenged, is put to the task and expense of defending the proceedings. This would not be the case if the procedure adopted for the new remedy were the ordinary civil procedure,[195] since then it is the defendant who has to apply under R.S.C. Order 18, rule 19 for the action to be struck out as vexatious or frivolous. The likelihood of frivolous actions to challenge the legality of administrative action and orders may be increased by the fact that anyone adversely affected by administrative action will have standing to challenge it in the courts;[196] it would seem, therefore, all the more important to have some procedure for striking down applications without delay and cost for the particular public authorities and tribunals concerned. On the other hand, it may be argued that the two-stage procedure makes the prosecution of serious applications more expensive, and unnecessarily delays the full hearing. Our provisional view, however, is that the applicant for review should first seek leave to apply for review.

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195. As is recommended in the alternative proposal for reform discussed in paras. 139-144 below.

196. See paras. 125-133 below for a full discussion of locus standi.

99. If the procedure of the application for review is to follow that of the prerogative orders, the application for leave to apply will be made ex parte. This has the advantage that the administrative authority or tribunal, the decision of which is challenged, is not involved in the proceedings until the court has ascertained on the application for leave that the challenge is not frivolous or wholly unfounded. On the other hand, it might be thought procedurally more convenient if applications for discovery[197] and any other preliminary matters, such as fixing a date for the hearing of the application for the relief claimed, were disposed of by the judge[198] when granting the application for leave. In that event, at least if the applicant wished to claim discovery of documents, it is arguable that the application for leave should not be heard ex parte; the defendant might wish to contest the application for discovery as well as an application for interim relief which, as we have suggested,[199] could be granted by the court at this stage. But on balance we think that these procedural advantages do not outweigh the disadvantage that the administrative authority will in practice always be put to the trouble of resisting the application for leave. We therefore tentatively propose that the application for leave should continute to be heard ex parte. Nevertheless, we should welcome views on the question whether the application for leave should be made ex parte or should be contestable by the other party.

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197. See paras. 104-105 below.

198. In para. 138 below we tentatively propose that applications for leave, if not necessarily the final order itself, should be made to a single judge.

199. See para. 94 above.

100. We also invite views on the question whether it should be possible to dispense with the initial application for leave where the defendants consent. There are some cases where it is clear that leave will be granted and, indeed, where the procedings are in the nature of a test case which the defendants are equally anxious to have heard. In these circumstances, it seems something of a waste of time and of money (which the parties or the State will have to bear) to have a formal hearing to obtain leave. Under the present procedure, this can often be avoided by the device of applying for a declaration rather than for one of the prerogative orders. Under our proposals, however, it is intended that there shall be an application for review whenever the object is to challenge, at least directly, the administrative decision. It would be unfortunate if that meant that one could not dispense with the initial hearing for leave, when it obviously fulfils no purpose.

101. We do not suggest that the applicant should be under any obligation to approach the defendants to see whether they will consent, nor do we suggest that a refusal to consent should, in any circumstances, lead to the defendants being mulcted in costs. All we are suggesting for consideration is that if in fact there is a voluntary agreement to dispense with an application for leave, the Rules of Court should provide that no such application is necessary.

102. We would hope and expect that in the vast majority of cases affidavit evidence would be the most convenient and suitable method for the presentation of the application for the order itself. Certainly cases will be disposed of more quickly than if oral evidence is heard and cross-examination allowed. The court already has power at the moment to order evidence to be given orally, and deponents to be cross-examined on their affidavits, if any party applies, on applications for the prerogative orders, but in

practice it rarely exercises this power. We think that the court should have this power on the application for the order itself.

103. We would like at this point to raise the question whether the court should not have limited investigatory powers of its own. We would not suggest that its procedure should be modelled along the lines of that followed by the French Conseil d'Etat, nor do we feel able to make any proposal for the appointment of a Registrar to the court to make a preliminary investigation of the plaintiff's case; but the court might be given powers to cross-examine deponents of affidavits, whether a party has applied for this or not, and further to summon witnesses to give oral evidence, where the court thought that the truth was unlikely to emerge from the affidavits submitted by the parties. This would mark a radical departure from the general rule that in civil cases a judge can only call witnesses with the consent of the parties.[200] If such powers were conferred, we would expect that they would be exercised rarely. We would welcome views on this question.

104. There is no provision for the discovery of documents under R.S.C. Order 53 which governs the procedure of the prerogative orders, whereas discovery is available in proceedings for declarations and injunctions as it is in any ordinary civil action. Because inability to obtain discovery may lead to failure to detect an absence of jurisdiction,[201] we think that some provision for discovery of documents should be made. But it is difficult to make such provision in the absence of a full interlocutory

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200. Re Enoch and Zaretsky, Bock & Co. [1910] 1 K.B. 327, C.A.

201. See Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, C.A., where the applicants in proceedings for a declaratory judgment learned on discovery of certain documents that their suspension was ultra vires.

process; we would hesitate to recommend the introduction of such a process because of the delay it would entail, a delay moreover which would affect the large number of cases where discovery is not essential. It might therefore be best to provide that the court should order discovery of documents only on special application by a party seeking review; there would in that case be no provision for automatic discovery of documents in the Rules of Court governing the new remedy.[202] If the application for leave is to be heard ex parte, a separate application for the order of discovery would need to be made after leave has been granted, and a copy of the application would have to be served on the other party together with the notice of motion or summons and copies of the statements made in support of the application for leave.[203] The application for discovery would be accompanied by an affidavit stating the belief of the deponent that the party from whom discovery is sought has, or at some time had, in his possession or custody the document or class of document specified or described in the application.[204] We would further suggest that the Rules of Court should provide that the application for discovery should be heard by a Master of the Queen's Bench Division before the application for the order itself is heard. But it may be suggested that primarily because of these procedural complexities the application for leave under the new remedy should not be made ex parte; this alternative approach under which

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202. cp. R.S.C. Ord. 24, r. 2 which makes such provision for ordinary civil actions.

203. See para. 14 above. The details of the present procedure for the prerogative orders would, we envisage, be substantially reproduced in the Rules governing the new remedy.

204. See R.S.C. Ord. 24, r. 7(3): Order for discovery of particular documents.

applications for discovery would be heard on the application for leave has already been discussed in paragraph 99.

105. We must concede that this solution may not be sufficient to enable the applicant to get at the true facts in all cases; in particular, the absence of provisions for discovery by the parties without court order will mean that the applicant for review has to have at least some suspicion that the facts are concealed from him, for otherwise he will not make the special application for discovery of particular documents or documents of a specified class.[205] So it might be better to adopt the full procedure for discovery of documents in R.S.C. Order 24 for the application for review, even though the provision for mutual discovery of documents might slow down the procedure in the vast majority of cases where there is no dispute as to the facts. We have found this problem particularly difficult, and this is why we put forward two alternative approaches for consideration. We would welcome views on this question.

(c) Time-limits

106. The present system of remedies (statutory and common law) provides, as we have seen, time-limits ranging from six weeks for many cases of statutory review to the apparently unlimited period for bringing proceedings for declaratory judgments.[206] Few aspects of English administrative law have been so disputed as the merits of the six months time-limit for challenge by certiorari, the principal method of judicial review. Undoubtedly this limit has been partly responsible for the greater use of the declaration

205. It is doubtful if the applicant in Barnard v. National Dock Labour Board [1953] 2 Q.B. 18, C.A., would have discovered the true facts on this limited approach.

206. It seems that s. 2 of the Limitation Act 1939 does not apply to declaratory judgments.

as a remedy for the control of illegal administrative action. Nevertheless, as we have also seen, the period is more liberal than those in major European jurisdictions.[207]

107. In paragraph 84 above we said that the new remedy will be available to challenge ultra vires delegated legislation. At the moment the sole remedy to quash delegated legislation is the declaratory judgment for which there is no time-limit. It seems quite inappropriate for there to be any time-limit for judicial control in this case; by-laws may remain enforced for years and nobody might be prejudiced if they were then challenged as ultra vires.[208] We, therefore, propose that the new procedure should be available to challenge delegated legislation without restrictions as to the time within which proceedings must be brought.

108. It would certainly make for simplicity to have a uniform time-limit for all proceedings for review of administrative action and orders. But we do not think this is possible. It seems to us that two sets of distinctions should be drawn. The first concerns the grounds of review. Although we have generally referred to review by the courts of "illegal administrative action", review is usually regarded as exercisable on two distinct grounds - first, lack or abuse of jurisdiction or powers (including breach of the rules of natural justice) and secondly, error of law on the face of the record. In the latter case the tribunal the decision of which is impugned has acted within jurisdiction but has made a mistake of law discoverable on

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207. n. 38 above.

208. In Nicholls v. Tavistock U.D.C. [1923] 2 Ch. 18, a by-law made in 1862 was successfully challenged in 1922.

the face of its record in the course of coming to its conclusion.[209] This really resembles an appeal on a point of law rather than review in the strict sense. It is at first sight hard to see why the time-limit for "review" on this ground should be more generous than that allowed for an appeal on a point of law (where the error of law, of course, may not be on the face of the record and may require more time to be discovered).

109. In this context, it is interesting to note that R.S.C. Order 55, rule 4(2) provides that appeals (otherwise than by case stated) from any court, tribunal or person to the High Court must be entered within 28 days after the date of the judgment, order, determination or other decision against which the appeal is brought. An application for an order directing a Minister, tribunal or other person to state a case for determination by the court or to refer a question of law to the court by way of case stated must be entered for hearing within 14 days after receipt of notice of the refusal to state a case.[210] Our provisional view is, therefore, that the time allowed for an application for review on the ground of error of law on the face of the record should be more closely assimilated to the time allowed for an appeal on a point

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209. It may be that after the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147 which seems to expand the scope of error of law going to the jurisdiction, error of law within the jurisdiction will have a very limited role indeed.

210. R.S.C. Ord. 56, r. 8. An application for an order requiring a tribunal to state a case for determination by the Court of Appeal must be made within 21 days, except in the case of the Lands Tribunal when the period is 6 weeks: Ord. 61, rr. 1 & 2.

of law. We would welcome views on this point.

110. The second distinction which we would draw is based on the subject-matter of the issue between the individual and the administrative authority. We have already pointed out that there is in many cases ample justification in the public interest for a short time-limit for the challenge of administrative action in the courts.[211] It is because of this that the legislature has, principally in land development cases, cut down the time allowed for review to a period of six seeks after the making of the impugned order. On the other hand, there are equally some other cases where the legislature has imposed a shortened, although different, time-limit, where it is not immediately obvious why this is required.[212]

111. At this stage we take the view that in some areas of administrative law recourse to the courts will have to be confined within a shorter time-limit than the normal period. In the next section of this Working Paper we look at the whole question of the relationship of statutory remedies to the new general remedy which we are proposing. The question of time-limits in the cases covered by existing legislation is one important aspect of this problem, and we therefore postpone detailed consideration of special time-limits till then.[213]

112. Turning to cases where a special period is not to be prescribed, some commentators take the view that the present period of six months in certiorari proceedings is

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211. See para. 62 above.

212. See, for example, s. 107 of the Medicines Act 1968, which excludes review of the licensing authority's decisions after three months.

213. Paras. 123-124 below.

too short.[214] We agree that this may work injustice in some cases.[215] But in most situations there is a public interest in not re-opening the administrative decision after a substantial period of time has elapsed. The public authority concerned and individuals may well have relied upon the validity of the challenged decision for some considerable time. For example, a man may wrongly be refused a licence to operate a business because the authority made some mistake of law in construing the conditions of which they had to be satisfied before granting a licence. Others who have successfully applied for a licence later and commenced business, but who would not have done so if the first applicant had not been refused, might be prejudiced if the court quashed the refusal and declared his entitlement to a licence. So in direct review proceedings, where the object of bringing the application for review is to have an administrative decision quashed or declared void, we doubt whether any increase in the six months period should be substantial. Our provisional view is, therefore, that the period should be extended to one year from the making of the challenged order in the case of direct review proceedings. Even though the application for review is brought within the year (or whatever other limitation period is eventually decided on) it can be argued that there may be cases where the applicant has initially showed such a lack of concern at the impugnable administrative decision - has "slept on his rights"[216] - that the court should refuse him relief.

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214. e.g. Borrie, (1955) 18 M.L.R. 138, 146-7; H.W.R. Wade, (1958) C.L.J. 218, 222.

215. We have in mind cases where owing to the fact that the administrative authority or tribunal was not obliged to give reasons, the error of law going to jurisdiction or other jurisdictional defect was not discoverable until some time after the decision was made.

216. See R. v. Aston University Senate [1969] 2 Q.B. 538, D.C., though in that case the application was brought more than six months after the impugned order was made.

But we do not think it would be desirable or necessary to make special provision for this rare contingency. There are, we think, on the other hand cases where the court should have discretionary power to allow an application for review after the year is over. We have particularly in mind those cases when the defect in the administrative authority's jurisdiction or the bias of one of its members is fraudulently hidden from the applicant's attention. We would provisionally recommend that in these cases and other cases where it can be shown that the delay has not prejudiced the public interest the court should have a discretion to allow review after the year limitation period. We would not go so far, however, as to suggest that in cases of fraud, the period of one year should only start to run from the time when the applicant for review discovered the mistake or could with reasonable diligence have discovered it.[217] The effect of such a provision might be to allow review of orders when despite the existence of some fraud, the public interest was on balance against review. We would welcome views on the court's discretionary powers to extend the time allowance for challenge and whether this is the most suitable method of dealing with cases of fraud.

113. We realise that the establishment of the period of one year (apart from the statutory cases discussed in the next section of this Working Paper) within which the application for review must be brought in direct review proceedings will impose a limitation on the availability of both declarations and the enjoining orders which will replace injunctions in their public law aspect; but we are not deterred by this consideration bearing in mind that a declaration has only quite recently become freely available in the public sphere. The time-limit of six years for injunctions has not been devised with regard to

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217. Limitation Act 1939, s. 26.

its use in public law. We would welcome views on our proposal therefore to impose a general time-limit of one year for bringing the application for review.

114. If the new remedy and procedure is to be confined to direct review proceedings,[218] then subject to the qualifications already discussed it seems to us possible to make a recommendation for a general time-limit for the application for review. But this would not be the case if the application for review were also to be the sole procedure for collateral challenge to the validity of administrative acts and orders and to apply to other actions where an administrative law issue is involved.[219] Where an action is brought for damages only, there seems to be no good reason for having a shorter limitation period than the normal tort or contract limitation periods merely because, before making the award of damages, the court will have to decide the validity of some administrative act or order. The justification for a short time-limit does not apply where the only consequence of a successful application for review is an award of damages. But we think that where an injunction is applied for in a case involving a question of the legality of administrative action, it is in the public interest to have a short time-limit, even though the plaintiff is seeking to restrain the commission of a tort or a breach of contract. It seems to us that the same arguments for a short limitation period apply as where an enjoining order is sought merely to restrain an illegal exercise of power.

115. More difficult is the question whether the one year limitation period we are tentatively proposing is to be applied to cases where the application for review is used in order to obtain a declaration of legal rights, an issue

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218. See para. 79 above.

219. See paras. 80-82 above.

of administrative law being involved. Under the existing law, as we have seen,[220] the court would grant a declaration in its original jurisdiction: there is no time-limit.[221] In many of these cases it seems to us that the same policy arguments for a short time-limit apply as they do where a strictly supervisory remedy is being sought. This is so, for example, where the applicant wishes to obtain a declaration that he has been granted planning permission, although it is no part of his argument to allege the invalidity of some administrative act or order.[222] The relevant administrative decision in such a case is made when the authority asserts that the proposed activity of the applicant is not covered by the planning permission granted; the limitation period should run from the date of this decision. Moreover, if no time-limit were imposed, it would be possible for the applicant to evade the limitation period by framing his application in terms of a declaration of his rights rather than a declaration that a particular administrative decision was void. We would, therefore, tentatively suggest that the general time-limit of one year proposed for the application for review should apply to declarations in their original role, in so far as the case involves a question of the validity of the exercise of public powers.

116. One further matter which should be raised in this section of the Working Paper is the situation when an applicant serves a writ in a case suitable for the application for review under our proposals, and then is too late to rectify his error as the time-limit of one year

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220. See paras. 52, 77 above.

221. See para. 106 and n. 206 above.

222. Lever Finance Ltd. v. Westminster (City) London Borough Council [1971] 1 Q.B. 222, C.A.

(or whatever period is eventually chosen) has meanwhile passed. In that event, we think it would be unreasonable if the applicant were to be barred from applying for review. We, therefore, propose that, subject to the court's discretion as to costs, an applicant who serves a writ within the period of one year from the challenged administrative action should be able to bring the application for review even though the year is over when the case first comes before the Queen's Bench Master. If, however, the writ is served after the year is over, then the applicant should, we think, be barred from using the correct procedure.

(d) The relationship of the Application for Review to statutory remedies: exclusion of the new remedy.

117. It seems to us that there are three principal problems posed by the existence of statutory remedies and their relationship to any new general remedy. The first is the question whether the application for review should be comprehensive and replace all existing statutory provisions for review of administrative action or orders in the courts. The only special provisions which would be made, if this were the case, would be to impose short time-limits for particular situations. The second question concerns the effectiveness of exclusion clauses barring judicial review either totally or after some period of time. This problem has already been discussed.[223] The third aspect of statutory remedies to which we would direct attention is the question of time-limits: should an investigation be made of these provisions to see whether they are in each case justifiable and whether some greater degree of uniformity might not be achieved?

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223. See paras. 26, 62 above.

118. On the first problem it might be suggested that statutory interference with the common law powers of judicial control should be limited to the imposition of shorter time-limits. Certainly some statutory provisions for review can be criticised as unclear in their scope, and the courts have on occasion found it difficult to construe them. A classic example of judicial uncertainty when confronted by these statutory provisions is presented by Smith v. East Elloe R.D.C.[224] There the House of Lords had great difficulty in interpreting the formula in paragraph 15(1) of Part IV of Schedule 1 to the Acquisition of Land (Authorization Procedure) Act 1946.[225] The issue for decision was whether a compulsory purchase order could be challenged after six weeks but the House considered the circumstances in which a challenge could be made within that period. Viscount Radcliffe said that the Act permitted challenge on any ground which amounted to an abuse of power, including bad faith, while Lords Reid and Morton though it only allowed review of orders made in contravention of the relevant Act and regulations made thereunder. Lord Somervell thought that the right of challenge under paragraph 15 did not encompass applications based on the allegation of bad faith. Viscount Simonds expressed no definite opinion on this point.

119. We find it impossible not to agree with this criticism of statutory provisions for judicial review. There is, therefore, a good case for subsuming existing statutory remedies under the new general remedy; in a

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224. [1956] A.C. 736.

225. It provides: "If any person aggrieved by a compulsory purchase order desires to question the validity thereof ... on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act ...", he may challenge the order within 6 weeks.

number of instances this would make the work of the courts easier. The grounds of review would clearly be the same as in all other proceedings for the control of administrative action and orders. On the other hand it might be argued that to sweep away all statutory remedies wholesale would be too radical a step to deal with these difficulties. Many of the statutory provisions allow for review not only on the ground that the administrative authority has acted outside its powers but also for non-compliance with a procedure established by the relevant Act,[226] if the applicant has been substantially prejudiced. Assuming that this limitation on the right to review for breach of mandatory procedural conditions is justifiable, it would be difficult to reproduce this under the new general remedy for certain administrative situations. It may be said, therefore, that the right approach is to admit that in certain cases special statutory review provisions are justifiable; difficulties in their construction should be removed by amendment to the particular legislation concerned, making it clear, for example, that review may be sought for bad faith or abuse of powers.[227]

120. We have, however, to consider whether this proposal to abolish statutory remedies would be outside our terms of reference;[228] for in some cases the effect of allowing the application for review to be brought to challenge the exercise of administrative power now challengeable only

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226. See para. 63 above.

227. We are here concerned with review within any statutory time-limit that may be imposed: see para. 124 below for the suggested power of the court to grant an extension for review after a statutory time-limit on the ground of bad faith.

228. See paras. 3-4 above.

under a statutory procedure would be to widen the scope (as opposed to the form and procedure) of judicial review. One particular example is a statute which provides a remedy to the citizen by way of complaint to a Minister against failure by a local authority to comply with its statutory duty; in this situation the Minister exercises default powers, himself using mandamus if necessary to enforce compliance by the local authority with his directions. The courts construe the provision of a remedy by complaint to the Minister as excluding ordinary judicial remedies of the complainant.[229] Whatever the correctness of this approach, to allow the application for review to cover this particular situation would surely be to extend the scope of judicial review, a matter which is outside our terms of reference. The same would be to some extent true if the application for review were to replace statutory review under the Town and Country Planning Acts and other similar legislation. We therefore propose that the application for review should not replace existing statutory remedies which should co-exist with the new remedy.

121. The second aspect of existing statutory provisions which we wish to consider concerns the effectiveness and justifiability of clauses barring judicial review, either totally or after some special period of time shorter than the period allowed generally for challenge by certiorari. Ultimately, of course, the degree to which challenge in the courts should be excluded or restricted is a matter of policy which lawyers alone cannot decide. But quite apart from the question whether particular exclusion clauses are justified, we think that the whole situation should be reviewed on the ground that after the recent

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229. e.g., Watt v. Kesteven County Council [1955] 1 Q.B. 408, C.A.; Bradbury v. Enfield L.B.C. [1967] 1 W.L.R. 1311, C.A.; Cumings v. Birkenhead Corpn. [1971] 2 W.L.R. 1458, C.A. And see para. 37 above.

decision of the House of Lords in Anisminic v. Foreign Compensation Commission,[230] this area of law is in some considerable doubt and confusion.[231] Although, as we have conceded,[232] exclusion clauses are strictly outside our terms of reference since they restrict review by any form of proceeding, it would hardly seem possible to leave the law in the present state of uncertainty. Moreover, it would be odd to examine the special limitation periods imposed by various statutes which are clearly an aspect of the form and procedure of remedies, and not to examine the exclusion clauses which are so intimately related to these time clauses.

122. Provisions purporting wholly to exclude any judicial review are now very rare indeed. Since the Report of the Committee on Ministers' Powers[233] they have been very heavily criticised; in 1958 the legislature rendered ineffective such clauses (with two exceptions - decisions under section 26 of the British Nationality Act 1948 and those of the Foreign Compensation Commission) in statutes passed before that year.[234] Nevertheless such provisions, or provisions which purport at least to exclude judicial review, are still to be found in modern statutes.[235] Now

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230. [1969] 2 A.C. 147.

231. See para. 26 above.

232. Para. 27 above.

233. 1932, Cmd. 4060, p. 65 (delegated legislation) and p. 117 (judicial or quasi-judicial decisions).

234. Tribunals and Inquiries Act 1958, s. 11. The corresponding section, section 14, of the consolidating Tribunals and Inquiries Act 1971 omitted the Foreign Compensation Commission as an exception. One consequence of the proposals in these paragraphs would be that this section could be repealed so far as it concerns England.

235. e.g., Ministry of Social Security Act, 1966, s. 18(3). The predecessor of this section (in the National Assistance Act 1948) was commented on adversely by the Franks Committee, (1957), Cmnd. 218, para. 117.

it seems that after the decision in Anisminic they will not be effective to prevent review of ultra vires determinations. We think a review should be made of every statutory provision which purports to exclude all recourse to the courts to see whether in the light of the Anisminic case they serve any useful purpose, i.e., whether it is wished to exclude review of error of law on the face of the record, not going to jurisdiction. If not, they should be repealed.[236] If, however, it is thought for some reason necessary to exclude judicial review in some cases, then it seems that the provisions will have to be re-drafted to take account of the Anisminic decision. It is hoped that there would be set out in a Schedule to the new Act instituting the application for review all those cases in which the new remedy is to be excluded; in this way the courts would be able to see clearly whether there is a total bar on judicial review or not.[237]

123. With regard to the third question raised by statutory remedies - time-limits - it may be noted that section 11 of the Tribunals and Inquiries Act 1958 which for the most part outlawed exclusions clauses in statutes passed before that Act, did not apply to any case "where an Act makes special provision for application to the High Court ... within a time limited by the Act". As we have pointed out,[238]

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236. We would point out in this context that the new Foreign Compensation Act, 1969 does not contain an exclusion clause.

237. This Schedule would only cover cases of express exclusion of ordinary judicial review; the courts will still be able to construe statutes as impliedly excluding the ordinary remedy by the provision of some other suitable remedy in the relevant statute; see paras. 25, 37 and 119 above.

238. In para. 26 above.

however, it is now doubtful after the Anisminic decision whether the earlier decision of the House of Lords in Smith v. East Elloe R.D.C.[239] upholding the efficacy of a clause barring judicial review after six weeks is still good law. It is obviously essential that this doubtful point should be clarified. Moreover, as we have pointed out earlier in the course of this Working Paper,[240] there may be situations where short time-limits have been imposed although it is not entirely clear whether this is necessary in the public interest. For both these reasons, we think that all special statutory limitation periods should be examined to see whether a shorter limitation period than the general one year allowed for review, which we are proposing,[241] is really justifiable.

124. It may be that some of these time-clauses could be removed, and the statutory review procedure made subject to the normal period of one year, if that is the period decided on. In those cases where a special period is justified, the consequent exclusion clause should clearly have the effect of barring all judicial review after that period is over. If the time-limit is rightly determined then it seems to us that there is no case for allowing review, even on jurisdictional grounds afterwards. The court might have the same discretionary power to grant an extension, particularly where the ground of review is fraudulently concealed from the applicant, as we have proposed it should have in cases of non-statutory review.[242] We would welcome views on these proposals, and any other aspects of the relationship between the new remedy and

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239. [1956] A.C. 736.

240. See paras. 62 and 110 above.

241. See para. 112 above.

242. ibid.

existing statutory provisions.[243]

(e) Locus standi

125. We have described how in the present law the requirement of locus standi to apply for review has been treated with varying degrees of strictness in the different remedies. We propose that the criterion for locus standi should be the same whatever form of relief is requested, or granted by the court. It would seem to us indefensible to perpetuate the present position under which an aggrieved citizen may be refused one remedy for lack of standing, although if otherwise available, the court would have held that he had sufficient standing to be granted another form of relief. We also propose that the new Act implementing our recommendations for reform should contain a broad formulation of locus standi to apply for the new remedy: what we have in mind is that any person who is or will be adversely affected by administrative action should have sufficient standing to challenge the legality of that action, and therefore be able to obtain the form of relief requested.

126. Our reasons for advocating a liberal requirement of standing are as follows. First, it seems to us an elementary principle of justice that a person whose interests are affected adversely by illegal action should be entitled to challenge that action in the courts. It would not, we think, be too much to say that this principle lies at the heart of our, and indeed any developed system of administrative law, though it is easy, however to point to cases where this principle has been lost in the unnecessary

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243. The question of locus standi with relation to statutory remedies is discussed below: paras. 130-131.

complexities and technicalities of remedies in administrative law.[244] Secondly, this formulation of locus standi should be fairly easy to apply in the courts. Of course, we recognise that there will inevitably be borderline cases on this formulation, and the courts will still be confronted with finely-balanced situations in which they have to determine whether the applicant has standing or not. But this broad formulation should give rise to much less difficulty than the various requirements in the existing law of "legal right" or "special interest". Thirdly, and perhaps most importantly, the existing law in the prerogative order of certiorari has reached this liberal position; the vast majority of decided cases there require only that the applicant show that he has a genuine interest in the administrative action for the order to be granted. A liberal criterion for standing is furthermore consonant with the first of the guidelines to which we attached importance in paragraph 74.

127. If the requirement of locus standi is so framed, then we see no reason to complicate the position by giving the court power in its discretion to admit challenge by a complete stranger. As we have pointed out,[245] cases have rarely arisen in which the court has granted certiorari to a stranger; and it might be that now the applicant in these few cases would be held to be "a person aggrieved" in the terms of the classic formula. Indeed, although locus standi is usually regarded as an aspect of the discretionary powers of the court to grant or withhold relief it might more properly be categorised as an independent condition precedent to the grant of relief, and not just a factor determining the exercise of the court's discretion.

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244. We would instance Durayappah v. Fernando [1967] 2 A.C. 337, P.C. (para. 22 above) and Gregory v. Camden L.B.C. [1966] 1 W.L.R. 899 (para. 58 above).

245. See n. 46 above.

We think that this should be the position under the new remedy.

128. But we would readily concede that though it is comparatively easy to state what we think should be the general principles, it is more difficult to formulate them in a clear and precise way. Some aid may be derived from the American experience here. Several important Federal Statutes provide for review in the federal courts at the instance of one who is "aggrieved" or "affected" by adverse administrative action or agency decisions; but these statutes differ only in detail. For example, the Federal Communications Act 1934[246] provides;

> "An appeal may be taken ...
>
> (1) By an applicant ... whose application is refused ...
>
> (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

One possibility is, therefore, that the new Administrative Procedure or Remedies Act should have a provision similar to this one, and the courts, aided in their interpretation by guidelines in the Act[247] would be left to develop

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246. 48 Stat. 926 (1934), 47 U.S.C.A., s. 402(b).

247. We have in mind as possible guidelines such factors as the nature of the powers or duties, in respect of which illegality is alleged, the relative seriousness of the illegality, and having regard to those matters, whether it is reasonable for the applicant to seek review. Some matters may be of sufficient importance for a very wide range of applicants to be accorded standing as persons adversely affected, while on the other hand it would be possible for the courts to hold that illegality in respect of some other duties or powers would justify intervention by a restricted range of people, e.g., ratepayers in a particular area. Thus the duty to enforce the criminal law (see R. v. Metropolitan Commissioner of Police, ex p. Blackburn [1968] 2 Q.B. 118, C.A.) might be thought to affect a large number of people, or indeed the whole populace, and therefore to justify a wider scope to locus standi than, for example, the duty of a local authority not to exceed its powers in providing free transport for old age pensioners (Prescott v. Birmingham Corpn. [1955] Ch. 210, C.A.).

the principles in cases arising subsequent to the passing of the statute. We do not think that such a formulation would hamper the development by the courts of the appropriate rules of locus standi in particular administrative situations. Rather we think that the provision of a broad and liberal formula together with guidelines would enable the courts to reach their decisions on standing on clear principles but within a sufficiently elastic framework to allow some flexibility of approach.

129. As we have seen,[248] the courts have criticised the formula allowing challenge under statutory review by "a person aggrieved". That is why we would emphasise that the new statutory formulation should make it clear beyond argument that relief is not to be confined to those who are asserting a private law right. This restriction, which has limited recently the scope of declarations, injunctions and statutory review, though never certiorari and not on most authority mandamus, is quite unjustifiable once the emphasis is put on, as it should be, the legality of the administrative action rather than the assertion by the applicant of his rights.

130. But there remains for consideration the difficult problem whether the existing statutory formulae for standing to challenge, which as we have seen have on the whole been restrictively construed by the courts,[249] should be affected by the proposals we are making. The most important area where the courts have adopted this restrictive approach is the Town and Country Planning legislation. Under this only the applicant for planning permission, the local planning authority and other limited classes of persons have a right to appear before the person appointed by the Minister to hear or decide

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248. See para. 66 and n. 144 above.

249. Paras. 65-66 above.

the planning appeal.[250] It was to a large extent because of the similar provisions in the earlier Acts that Salmon J. refused to hold the neighbour in Buxton v. Minister of Housing and Local Government "a person aggrieved" for the purpose of those Acts.[251] This decision has some plausibility on the facts of Buxton itself, for there the grounds of challenge was that the Minister had broken the rule of natural justice, audi alteram partem, and it would have been odd for the court to have held that though the neighbour was not entitled to a hearing before the inspector, the Minister had to give him a fair hearing when considering the inspector's recommendations. But it should perhaps be otherwise if the ground of challenge was that the Minister exceeded his statutory powers in giving planning permission, for then it would seem on principle that any person adversely affected by the ultra vires grant should be able to seek review in the courts. But if Buxton were strictly followed review at the suit of a neighbour would be refused whatever error were alleged.

131. Whether the formulae in the Town and Country Planning Acts and other legislation on similar lines should be looked at in the light of our general proposals for locus standi is obviously a delicate policy question on which we invite views. It may well be that it is possible to justify a more restrictive criterion of locus standi in these special areas just as it is possible to justify shorter time-limits. It may be that to allow neighbours and third parties to challenge grants of planning permission by the Minister would endanger the whole system of planning machinery set up by the Town and Country Planning Acts. But against this, it should be said that when planning permission has been granted by the local planning authority, there have been

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250. Town and Country Planning Act 1962, s. 23(5) as amended by the Town and Country Planning Act 1968, s. 21(6).

251. See para. 65 above.

very few applications by neighbours on certiorari to quash these orders.[252] The threat of intervention by a large number of third parties may be more imaginary than real. We should, therefore, like to raise the question whether the restrictive formulae of standing to apply for the statutory remedies should be reconsidered.

132. To return to locus standi in general, we would add that we have considered, as an alternative to a broad formulation of the requirement of standing with the details to be filled out by the courts, listing those persons who would have standing to challenge unlawful administrative action. But merely to state this solution is, we think, enough to show its unattractiveness. This list could clearly not attempt to be exhaustive but there would be a danger that the courts would be chary of granting standing to applicants for review who were not expressly covered by it. If they did so grant review, they would probably allow the criterion of standing to be satisfied on much the same general test as we are proposing. Our provisional proposal is therefore that the new remedy should be available to anyone adversely affected by illegal administrative action or orders; the courts would be assisted by statutory guidelines[253] directing their attention to various aspects of the

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252. See R. v. Bradford-on-Avon U.D.C., ex p. Boulton [1964] 1 W.L.R. 1136, 1145-6, D.C. It is doubtful, as Widgery J. pointed out in this case, whether certiorari is available in these circumstances. But this is not the point. What is interesting is that neighbours have rarely attempted to challenge planning permission by this means. cp. the Northern Ireland case, R. (Bryson) v. Ministry of Development for Northern Ireland (1967) N.I. 180, where a neighbour whose amenities would probably have suffered obtained certiorari to quash an invalid grant of interim development permission.

253. See n. 247 above.

question whether standing should be conferred. We are of course not intending to draft a precise formulation of locus standi at this stage.

133. It is probable that as a result of our proposed formulation of locus standi, there would be less scope than there is at present for relator actions. But we would hesitate to recommend the abolition of these actions. First, they may under the present law be used at the instance of local authorities to restrain breaches of the law by individuals. This role must clearly remain unaffected by our proposals, which are concerned with the control of the acts and omissions of the administration. Secondly, and more importantly, a strong argument might be made that the relator action be retained as a "long-stop" procedure for those cases where even under our proposals the individual acting alone would lack locus standi. In these admittedly rare cases, the Attorney General might be able to apply for judicial review under the new remedy. We would welcome views on the implications of our proposals for relator actions.

(f) Discretion of the court to refuse relief

134. All the existing remedies are discretionary in the sense that the court may refuse the applicant relief even though it is clear that the administrative order or action has been made or taken illegally and that the applicant has standing to challenge that order or action.[254] Some would argue that relief should lie as of right to a person adversely affected by illegal administrative action. It is however true that because the discretion is exercised judicially, i.e., in accordance with principles developed in the cases, it is an aspect of the present law which has

254. See para. 24 (certiorari and prohibition), paras. 36-37 (mandamus), and para 59 above (declarations).

on the whole excited little criticism. Our provisional view, therefore, is that the new Act should preserve the court's discretion to refuse relief and lay down a number of grounds on which it may exercise this discretion, e.g., that the grant of the remedy would be futile; that an equally efficacious administrative appeal or other statutory remedy has not been used or that the applicant's conduct has been so unmeritorious that he does not deserve to obtain relief. This list would not be exhaustive. By this means the principles of the existing law would be preserved in a clear way, and the court would be free to develop new rules when occasion arose.

135. But it is possible to take the view that though there must be certain cases where the courts should have a discretion (not necessarily including all the existing categories), there should not be a general discretion to refuse relief. This alternative approach has the attraction of imposing some degree of certainty in this area. But our provisional view is that it would be better not to fetter the courts on this point. We would therefore invite views on our proposal that the new Act should set out a non-exhaustive list of grounds on which the court may refuse relief in its discretion.

(g) The courts which would hear the Application for Review

136. A question which necessarily arises from the proposals for reform outlined in the preceding paragraphs is: to which courts will the application for review lie? In

our Exploratory Working Paper we posed the following question:[255]

> "(E) How far should changes be made in the organisation and personnel of the courts in which proceedings may be brought against the administration?"

Clearly this question is not one which in its full scope we are entitled to examine under our terms of reference. But equally obviously even on the most limited view of our terms of reference it will have to be determined in which existing court the new remedy will be available.

137. The present position is that the prerogative orders can be granted only by the Divisional Court of the Queen's Bench Division, while all Divisions of the High Court can grant declarations and injunctions. A County Court in an action lying within its jurisdiction may award damages and, by way of ancillary relief, grant a declaration or issue an injunction where the underlying issue is the legality of administrative action.[256] As regards the new remedy, one view is that it should be confined to the Divisional Court; it has been persuasively argued that this Court because of its experience in this area is more consistent in its application of administrative law principles than other courts are.[257]

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255. Law Commission Published Working Paper No. 13, para. 10.

256. e.g. as in Hannam v. Bradford Corpn. [1970] 1 W.L.R. 937, C.A., (rule against bias a collateral issue in an action for breach of contract).

257. See H.W.R. Wade, "Crossroads in Administrative Law", (1968) C.L.P. 75, 90.

138. On the other hand, it can be argued that it is unnecessary for all administrative cases arising from an application for review to be heard by a three-judge court. An alternative proposal would therefore be to allow the application for review to lie to a High Court judge sitting singly either in London or at one of the five Circuit Centres established in implementation of the recommendations of the Royal Commission on Assizes and Quarter Sessions.[258] In particular a High Court judge sitting alone should be able to hear applications for leave. The specialised supervisory jurisdiction which we regard as essential to the consistent application of the principles of administrative law could be secured by the assignment of judges with particular experience of administrative law to hear applications for review. The Rules of Court might provide that on granting the application for leave the High Court judge could assign the application for review itself to the Divisional Court, if the case seemed to him to be one of unusual difficulty. But generally the same judge who granted the application for leave would hear the application for relief and deal with any other matters arising. This alternative proposal seems to us to have the merit of combining the required degree of specialisation with the advantages of cheapness and convenience afforded by a single member tribunal which may sit in the provinces. The proposal would ensure a court with the same features as the Commercial Court, namely, an expert judge who is in charge of the case from beginning to end, supervising all interlocutory matters. We would therefore tentatively propose that a single judge selected from a panel of those experienced in administrative law should entertain the application for review with power on the application for leave to assign difficult cases to a full Divisional Court. At the very least it

258. Report of the Royal Commission on Assizes and Quarter Sessions, (1969), Cmnd. 4153.

seems to us that applications for leave should be heard by one judge only. We would welcome views on this proposal and the other approach discussed in the previous paragraph.

3. AN ALTERNATIVE APPROACH

139. Although our provisional view is that the most satisfactory reform of remedies in administrative law is to replace the existing remedies by a single remedy under which all the present varieties of relief can be obtained, we think it right to put forward for consideration an alternative approach. Under this the prerogative orders - certiorari, prohibition and mandamus - would be retained, but their procedure would be assimilated to that of ordinary civil proceedings begun by writ or originating summons. The procedure for a declaratory judgment and injunctions and the prerogative orders would, therefore, be the same and they could be applied for in the alternative. As a consequence the difficulties caused by Punton v. Ministry of Pensions and National Insurance (No. 2) [259] would disappear; if a declaration were applied for in the circumstances of that case, the court would simply award certiorari. The differences in the criteria for locus standi would also be irrelevant, since the court could in its discretion award certiorari or prohibition where on a strict interpretation of the law, the applicant lacked standing for a declaration or an injunction.

140. Even if this alternative approach were preferred, then many of the points made in the preceding paragraphs with regard to the incidents of the application for review would still be relevant, and the problems discussed there would have to be solved. Common time-limits for declarations, injunctions and the prerogative orders would have to be introduced. Our proposals regarding exclusion clauses, the relationship of statutory and judicial remedies, and the court's discretionary powers to refuse relief could be

259. Para. 55 above.

applied to this alternative approach. Although, as we have just said, it would not be necessary to do so, it would still be possible to reformulate locus standi for the prerogative orders and declarations and injunctions (where the validity of an administrative order or act is in issue) on the lines we have proposed.[260] Rules of Court might provide that administrative law cases should be channelled to the Divisional Court of the Queen's Bench Division.

141. The result of assimilating the procedure of the prerogative orders to that of declarations and injunctions is that there would be at least the opportunity for full interlocutory process on applications for certiorari and mandamus with provision for mutual discovery of documents and interrogatories. Where the facts are not in dispute as would often be the case, the application could be made by originating summons.[261]

142. The principal advantage of this approach, as we see it, is that it avoids the technical difficulties involved in establishing a new general remedy which we discussed in paragraphs 83 and 85. Because the prerogative orders would be preserved, though with a different procedure, there would be no risk that the courts would lose sight of the principles on which judicial review is exercised. Moreover, all proceedings against public authorities would be governed by the same procedure. If the alternative proposal in paragraph 79 were accepted there would be a different

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260. Paras. 125-132 above.

261. The provision as to discovery and interrogatories will apply if the application is made by writ, or if made by originating summons, the court orders the proceedings to continue as if begun by writ.

procedure for direct review of the legality of administrative action from the ordinary civil procedure applicable to actions against public authorities in tort or contract, even though in the latter cases administrative law matters may arise collaterally; but this difference would not arise if our approach to collateral actions were adopted.[262]

143. However, as we have said,[263] we do not regard the technical difficulties - how to describe the scope of the new remedy and the question which bodies it will lie to - as insuperable. We doubt whether the courts would be at all hindered in their development of the principles of judicial review merely because the prerogative orders would be replaced by an application for review. But, more positively, we believe that the new remedy has the following advantages. First, the new remedy would preserve those features of the prerogative orders designed to facilitate the expeditious decision of questions which, in the interests of the public as well as the applicant, often require to be dealt with more quickly than is usually possible under the ordinary civil procedure.[264] Secondly, it would also preserve the present means of eliminating frivolous or unfounded claims without the defendant having the burden of applying for the application to be struck out.[265] Thirdly, the new single remedy, the title of which would give a reasonably clear indication of its character, would replace four remedies the nomenclature of which does not for historical reasons readily convey their present functions. Fourthly, although it may be possible by a

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262. See paras. 80–82 above.

263. Paras. 83–86 above.

264. See paras. 102–104 above.

265. See para. 98 above.

flexible procedure to overcome the difficulties arising from the technical peculiarities of the four prerogative orders without in fact abolishing them, we think that their abolition and replacement by a single remedy will make a real contribution to simplicity; such a simplification would help to clear the ground for the future consideration of any further reforms in the field of administrative law.

144. Although we have come to the provisional conclusion that the best method of reform of administrative law remedies is the provision of a general remedy under which different varieties of relief may be claimed, we would not deny that the alternative approach we have been considering in the last few paragraphs has some attraction. We should welcome views on the respective merits of the two approaches outlined.

4. ACTIONS FOR DAMAGES: THEIR RELATIONSHIP TO THE APPLICATION FOR REVIEW

145. In our review of the present law and our tentative proposals for its reform, we have refrained from discussing civil actions against the administration for damages. It may be remembered that we have taken the view that the questions posed by this aspect of relief for unlawful administrative action were outside our terms of reference.[266] Our work on the other judicial remedies has, however, convinced us that at this stage we must raise the question whether it is really satisfactory to attempt a serious reform of the form and procedure of judicial remedies without considering the extent to which damages are available as an alternative remedy.

146. The existing law is that if an administrative authority commits a tort or breach of contract it is as liable to an action for damages as a private individual

266. See para. 5 above.

is.[267] Thus, an action for breach of statutory duty against a public authority will lie in the same circumstances as it would against the citizen, i.e., when it can be shown that the statute is intended to confer a right of action on individuals.[268] No action will lie for the mere failure to exercise a discretionary power, even though the damage suffered is injury to the person or property. On the other hand, there is some suggestion that where an administrative authority with discretionary powers acts maliciously to an individual's loss (including economic loss) it may be liable to pay damages.[269] The scope of this "administrative" tort is as uncertain as its existence. Will it be committed whenever an administrative authority wrongly exercises its discretion to the loss of an individual, e.g., by acting for extraneous purposes or taking into account irrelevant factors in reaching a decision? There is Canadian authority for liability in such situations; in the leading case,[270] the plaintiff recovered damages from the Prime Minister of Quebec Province for persuading the Liquor Commission to cancel his licence to sell liquor. This act was done

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267. It might be added that in some circumstances bodies acting under statutory authority are immune from strict tort liability: see Dunne v. North Western Gas Board [1964] 2 Q.B. 806, C.A.

268. These circumstances are discussed briefly by de Smith, op. cit. (n. 13 above) p. 551.

269. David v. Cader [1963] 1 W.L.R. 834. There the Privy Council doubted the authority of the decision in Davis v. Bromley Corporation [1908] 1 K.B. 170, where the Court of Appeal held that an action would not lie against a local authority for maliciously failing to approve the plaintiff's building plans.

270. Roncarelli v. Duplessis [1959] 16 D.L.R. (2d) 689; but the relevance of this case for English law is weakened by the fact that it was decided in a civil law jurisdiction.

without legal authority on the part of the defendant, and for the ulterior purpose of punishing the plaintiff, a Jehovah's Witness, for acting as bailsman for a large number of members of the sect when they were charged with the violation of various by-laws.

147. Although the present state of the law is in some doubt, this does not appear to be the main argument for looking at the question of damages together with our proposals for the reform of the judicial remedies. It is rather that it may be thought impossible satisfactorily to solve some of the problems posed by the reform of the judicial remedies without having regard to the question whether damages should be made available or not. For example, we have at several stages of this Paper made the point that in many administrative situations, particularly those concerned with the compulsory purchase and development of land, it is in the public interest to allow challenge in the courts of the validity of administrative action only within a short time-limit. On the other hand, this restriction may work grave hardship on the aggrieved citizen, possibly the victim of fraud or other maladministration. It would probably be easier to fix the time-limit for applications for orders quashing the administrative action in these situations, if provision were made enabling the citizen to recover damages, a right which would subsist for the normal limitation period.[271]

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271. See in this context Smith v. East Elloe R.D.C. [1956] A.C. 736, where the House of Lords assumed that an action for damages might lie against the town clerk for fraudulently procuring the making of the compulsory purchase order. In fact in later proceedings for conspiracy, bad faith was held not to have been proved by the plaintiff: (1964) Public Law, p. 375.

148. The argument for looking at the circumstances in which the citizen has a right to damages against the administration can be put on much broader grounds. It is arguable that no system of remedies can afford justice to the individual who has suffered loss as a result of an administrative decision adversé to him unless it makes provision for the recovery of damages.[272] We have already expressed the view that this problem must be looked at as one aspect of the inquiry into administrative law which we envisage would be undertaken by a Royal Commission or by a committee of comparable status.[273] But we do not think that our terms of reference allow us to look at this very important and difficult topic at this stage. We, therefore, do not go beyond raising the question whether the reforms we have proposed with regard to the form and procedure of existing remedies can be satisfactorily implemented without regard to the question when damages should be available as a remedy against the administration. We should welcome views on this question.

149. Although we do not think we can now inquire into the range of circumstances in which damages should be awarded against the administration, the procedural relationship between the application for review and actions for damages against the administration for ordinary torts or breaches of contract must be considered. It may be that actions for damages in which a point of public law is involved are to be channelled into the appropriate administrative court with the result that the procedure of the application for review may apply.[274] But even if this is not so, there will be cases in which an applicant wishes to

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272. See the Report by "Justice", Administration under Law, (1971), paras. 62, 73-5.

273. Law Com. No. 20, paras. 9-10.

274. See paras. 80-82 above.

combine a claim for direct review of an administrative act or order and a claim for damages.[275] We think that the affidavit procedure which we have said will generally be the most convenient method of making the application for review,[276] should also be used to initiate the claim for damages when it is joined with an application for direct review. In some case the judge or the Divisional Court[277] might be able to determine the question of liability on the basis of the parties' affidavits at the same time that the order quashing or declaring the administrative decision void is granted. In other cases the court might want to make use of its powers to order oral evidence and the cross-examination of witnesses to determine disputed questions of fact on the issue of liability. Where this issue is particularly difficult the court might require the parties to serve a statement of claim and a defence so that the question can be determined by ordinary civil procedure.

150. We appreciate that these tentative proposals mean that there would be, in some cases at least, a different procedure for tort or contract actions against the administration from that governing actions against individuals or corporations. But we think that the argument from convenience, namely that the same procedure should, if possible, govern the application for direct review and the damages claim joined to it, is important. We should welcome views on this question.

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275. As in e.g., Ridge v. Baldwin [1964] A.C. 40 where the chief constable applied for a declaration that his dismissal was void and also for damages for unlawful dismissal; Vine v. National Dock Labour Board [1957] A.C. 488, application for declaration that dismissal void and damages for breach of contract.

276. See para. 102 above.

277. For the jurisdiction of the courts, see para. 138 above.

151. Generally the court should assess the damages after it has determined the question of liability. But in some cases it might be more convenient for them to be assessed by a Queen's Bench Master.[278] This might be so if the question of liability has been determined on affidavits; for it would usually be desirable to adduce oral evidence for the assessment of damages and then it might be better not to take the time of the expert administrative law judge on this further question.

5. HABEAS CORPUS

152. We have not made any proposals in this Working Paper with regard to the prerogative writ of habeas corpus. Issues of administrative illegality may, of course, arise in applications for habeas corpus, but compared to the prerogative orders it has a specialised role - the protection of liberty. It is thus not a general remedy for the control of administrative power. We have suggested, as an alternative proposal, that where an action for damages against the administration involves a collateral attack on the legality of an administrative decision, the main procedural features of the application for review should be applied to the action[279] but we would not recommend any changes in the procedure of habeas corpus,[280] some aspects of which were considered and reformed as recently as 1960.[281]

153. In some cases under the present law an order of certiorari is applied for in the same proceedings as the writ of habeas corpus.[282] The court gives leave to apply

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278. See R.S.C. Ord. 37.

279. See paras. 80-82 above.

280. R.S.C. Ord. 54.

281. In the Administration of Justice Act 1960.

282. e.g., In re H.K. (An Infant) [1967] 2 Q.B. 617, D.C.

for the prerogative order in the course of the hearing. There is no reason why this should not also happen with the application for review. At any time during the course of habeas corpus proceedings the court could grant leave to apply for review and, if necessary, adjourn the proceedings to allow any further necessary affidavits to be served. The application for review itself would then be heard at the same time as the return to the writ of habeas corpus. We should welcome views on the question whether there are any difficulties in the relationship between the application for review and proceedings for habeas corpus.

V. CONCLUSIONS

154. We append here a summary of the provisional proposals made and questions raised in this Working Paper. We would welcome views and comments on these proposals and questions:

(1) There should be a single remedy for judicial review of administrative action and orders which, we suggest, would be called "the application for review" (para. 75).

(2) The application for review should provide an exclusive remedy not only where an administrative act or order is challenged directly, but also where it is challenged collaterally in an action for tort or contract and in other cases which essentially involve the validity of the exercise of public powers (paras. 76-82).

(3) The applicant would be able to ask for various forms of relief - orders quashing, or enjoining the administrative authority from acting illegally, or commanding it to act, where it is under a duty to do so, or declaring the particular administrative action to be invalid. In suitable cases, the court could also, as it can now, declare

the applicant's legal rights or privileges (paras. 89-90).

(4) The application for review would be available to challenge the validity of all illegal public orders or action including ultra vires delegated legislation and decisions of inferior courts and tribunals. It might be available only to control those bodies at the moment amenable to control by the prerogative orders; alternatively it would also cover decisions of bodies exercising monopoly licensing functions (paras. 84-86).

(5) All forms of relief, as described above, should be available against the Crown (paras. 91-92).

(6) The court should have full powers to grant a stay of proceedings or enforcement of an order and any other interim relief where suitable (paras. 93-94).

(7) In all cases the court should have a discretion to remit the matter with its opinion on the law to the Minister or other deciding authority to decide the issue rather than make a declaration of the applicant's legal rights or privileges. In some cases it may be that the court should be compelled to remit a matter to the deciding authority (paras. 95-96).

(8) The application for review should generally have the two-stage procedure which is a feature of the applications for the prerogative orders. The application for leave might be dispensed with if the defendant consents to this. On balance, we think the

application for leave should continue to be made ex parte. The court should have power on application to order evidence to be given orally and deponents to be cross-examined on their affidavits. We raise the question whether the court should have power to make such orders on its own initiative (paras. 98-103).

(9) Provision should be made for discovery of documents. We put forward for consideration two approaches to this problem: there should either be full provision for discovery of documents as in R.S.C. Order 24, or alternatively discovery should be available on application by the party seeking review. In either case we propose that the Rules of Court should provide for applications for discovery to be heard by a Queen's Bench Division Master before the application for review is heard; if, however, the application for leave is not ex parte, applications for discovery could be made at that stage (paras. 104-105).

(10) There should be no time-limit for the challenge of delegated legislation. The period during which direct challenge to an administrative act or order may be made under the application for review should be not longer than one year though the court should have a discretion to extend this period. But where the ground of review is error of law on the face of the record we take the view that the time allowed for challenge should be assimilated to the time allowed for an appeal on a point of law.

The normal limitation periods for actions in tort and contract for damages should apply if it is decided that the application for review is the appropriate procedure for these actions when they involve collateral challenge to the legality of an administrative decision. The limitation period should be imposed where a declaration is sought in its original role, where the case involves a question of the validity of the exercise of public powers. Finally, where an applicant serves a writ within the one year limitation period in a case appropriate for the application for review, he should not be non-suited but should be able to use the correct procedure even if the case comes before the court after the period is over (paras. 106-116).

(11) We do not propose that the existing statutory remedies should be abolished and the application for review become comprehensive to cover all judicial review, which would, we think, involve issues outside our terms of reference (paras. 118-120).

(12) An examination should be made of those few clauses which purport wholly to exclude judicial review to see whether they now serve any useful purpose in the light of the Anisminic case, and whether they might not be repealed (paras. 121-122).

(13) An examination should be made of all special statutory limitation periods to see whether a shorter limitation period than the general one year period which we are proposing is really justifiable (para. 123).

(14) The requirement of locus standi, or standing to challenge, should be the same whatever form of relief is requested. It should be broadly formulated, so that any person who is adversely affected by administrative action should have standing to have that action reviewed. Guidelines would be drafted to help the courts determine whether the applicant had standing on a broad formulation of this kind. Restrictive statutory formulae of standing should be considered in the light of these general principles (paras. 125-132).

(15) Relator actions would not be affected by our proposals (para. 133).

(16) The court should have discretion to refuse relief; a non-exhaustive list of such discretionary grounds should be set out in the new Act implementing our proposals (paras. 134-135).

(17) Applications for leave to apply for review should be heard by a single judge who would be drawn from a panel of judges expert in administrative law. He would usually hear the application for the order itself, but he will have a discretion to assign cases of exceptional difficulty to a full Divisional Court (paras. 136-138).

(18) We would raise the question whether the reforms we are proposing are really practicable without an investigation of the grounds on which damages can be awarded against the administration (paras. 145-148).

(19) Where claims for damages are brought with an application for direct review, the question of liability might be determined by the same procedure as governs the application for review. On the other hand the court might order that this question be decided by ordinary civil procedure. Assessment of damages should be made by the court or by a Queen's Bench Master (paras. 149-151).

(20) We invite consideration of an alternative approach to reform of the remedies in administrative law under which the prerogative orders would be retained and their procedure assimilated to that of ordinary civil proceedings (paras. 139-144).

(21) We make no proposals in this Paper with regard to the procedure of habeas corpus; but there is no reason why an application for review should not be brought in the same proceedings as this prerogative writ (paras. 152-153).

APPENDIX A

Membership of the Consultative Panel on Administrative Law

(see paragraph 7)

The Hon. Mr. Justice Bridge

Mr. Peter Boydell, Q.C.

Mr. F.N. Charlton, C.B., C.B.E.
(Treasury Solicitor's Office)

Mr. W.R. Cox (Home Office)

Master J.B. Elton

Mr. G.T. Heckels, D.L.

Mr. Michael Mann

Mr. H. Wentworth Pritchard

Professor S.A. De Smith

Professor H.W.R. Wade, Q.C.

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