Intermediate Year

Sri Lanka Law College

Administrative Law

Empowers Independent Learning

Independent Law Student Movement

Reviews, responses and criticism
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1. SOURCES OF ADMINISTRATIVE LAW

The term 'Administrative Law' has been defines as the law relating to public administration. Wade and Forsyth defines Administrative Law as ***the body of principles which govern the exercise of power and duties by public authority***. The term Public Authority or Administrative Authority includes a person or body of persons appointed by Ministers or Parliamentary Acts. The primary purpose of Administrative Law is to keep the powers of government within their legal bounds in order to protect the citizens against their abuse and also to compel public authorities to perform their duties if they do not perform them.

These public authorities derive their power from legislation including Parliamentary Acts, the Constitution and various other sources and perform their duties toward the general public. Though statutory provisions are the main sources of Administration Law, it is not the only source of that law. It has been nurtured by other aspects of the law such as –

1. The Constitution
2. English Common Law
3. Prerogative Powers of the Monarch
4. Contracts between the Public Authorities and Ordinary Citizens
5. Sri Lankan Judge-made Law
6. Statutory Provisions

The Constitution

This is the main source of Administrative Law. Since the constitution of a country provides the fundamental framework for the governance of the country, it is natural to state that the constitution becomes the main source of Administrative Law of that country.

According to constitutional provisions, the three (3) organs of the government have to perform three (3) different functions.

- Legislature – Legislate
- Executive – Implement
- Judiciary – Supervise the implementation of legislative provisions

The constitution authorizes the President and the Cabinet of Ministers to delegate some of their power to state officials to implement their general policies that have been transformed into legislative instruments by the Legislature. Further, it also establishes the principal authorities responsible for the administration of a country and gives powers to them to delegate such power to lower administrative bodies.

- Chapter VIII — Provisions relating to setting up of a Cabinet of Ministers who will be in charge of implementing legislative policy
- Chapter IX — Provisions relating to the appointments to be made by the President and Cabinet to the Public Service

It also established superior courts with authority to review actions of administrative bodies.

- Chapter XV – Provisions relating to the establishment of courts

Art. 140 of the Constitution

Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.

Art. 154P(4)(b) of the Constitution

Every such High Court shall have jurisdiction to issue, according to law order in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against any person exercising, within the Province, any power under –

(i) any law ; or

(ii) any statutes made by the Provincial Council established for that Province,

in respect of any matter set out in the Provincial Council List.

The Constitution also provides for the establishment of Provincial Councils and Provincial Administrations.

Statutory Provisions

Separate statutory instruments relating to specific subject matters give specific authority to separate Ministers to implement them through their network of officers.
Example : Act on Price Control – Minister of Trade can appoint Price Control Inspectors to implement the Act

Statutes or Laws passed by Parliament are a main source of Administrative Law as they establish various kinds of administrative institutions and grant power, duties and discretion to their officers to perform function assigned to them.

The statutory provisions authorize local government authorities and other public institutions

- To promulgate subordinate legislation
- To establish tribunals, corporations, board and commission to look into matters
- To take action to punish those who violate the statutory provisions

English Common Law

We inherited a set of principles of Administrative law from English Law through the British. Judges of English Courts developed many principles that govern specific areas in Administrative law such as –

- Rules of Natural Justice
- Grounds for Judicial Review
- Exercise of Discretion
- Doctrine of *Ultra Vires*
- Judicial Control of Delegated Legislation

Therefore, the English Common Law plays an important role as a source of Administrative Law.

Due to their importance landmark cases such as –

- *Ridge v. Baldwin [1964] AC 40*
- *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation [1948] 1 KB 223*
- *Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147*

have exceeded their territorial limits and have contributed to the development of Administrative Law in Sri Lanka. Such cases are considered as authoritative because they have created important principles that act as guidelines in determining disputes in Administrative Law.

Sri Lankan Judge-made Law

There are number of cases which have developed various aspects of AL in Sri Lanka such as –

- *Peter Atapattu and Others v. People's Bank and Others [1995] 2 SLR 352*
- *Nakkuda Ali v. M. F. De Jayaratne 51 NLR 457*
- *Mundy v. Central Environmental Authority and Others (SC Appeal 58/2003) decided on 20 Jan 2004*

Contracts

Public Authorities in performing their functions enter into contracts with other people and organizations and acquire power through contracts.
Example : Housing Development Authority leases houses to tenants and under the terms of the lease contract the Authority acquires power to evict tenants and increase the tent.

2. ENGLISH PREROGATIVE WRITS V. ORDERS IN THE NATURE OF WRITS

A prerogative writ is a writ directing the behavior of another arm of government, such as an agency, official, or other court. It was originally available only to the Crown under English law, and reflected the discretionary prerogative and extraordinary power of the monarch.

Art. 140 of the Constitution

***Subject to the provisions of the Constitution**, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution and **grant and issue, according to law, orders in the nature of writs** of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person.*

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.

- **Certiorari** is an order by a higher court directing a lower court to send the record in a given case for review.
- **Habeas Corpus** demands that a prisoner be taken before the court to determine whether there is lawful authority to detain the person.
- **Mandamus** is an order issued by a higher court to compel or to direct a lower court or a government officer to perform mandatory duties correctly.
- **Prohibition** directs a subordinate to stop doing something the law prohibits.
- **Procedendo** is to send a case from an appellate court to a lower court with an order to proceed to judgment.
- **Quo Warranto** requires a person to show by what authority they exercise a power.

The Conceptual Significance of the Distinction between Prerogative Writs and Orders in the Nature of Writs

English Prerogative Writs are based on the Crown's prerogative and they are issued under the name of the Crown. However in Sri Lanka, all sovereignty is vested in the people (Articles 3 and 4 of the 1978 Constitution)

In ***Mundy v. Central Environmental Authority and Others (SC Appeal 58/2003) decided on 20 Jan 2004***, it was held that the jurisdiction conferred by Article 140 which extends to 'orders' in the nature of writs constitutes one of the principal safeguards against excess and abuse of executive power, mandating the judiciary to defend the sovereignty of the people enshrined in Article 3 against infringement or encroachment by the executive without any due deference to the Crown and its agents. The term "prerogative" reflects the discretionary nature of writs in the UK. But orders in the nature of writs moves away from this discretionary nature to a constitutional remedy based on a right. The term "prerogative" has no relevance.

The Practical Significance of the Distinction between Prerogative Writs and Orders in the Nature of Writs

The scope of writs was enlarged by linking fundamental rights and Article 140 through the conduct of Articles 3 and 4 of the Constitution.

In ***W. K. C. Perera v. Prof. Daya Edirisinghe and Others (1995) 1 SLR 148***, it was held that whether the rules or examination criteria have statutory force or not, the rules and examination criteria read with Article 12 of the 1978 Constitution (equality and equal treatment) confer a right to a duly qualified candidate to the award of a degree and a duty on the University to award such degree without discrimination. Though the applications involved writs of Mandamus and Certiorari, Justice Mark Fernando held that a gain for relief by way of writs may also involve an allegation of a fundamental right. He established that Article 140 and 12(1) flow from Article 3 which is a predominant character in the Constitution.

In ***De Silva v. Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another (1993) 1 SLR 283***, the Supreme Court applied the public trust doctrine i.e. that powers vested in public authorities are not absolute or unfettered but are held in trust for the people to be exercised for the purpose for which they were conferred and that their exercise is subject to judicial review by reference to those purposes.

'According to Law'

The phrase 'According to Law' has been interpreted by our courts in several instances.

(1) <u>Courts Ordinance of 1889</u>

The phrase 'According to Law' was first appeared in Section 42 of the Courts Ordinance 1889 which gave the power to the Supreme Court to issue writs according to law.

In ***Nakkuda Ali v. M. F. De Jayaratne 51 NLR 457***, the Privy Council held that the Controller of Textiles was acting in an executive capacity and not judicially and therefore, no right of a hearing was available to the dealer whose license was cancelled. This was in accordance with the prevailing English Law and as such it is inferred that the Privy Council interpreted "According to Law" to mean **"According to English Common Law"**

Lord Radcliffe in Nakkuda Ali v. M. F. De Jayaratne (Supra) : "Moreover there can be no alternative to the view that when Sec. 42 gives power to issue these mandates 'According to Law'. It is the ***relevant rules of English Common Law*** that must be resorted to in order to ascertain in what circumstances and under what conditions the Court, may be moved for the issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon."

This decision was upheld by the Supreme Court in the case of ***Abdul Thassim v. Edmund Rodrigo 48 NLR 228*** and interpreted "According to Law" as "According to English Common Law."

(2) <u>Administrative of Justice Law No. 44 of 1973</u>

Courts Ordinance of 1889 was repealed by this. Sec. 7 of the Administrative of Justice Law contained the same phrase, "According to Law." However, it has not evoked an interpretation in reported cases.

(3) <u>1978 Constitution</u>

Administrative of Justice Law No. 44 of 1973 was repealed by the 1978 Constitution, which contained the words "According to Law" in Article 140 and Article 154P(4)(b) with regard to

orders in the nature of writs. The phrase has been interpreted in many ways by our courts in several cases.

In the cases of ***State Graphite Corporation v. K. S. P. D. Fernando and Another (1982) 2 SLR 684, Peter Atapattu and Others v. People's Bank and Others [1995] 2 SLR 352*** and ***B. Sirisena Cooray v. Tissa Dias Bandaranayake and Two Others (1999) 1 SLR 1***, the Supreme Court interpreted the phrase "According to Law" as "According to English Law in so far as the English Law has not been modified by the statutes of Sri Lanka."

In ***Mohideen v. Goonewardane [1986] Vol. II Colombo Appellate Law Reports 487***, Siva Selliah J. interpreted "According to Law" as "English Common Law i.e. English Judge-made Law (but not English Statute Law), Statutes passed by the Parliament of Sri Lanka modifying the English Common Law and Rules of the Supreme Court of 1978 and 1990 (in relation to discretionary bars)."

In the case of ***Attorney General v. Shirani Bandaranayake S. C. Appeal No. 67/2013***, it was held that "According to Law" means **English Law or English Common Law modified by the statutes of Sri Lanka and does not include English Statute Law**.

'Subject to the Provisions of the Constitution'

The phrase 'Subject to the Provisions of the Constitution' has been interpreted by the Supreme Court in the case of ***Attorney General v. Shirani Bandaranayake (Supra)***.

Art. 67 - Privileges, immunities and powers of Parliament and Members

The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, mutatis mutandis, apply.

Art. 80(3) – When Bill becomes law

Where a Bill becomes law upon the certificate of the President or the Speaker, as the case may be being endorsed thereon, no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.

Art. 168(1) - Past operation of laws, previous Acts, offences and pending actions &c.

Unless Parliament otherwise provides, all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution, shall, mutatis mutandis and except as otherwise expressly provided in the Constitution, continue in force.

- Sec. 2 of the Parliament (Powers and Privileges) Act – 'Parliament' means parliament of Sri Lanka, include committee. Selecting Committee of Parliament does not come under the term 'any other institution.'
- Sec. 3 of the Parliament (Powers and Privileges) Act – Proceedings of parliament cannot be impeached.

3. ERROR OF LAW

'Error of Law' means where an administrative tribunal (decision maker) erroneously interprets the law as providing it a power which it did not have or has regard to the wrong legislative provision or misinterprets a statute and thereby, commits an error of law in exercising its powers. Error of Law is a ground on which superior courts can review decisions of inferior courts and administrative decisions makers. Error of Law has three forms. Two of these forms of the ground come from common law and the third form of the ground comes from statutes.

Error of Law could be divided into three as follows –

1. Jurisdictional Error
2. Non-jurisdictional Error (Error within the Jurisdiction)
3. Error of Law on the Face of the Record

(1) Jurisdictional Error

A decision maker who erroneously interprets the law as providing a power which it did not have, is said to make a jurisdictional error of law thus any decision taken under that power could therefore make his decision illegal because the decision maker did not have the power to decide the matter in the first place.

It holds that an error of law committed by a tribunal by adopting an incorrect interpretation of the statutory provisions in the enabling instrument destroys the jurisdiction conferred on that tribunal and that as a result the decision that was taken on the basis of that misinterpretation becomes ultra vires as it was takers in excess of jurisdiction.

This is also known as 'going to jurisdiction' or 'exceeding the jurisdiction'.

If a tribunal in the course of its inquiry addresses itself the -wrong question or violates the rules of natural justice and thereby steps outside its jurisdiction, it amounts to a jurisdictional error.

(2) Non-jurisdictional Error (Error within the Jurisdiction)

There are two requirements for non-jurisdictional error of law. There must be (a) an error of law and (b) the error of law must be on the face of the record of the decision.

(a) Error of Law

Non-jurisdictional error of law commenced its modern phase in the landmark case of ***Regina v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw [1952] 1 KB 339***. There, the Court of King's Bench had to consider whether certiorari was available for a non-jurisdictional error of law.

The applicant for the writ, Mr. Thomas Shaw, was formerly the clerk to the West Northumberland Joint Hospital Board. Shaw had performed two types of service – he had served with the hospital board from 7 October 1936 to 31 March 1949 and he had performed other types of service as well. Consequent upon the passing of the National Health Service Act 1946 Shaw suffered the loss of his employment with the Board. Shaw then sought compensation for loss of office under a statutory scheme. For the purpose of assessing Shaw's claim the Northumberland Compensation Appeal Tribunal took into account only Shaw's service with the hospital board from 7 October

1936 to 31 March 1949. It did not take into account his other types of service. However, Regulation 2 of the National Health Service (Transfer of Offices and Compensation) Regulations 1948, which covered Shaw's situation, defined 'service' in a manner that included these other types of service undertaken by Shaw in addition to his service with the hospital board. This meant that the tribunal had misinterpreted Regulation 2 of the compensation regulations. It was an error of legal interpretation. The tribunal had decided a point of law incorrectly. In consequence of this error the tribunal had awarded Shaw a lesser amount of compensation than the amount to which he was properly entitled.

At the time of Shaw's Case the dominant opinion was that the prerogative writs of certiorari and prohibition were available only for an error of law that affected the jurisdiction of the original decision maker, typically an official, a tribunal or an inferior court. In Shaw, however, the Court of King's Bench overruled this dominant opinion. Instead it decided that these writs extended to any error of law, be it jurisdictional or otherwise, provided that in the case of non-jurisdictional error the error of law was an error on the face of the record of the decision.

There were several reasons for deciding in this way. First, the wording of the writ of certiorari made it clear that the writ extended to all errors of law. It required that the Court of King's Bench do to the original decision 'what of right and according to the law and custom of England' ought to be done. The 'amplitude' of these words in the writ was clearly not confined to jurisdictional error but included non-jurisdictional errors as well.

Second, text writers had taken this view. Thus the illustrious writer Joseph Chitty in his text on practice of 1833 had said that by the writ of certiorari 'the Court of King's Bench has a most extensive power to bring before it their proceedings and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings below.'

Third, there was judicial authority for the proposition. Lord Sumner was direct and specific when he asserted that the supervision provided by certiorari 'goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.'

In ***Walsall Overseers v. London and North Western Railway Co (1878) 4 App Cas 30***, the House of Lords was also of the view that certiorari was available for non-jurisdictional error of law.

Fourth, up until about 100 years before Shaw, certiorari was regularly used to correct non-jurisdictional errors of law on the face of the record. For some reason, perhaps lack of necessity, it had fallen into disuse.

Fifth, there was the justice of the case. In the case before the Court of King's Bench there was an error of law, which in the words of Lord Denning deprived 'Mr. Shaw of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay Mr. Shaw the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such case there were no means of correcting the error.'

As the maxim goes, *ubi ius ibi remedium*, where there is a right there is a remedy. These reasons are overwhelming. So, as a result of Shaw's Case, in judicial review at common law error of law on the face of the record is one of the grounds of review regardless of whether the error goes to jurisdiction.

(b) Error of Law on the Face of the Record

As a common law ground for review there is an additional requirement for non-jurisdictional error of law. Not only must there be an error of law, but the error of

law must appear on the face of the record. This means that the error is visible on or detectable from the record of the decision. It must be patent not latent.

This requirement is not directly relevant to the issue as to what constitutes an error of law so it is not necessary to consider it in any detail. However, some brief comments are appropriate to give readers some idea of its function and shape as a requirement for the error of law ground of review.

To appreciate why the ground carries this requirement consider what would happen if this requirement was not part of the ground. This would mean that any error of law anywhere in the proceedings would do. Therefore someone of zealous disposition would scour any documents generated by the proceedings looking for something that could constitute an error of law. This would represent 'a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed'. For this reason common law imposed the requirement that the error of law be on the face of the record.

Being not only on the record, but also on the face of the record, means in principle at least that the error is very exposed.

Post-Anismic Position

Anisminic Ltd v. Foreign Compensation Commission [1969] 2 AC 147

The plaintiffs brought an action for a declaration that a decision of the Foreign Compensation Commission was a nullity. The Commission replied that the courts were precluded from considering the question by Section 4(4) of the 1950 Act which provided that 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' The respondent said these were plain words with one meaning; 'here is a determination which is apparently valid: there is nothing on the face of the document to case any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute.'

This was rejected by the Court. All forms of public law challenge to a decision have the same effect, to render it a nullity. The decision of the Commission was wrong in law, and therefore a nullity, rather than a 'determination' within the protection of the ouster clause. The House made obsolete the historic distinction between errors of law on the face of the record and other errors of law.

Lord Reid considered that the term 'jurisdiction' had both a wide and a narrow sense: 'I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.' He mentioned a variety of errors, including addressing the wrong question. 'But, if [the tribunal] decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.'

A statutory provision, which provided that any 'determination by the commission' in question 'shall not be called in question in any court of law', did not prevent the court from deciding whether a purported decision of the commission was a nullity, on the ground that the commission had misconstrued a provision defining their jurisdiction.

4. STATUTORY OUSTER CLAUSES

An ouster clause, preclusive clause, finality clauses or no certiorari clause is, in countries with common law legal systems, a clause or provision included in a piece of legislation by a legislative body to exclude judicial review of acts and decisions of the executive by stripping the courts of their supervisory judicial function. According to the doctrine of the separation of powers, one of the important functions of the judiciary is to keep the executive in check by ensuring that its acts comply with the law, including, where applicable, the constitution. Ouster clauses prevent courts from carrying out this function, but may be justified on the ground that they preserve the powers of the executive and promote the finality of its acts and decisions.

Ouster clauses may be divided into two species – total ouster clauses and partial ouster clauses. In the United Kingdom, the effectiveness of total ouster clauses is fairly limited. In the case of ***Anisminic Ltd v. Foreign Compensation Committee [1969] 2 AC 147***, the House of Lords held that ouster clauses cannot prevent the courts from examining an executive decision that, due to an error of law, is a nullity. Subsequent cases held that Anisminic Case had abolished the distinction between jurisdictional and non-jurisdictional errors of law. Thus, although prior to Anisminic Case an ouster clause was effective in preventing judicial review where only a non-jurisdictional error of law was involved, following that case ouster clauses do not prevent courts from dealing with both jurisdictional and non-jurisdictional errors of law, except in a number of limited situations.

Anisminic Ltd v. Foreign Compensation Committee [1969] 2 AC 147

As a result of the Suez Crisis some mining properties of the appellant Anisminic Limited located in the Sinai Peninsula were seized by the Egyptian government before November 1956. The appellants then sold the mining properties to an Egyptian government-owned organization called TEDO in 1957.

In 1959, a piece of subordinate legislation was passed under the Foreign Compensation Act 1950 to distribute compensation paid by the Egyptian government to the UK government with respect to British properties it had nationalized. The appellants claimed that they were eligible for compensation under this piece of subordinate legislation, which was determined by a tribunal (the respondents in this case) set up under the Foreign Compensation Act 1950.

The tribunal, however, decided that the appellants were not eligible for compensation, because their "successors in title" (TEDO) did not have the British nationality as required under one of the provisions of the subordinate legislation.

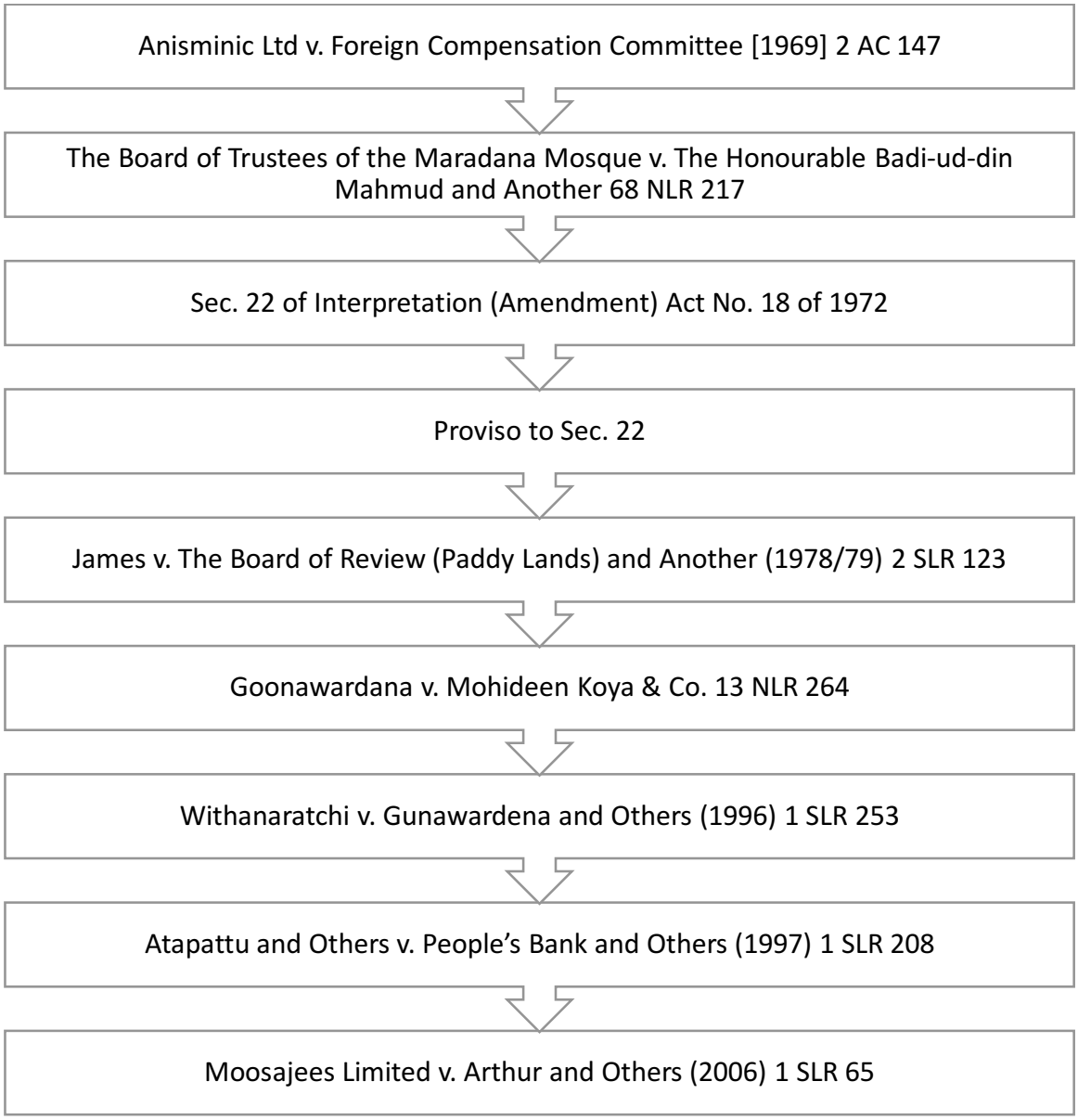
There were two important issues on the appeal to the Court of Appeal and later, the House of Lords. The first was straightforward; whether the tribunal had made an error of law in construing the term "successor of title" under the subordinate legislation.

The second issue was more complex and had important implications for the law on judicial review. Even if the tribunal had made an error of law, the House of Lords had to decide whether or not an appellate court had the jurisdiction to intervene in the tribunal's decision. Section 4(4) of the Foreign Compensation Act 1950 stated that "The determination by the commission of any application made to them under this Act shall not be called into question in any court of law."

By a 3-2 majority, the House of Lords decided that Section 4(4) of the Foreign Compensation Act did not preclude the court from inquiring whether or not the order of the tribunal was a nullity, and accordingly it decided that the tribunal had misconstrued the legislation (the term "successor in title"), and that the determination by the defendant tribunal that the appellant did not qualify to be paid compensation was null, and that they were entitled to have a share of the compensation fund paid by the Egyptian government.

The above decision illustrates the courts' reluctance to give effect to any legislative provision that attempts to exclude their jurisdiction in judicial review. Even when such an exclusion is relatively clearly worded, the courts will hold that it does not preclude them from scrutinizing the decision on an error of law and quashing it when such an error occurs. It also establishes that any error of law by a public body will result in its decision being *ultra vires*.

Development of STATUTORY OUSTER CLAUSE in Sri Lanka



The Board of Trustees of the Maradana Mosque v. The Honourable Badi-ud-din Mahmud and Another 68 NLR 217

In this case the Privy Council set aside a Minister's order under an Act which empowered him to take over management of the schools in Ceylon "where the Minister is satisfied" that a school is being administered in contravention of the provisions of the Act. The Minister based his order on past default which had since been made good. The Act required him to be satisfied of maladministration at the time of the order and as such, there was no ground for him to be satisfied that the school was being administered in contravention of the provisions of the Act and it was failed that he had failed to consider the right question

at the time of making the order. This case was decided on similar terms with the Anisminic Case.

Sec. 22 of Interpretation (Amendment) Act No. 18 of 1972

In 1972, the legislature introduced an amendment to the Interpretation Ordinance No. 21 of 1901 by the Interpretation (Amendment) Act No. 18 of 1972. Section 22 of this Act has the effect of limiting the jurisdiction of Courts to review administrative actions.

Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court", or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.

Proviso to Sec. 22

Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court or the Court of Appeal, as the case may be, in the exercise of its powers under Article 140 of the Constitution of the Republic of Sri Lanka in respect of the following matters, and the following matters only, that is to say –

a. *where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and*
b. *where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court or the Court of Appeal, as the case may be, is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law.*

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution of the Republic of Sri Lanka to issue mandates in the nature of writs of habeas corpus.

It should be noted that a Proviso of Section 22 enables the Court of Appeal and the Supreme Court to inquire into the legality of administrative actions covered by Section 22 only on the following matters –

1. Where such order decision, determination, direction, or finding is ex facie not within the power conferred on the administrative authority.
2. Where such administrative authority is bound to conform to the rules of natural justice.
3. Where the compliance with any provision of any law is a condition precedent to the making or issuing of any such orders decision, determination, direction or finding.

The Proviso (a) to Sec 22 of this Act by its very reference to the words "ex facie not within the power" shows that the Legislature amended to once again draw distinction to decisions falling outside jurisdiction and decisions within jurisdiction It is clear therefore that this amendment was enacted to overcome the law as developed in the Anisminic Case and The

Board of Trustees of the Maradana Mosque v. The Honourable Badi-ud-din Mahmud and Another (Supra).

James v. The Board of Review (Paddy Lands) and Another (1978/79) 2 SLR 123

The provisions of Section 22 of the Interpretation (Amendment) Act read with Section 59 (3) of the Paddy Lands Act bar the petitioner's application for a writ of certiorari and the preliminary objection must accordingly be upheld. The section bars any kind of challenge to an order which comes within Section 22 on grounds other than those specified in the proviso.

Goonawardana v. Mohideen Koya & Co. 13 NLR 264

In this case, the ouster clause was upheld in accordance with Sec. 22. It was held that only on three grounds that the Court of Appeal would be able to review a decision. When Sec. 22 is read with proviso, the three grounds would be –

1. The power exercised was not available ex facie to the decision maker.
2. The decision maker did not follow rules of Natural Justice.
3. The decision maker did not follow a mandatory provision of law which is a condition precedent.

Withanaratchi v. Gunawardena and Others (1996) 1 SLR 253

The respondent made an application to purchase her residing tenement under the Ceiling of Housing Property Law. The definition of house in Section 47 of the Ceiling on Housing Property Law No. 1 of 1973 includes a tenement. Here, there was a connecting door which was kept closed for 32 years. This interconnecting door served as access from the tenement to a book depot and not to a living accommodation though no doubt there was an attic in the book depot which however provided living accommodation. The Board of Review held this tenement was a house within the definition of the expression "house" in Section 47 of the Ceiling on Housing Property Law.

It was held that the Board of Review in holding in favor of the Respondent did not err in respect of a jurisdictional fact but the error if at all, is one made within the area of the jurisdiction of the Board of Review.

An ouster clause must be strictly construed and there is a presumption in favor of judicial review. Section 22 of the Interpretation Ordinance does not exclude review of jurisdictional questions. The bar applies only to erroneous decisions made within the area of the tribunal's jurisdiction. The error of the Board of Review is at most an error made within jurisdiction and the ouster clause would accordingly apply.

Atapattu and Others v. People's Bank and Others (1997) 1 SLR 208

The Supreme Court considered an ouster clause contained in the Finance Act of 1963 responding to this situation Mark Fernando J. comparing the fundamental jurisdiction of the Supreme Court and Article 140 of the Constitution, which confers judicial review through writ on the Court of
Appeal held as follows –

"Apart from any other consideration if it became necessary to decide which was to prevail an ouster clause in an ordinary law or a constitutional provision conferring writ jurisdiction on a superior court subject to the provisions of the Constitution (Article 140) I would unhesitatingly hold that the latter prevails because the presumption must always be in favor of a jurisdiction which enhances the protection of the rule of law as against an ouster clause which tends to undermine …"

But no such presumption is needed because it is clear that the phrase, "subject to the provision of the constitution" was necessary to avoid conflicts between Article 140 and other constitutional provisions. That phrase refers only to contrary provisions in the constitution itself and does not extend to provisions of unwritten law which are kept alive by Article 138(1)

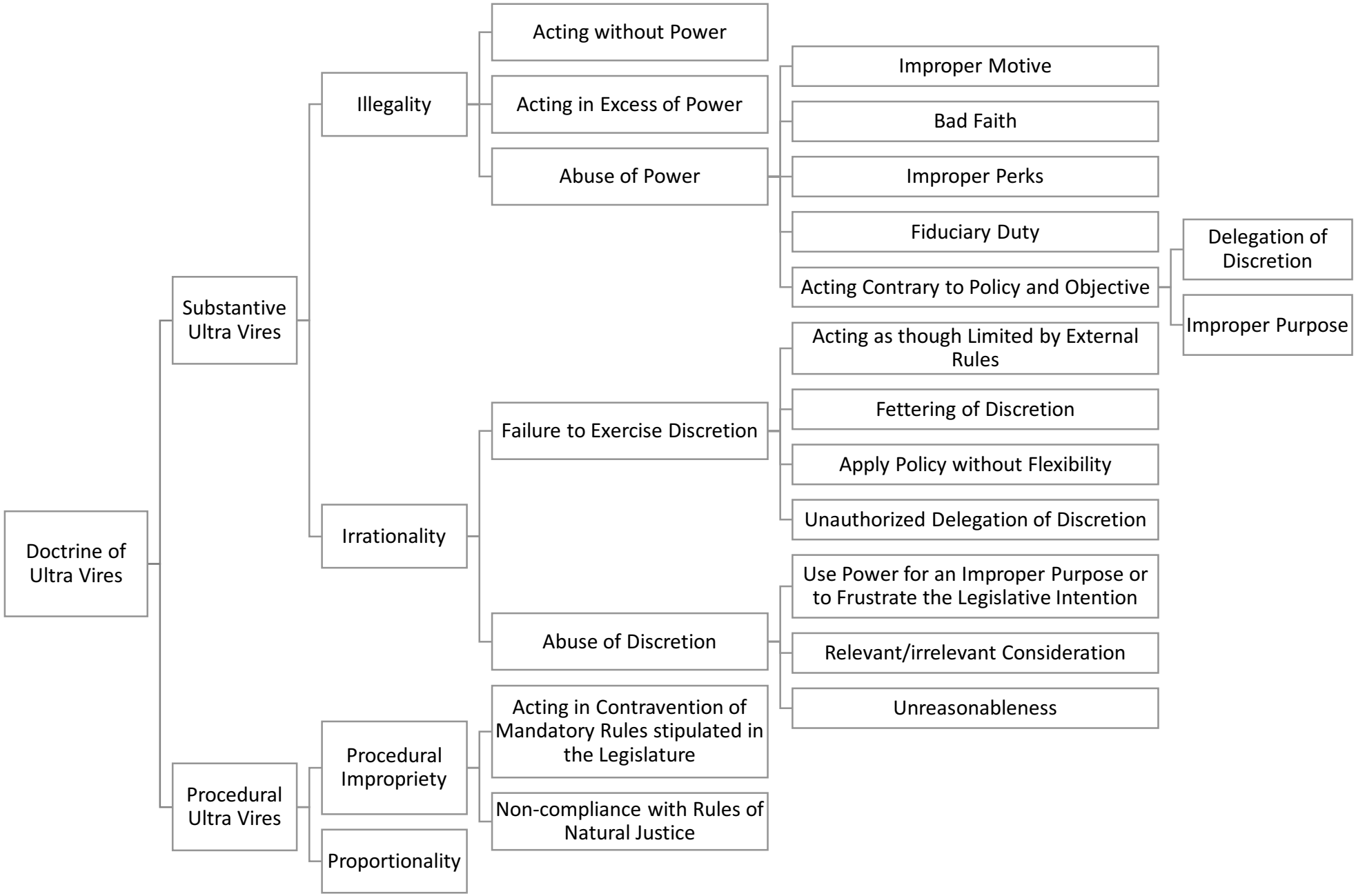
where the constitution contemplated that its provisions may be restricted by the provisions of Article 138 which is subject to ***any law***.

Moosajees Limited v. Arthur and Others (2006) 1 SLR 65

The 1st respondent tenant applied to the 2nd respondent (Commissioner for National Housing) under Section 13 of the Ceiling on Housing Property Law No. 1 of 1973 (CHP Law) to purchase the house in dispute owned by the appellant. On 25th Jan 1984, the Commissioner refused the application holding the premises were business premises under Section 47 of the CHP Law. On appeal to the Board of Review under Section 39(1) of the Law, the Board held that it was a house as it had been used for residence from 1943. The Court of Appeal refused an application by the appellant to quash the decision of the Board by certiorari. The Court held that in view of Section 22 of the Interpretation Ordinance, read with Section 39(3) of the CHP Law, the court's jurisdiction was ousted as the decision of the Board using the test of user was not ex facie outside the Board's jurisdiction and by its order dated 9th Feb 2001, refused the application for a writ.

It was held –

1. In terms of Section 47 (definition of 'house') the premises had been originally constructed as an eating house and assessed as such, but not originally constructed for residential purpose, although since 1943, it had been used for residence and assessed as such in 1980.
2. The Court of Appeal wrongly placed the burden of proof on the appellant to prove that the building was originally constructed for residential purposes when in terms of Sections 101 and 102 of the Evidence Ordinance, the burden of proving the original purpose of the building was on the 1st respondent.
3. In the above circumstances, the decision of the Board of Review was ultra vires and a nullity outside its jurisdiction and the appellant was entitled to a writ of certiorari notwithstanding Section 39(3) of the CHP Law. Further, Article 140 of the Constitution prevailed over Section 22 of the Interpretation Ordinance. For that reason also, Section 39(3) of the CHP Law had no application.


Doctrine of Ultra Vires
Substantive Ultra Vires
Illegality
Acting without Power
Acting in Excess of Power
Abuse of Power
Improper Motive
Bad Faith
Improper Perks
Fiduciary Duty
Acting Contrary to Policy and Objective
Delegation of Discretion
Improper Purpose
Irrationality
Failure to Exercise Discretion
Acting as though Limited by External Rules
Fettering of Discretion
Apply Policy without Flexibility
Unauthorized Delegation of Discretion
Abuse of Discretion
Use Power for an Improper Purpose or to Frustrate the Legislative Intention
Relevant/irrelevant Consideration
Unreasonableness
Procedural Ultra Vires
Procedural Impropriety
Acting in Contravention of Mandatory Rules stipulated in the Legislature
Non-compliance with Rules of Natural Justice
Proportionality

5. DOCTRINE OF ULTRA VIRES

The proposition that an administrative authority must act within the powers conferred upon it by the legislature may well be considered the foundation of Administrative Law. The primary purpose of Administrative Law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizens against their abuse.

The juristic basis, on which courts exercise judicial review whenever there is an allegation of administrative authorities acting outside their conferred powers, is commonly referred to as the ***Doctrine of Ultra Vires***. 'Ultra Vires' is a Latin phrase which simply means beyond powers or without powers. However, the courts, with the view of curtailing abuse of power by administrative authorities and providing relief for the parties thereby affected, have developed 'Ultra Vires' as a firm doctrine of law, by extending and refining its scope to embrace various types of abuse of power committed by administrative authorities.

The doctrine of ultra vires as used in Administrative Law implies that discretionary powers must be exercised for the purpose for which they were granted. At the inception, the application of the doctrine was designed exclusively to ensure that administrative authorities do not exceed or abuse their legal powers. If they did so, the courts declared such acts ultra vires and therefore, invalid.

Administrative power is generally derived from legislation. Legislation confer power on administrative authorities for specified purposes, sometimes, laying down the procedure to be followed in respect of exercise of such power. More often than not, these legislation stipulate the limits of such conferred power. If an administrative authority acts without power, in excess of power or abuses power, such act/s are liable to be rendered invalid on the ground of substantive ultra vires. When an administrative authority acts in contravention of mandatory rules stipulated in the legislation or does not comply with the principles of natural justice, such acts are liable to be rendered invalid on the ground of procedural ultra vires.

Hence, the manner in which as action of a public authority becomes ultra vires for excess of jurisdiction falls under two main categories. They are –

1. Doing the wrong thing (Substantive Ultra Vires)
2. Doing the right thing in the wrong way (Procedural Ultra Vires)

The earlier discussed concept of ultra vires is now further explained through the new classification adopted for judicial review by the House of Lords in the case of ***Council of Civil Service Unions v. Minister for the Civil Service [1983] UKHL 6***, also known as ***the GCHQ Case***.

In keeping with the classification of substantive and. procedural ultra vires it further explained the scope of ultra vires in the following four fold classification –

1. Illegality
2. Irrationality
3. Procedural Impropriety
4. Proportionality

Substantive Ultra Vires

Substantive ultra vires means that the rule making authority has no substantive power under the empowering act to make rules in question. It refers to the scope, extent and range of power conferred by the parent statute to make delegated legislation. This includes –

1. Illegality
2. Irrationality

Illegality

Where a statute gives a public authority power to perform an action and the public authority acts outside his jurisdiction his action becomes illegal. Therefore in such instances the court may declare his action as ultra vires by reason of it being illegal.

Illegality includes –

1. Acting without Power
2. Acting in Excess of Power
3. Abuse of Power

(1) Acting without Power

Where a public authority acts without power or lacks power his action becomes illegal.

Narandeniya v. Sri Lanka Export Development Board

Certain appointments were made for the posts of Deputy Director of the respondent Board by the Chairman of the Board. According to the Export Development Act as amended, such appointments were required to be made by the Board of which the Chairman was just another member. The sole appointing authority was the Board. The Court of Appeal quashed the appointment already made by issuing a writ of certiorari.

White & Collins v. Minister of Health (1939) 2 KB 838

A local authority has power to take land compulsory for housing provided that it was not 'part of any park or pleasure ground.' An order made by the authority and confirmed by the minister was quashed on the ground that the land was in fact a park land. This on its face is a simple case of ultra vires. The Minister contended that it was for the acquiring authority and himself to determine the facts and that their findings were conclusive. The Court of Appeal rejected this argument and upheld that the Minister had acted without power.

(2) Acting in Excess of Power

Where a public authority, who has been authorized to perform one action performs another action which he is not authorized to do, his second action becomes ultra vires.

Attorney General v. Fulham Corporation (1921)

The corporation ran a wash house allowing users to attend and to wash their clothes. It introduced a new scheme under which a user would purchase a wash bag, fill it with clothes and leave it to be washed by corporation employees. This scheme was challenged. It was held that the new scheme fell without the scheme authorized by the 1846 Act and was unlawful. The corporation, a statutory body, was to be restrained from acting outside its powers.

Robert v. Municipal Council, Kandy

The Council had power to grant permission to applicants to run an omnibus service in Kandy. In granting such licenses, the Council imposed a condition that passenger servicemen should not drop passengers at certain specified places. This condition was held to be ultra vires by the Supreme Court.

Regina v. Secretary of State for the Home Department, Ex Parte Leech [1994] QB 198

The case concerned a prisoner's right of confidentiality of mail from his/her solicitor. The prison rules gave power to the prison authorities to read and circumvent (if necessary) letters to and from prisoner, to check whether they were bona fide. The court held that this did not extend to checking communications that did not breach security and hence did not extend to letters to and from solicitors.

Mixnams Properties Ltd v. Chertsey Urban District Council [1965] AC 735

The council was given power under a statute to run a caravan site. The council gave on rent various parts of the site to several persons. After letting various parts of the site to several people it issued regulations in regard to the site as between them. The court held that the power to run a caravan site did not extend to the imposition of regulations regarding contractual lettings between caravan tenants.

(3) <u>Abuse of Power</u>

Where a public authority abuses his statutory powers and perform an action, such act will be declared as ultra vires by the courts. Abuse of power could be discussed under the following heads –

1. Improper Motive
2. Bad Faith
3. Improper Perks
4. Fiduciary Duty
5. Acting Contrary to Policy and Objective of the Statute

1. IMPROPER MOTIVE

Municipal Council of Sydney v. Campbell [1925] AC 338

The Council had a power to, with the approval of the Governor, purchase or resume land required for carrying out improvements or remodeling any portion of the city. Campbell's land was desired for the purpose of enabling the council to get the benefit of any increment in the value of it arising from the extension and to recoup municipality losses.

The resumption of the land for this purpose alone was not within the ambit of the authority conferred upon the Council. The use of the word 'proper' may be understood to invoke the requirement that a power can only be used for the purpose or purposes for which it is conferred and not for some extraneous purpose.

2. BAD FAITH

In ***Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223***, Lord Greene noted that a decision could be quashed on the basis of having been made in bad faith or dishonestly.

Regina v. Derbyshire County Council, Ex Parte the Times Supplements Limited and Others

A newspaper published a number of articles criticizing the activities of the Council Leader and the controlling party. The Council decided not to place any advertisements in that newspaper publications, including the Times Education Supplement. Granting certiorari to

quash the decision, the judge said the Council by taking a decision not to advertise in Sunday Times paper which greatest number of potential applicants are reading was induced by bad faith and motivated by vindictiveness towards the paper.

3. IMPROPER PERKS

Regina v. Secretary of State for the Home Department, Ex Parte Fire Brigades Union [1995] 2 AC 513

Parliament had passed the 1988 Act which provided for a new Criminal Injuries Compensation Scheme. Instead of implementing the Act, the Home Secretary drew up a non-statutory scheme for a tariff based system by using prerogative powers.

The House of Lords upheld the Court of Appeal decision which held that it was an abuse of power to introduce a radically different scheme which was not empowered under the Act.

4. FIDUCIARY DUTY

Local Authorities collect money from tax for fulfill its statutory duties and provide essential services to the public (housing, collect garbage, maintain highways). They owe a fiduciary duty to those from whom tax is collected and not spend them thriftlessly, but to provide service for benefit of community. If they fail to do so, it would be abuse of power which render their decisions illegal.

5. ACTING CONTRARY TO POLICY AND OBJECTIVE OF THE STATUTE

(i) Delegation of Discretion

In the case of ***Padfield v. Minister of Agriculture, Fisheries and Food***, the Minister had power to direct an investigation in respect of any complaint as to the operation of any marketing scheme for agricultural produce. Milk producers complained about the price paid by the Milk Marketing Board for their milk when compared with prices paid to producers in other regions. The Minister had power, if the committee of investigation so recommended, to make an order overriding the Board. But he refused to direct the committee to act, saying that since the producers were represented on the Board they should be content with 'the normal democratic machinery.'

The court held that where there was a relevant and substantial complaint and the minister had a duty as well as a power and that he could not use his discretion to frustrate the policy of the Act. Otherwise, he would be rendering nugatory a safeguard provided by the Act depriving the producers of a remedy which parliament intended them to have. Writ of Mandamus was therefore granted to compel the Minister to act as the law required.

(ii) Improper Purpose

Parliament confer particular power to a specific person for a particular purpose as expressed in the statute. If he acts accordance with the statutory purpose it will be lawful, otherwise illegal.

Irrationality

"It is a decision which is so outrageous in its defiance of logic, or of accepted moral standards that is no sensible person who had applied his mind would never arrived."

- Neil Parpworth in Constitutional and Administrative Law, Page 291 -

It is an accepted fact that administrative authorities are given discretionary power to be exercised subject to duty and depending on the situation that had arisen before such authority. The rule of law requires that all powers should be within legal limits. Therefore, in discharging its duty of maintaining the rules of law the courts have developed rules to control the exercise of discretion by administrative authorities and to control irrational decisions given by such authorities.

Irrationality could be discussed under two aspects –

1. Failure to Exercise Discretion
2. Abuse of Discretion

(1) <u>Failure to Exercise Discretion</u>

Failure to exercise discretion could be discussed under the following heads –

1. Acting as though Limited by External Rules
2. Fettering of Discretion
3. Apply Policy without Flexibility
4. Unauthorized Delegation of Discretion

1. ACTING AS THOUGH LIMITED BY EXTERNAL RULES

Here the decision maker fails to exercise any discretion at all, believing himself to be bound by some external rules.

Example : A decision maker who is required to take certain factors into consideration before arriving at his decision should have regard to those factors personally and not leave it to some other person to dictate on those factors or have regard to those factors and take them into consideration rather than being dictated by those factors.

In the case of ***Rex v. Mayor of Stepney [1902]***, a local authority had the power to make employees redundant, had to pay compensation. In fixing the level of compensation, took the advice of the treasury and the payments for council members were calculated according to treasury guideline applicable to the civil service. It was held that the decision maker had to make the decision themselves.

2. FETTERING OF DISCRETION

Where decision maker take relevant consideration without irrelevant consideration, but they must not allow those considerations to so influence their thinking that they cannot exercise discretion beyond it.

Regina v. Secretary of State for the Home Department, Ex Parte Venables [1998] AC 407

When parliament confers a discretionary power for a period, such power must be exercise in the light of circumstances in the occasion at the time to time in future. Decision maker may apply and develop own policy which he will adopt in future cases. If he adopts an inflexible, invariable or rigid policy, then the policy and decision will be unlawful and irrational.

3. APPLY POLICY WITHOUT FLEXIBILITY

A decision maker is conferred with discretionary powers is expected to consider each case on its own merits. Judicial review will be required where decision makers have developed their

own policies and applies them rigidly without considering whether the particular case has extenuating factors which would necessitate them into making exceptions.

Rex v. London County Council, Ex parte Corrie (1918)

A local authority changed a policy and revoked licenses and stop granting permission for sale of literature papers in public parks. 'The British Blind Association' asked permission to held a meeting and sell pamphlets, but wasn't granted permission. It was held that each application must be heard on its merits and general resolution could not be applied to all situations.

Lancelot Perera v. National Police Commission

In this case the petitioner, an SSP applied for the post of DIG and came third in the interview but was not promoted to the rank due to the rigid policy of the National Police Commission. It was the policy of the NPC not to promote the petitioner to the rank of DIG because his functions in the police force was to direct music and therefore was not involved in combat and other police related duties. Thus, the petitioner who was initially recruited as the Director of Music in the Police and continued in such functions as informed that he would not receive any further promotions beyond the rank of SSP.

In considering these circumstances the Supreme Court found that the petitioner had been meted out unequal treatment as envisaged in Article 12(1) of the Constitution. It was observed that adherence to administrative policy in a rigid manner would attract judicial review.

4. UNAUTHORIZED DELEGATION OF DISCRETION

It is an essential principle of Administrative Law that the authority given to a person by the enabling Act should be exercised only by that particular authority unless delegation of his power had been expressly authorized by the Act or necessarily implied in it.

This principle in contained in the maxim "delegata potestas non potest delegari" which is also stated alternatively as "delegatus non potest delegare" that means in Latin that "no delegated powers can be further delegated" or "one to whom power is delegated cannot himself further delegate that power."

The rationale behind this principle is that the legislative considers it important to give wide discretion or power only to a holder of a responsible position who would have acquired wide knowledge and experience by the time he come to that position. As such any delegation of the power or discretion by that person to another person unless such delegation has been authorized by the enabling Act constitutes unauthorized delegation.

Where the statutory discretion is exercised by an unauthorized person it becomes ultra vires.

In ***Padfield v. Minister of Agriculture, Fisheries and Food (Supra)*** it was held that the Minister did not have an unfettered discretion to justify his refusal to give reasons for his decision of delegating power to his committee.

Barnard v. National Dock Labor Board [1953] 1 All ER 1113

The appellant sought a declaration that the employer had imposed disciplinary measures improperly, in that they had been put in place by a Port Manager who possessed no relevant disciplinary powers. It has held that the delegation by the London Dock Labor Board, a statutory body, of its disciplinary functions to a Port Manager, was unlawful. The manager's

purported suspension of workers was therefore a nullity, and the Board was unable to ratify the decision.

(2) Abuse of Discretion

Abuse of discretion could be discussed under the following heads –

1. Use Power for an Improper Purpose or to Frustrate the Legislative Intention
2. Relevant/irrelevant Consideration
3. Unreasonableness

1. USE POWER FOR AN IMPROPER PURPOSE OR TO FRUSTRATE THE LEGISLATIVE INTENTION

This takes place when administrative authorities wrongly assume that the discretionary power was given to them by an enabling statute permitting them to use it subjectively when they really should have exercised objectively for the purpose it was granted by the enabling statute and not as they personally wish.

Municipal Council of Sydney v. Campbell (Supra)

In this ease the Council was given power by an Act of Parliament to acquire land for the purposes of redeveloping and remodeling a particular portion of the city. The decision of the council to acquire certain land for the purposes of benefiting from an anticipated increase in the value of the land was annulled by the court on the ground that the council was authorized to exercise its power for a specified purpose and was not authorized to exercise its power for different purposes.

Padfield v. Minister of Agriculture, Fisheries and Food (Supra)

It was held that the Minister had duty as well as a power that he could not use his discretion to frustrate the policy of the Act.

2. RELEVANT/IRRELEVANT CONSIDERATION

Here, a decision maker disregards to consider relevant matters and regard to irrelevant matters in exercising his discretion.

Roberts v. Hopwood (1925) AC 578

The district auditor for Poplar Council had surcharged council members for making payments of a minimum wage of £4 a week to their lowest grade of workers which was substantially in excess of the national average wage for similar workers. The council was acting under the power given to it by the Act to pay its employees "such wages as they think fit." The council was motivated by the belief that it ought to act as a model employer towards its employees. The sum was fixed not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether.

It was held that the surcharge was upheld. The councilors had not fixed on the sum as wages at all and had acted unreasonably. In fixing £4 they had fixed it by reference to irrelevant factors such as socialist philanthropy and feminist ambition and to the exclusion of those elements such as the wages level in labor market and burden placed on tax payers which they ought to have taken into consideration in fixing a sum which could fairly be called a wage.

Regina v. Somerset County Council, Ex Parte Fewings and Others (1994)

The local authority had power under the statute to impose a ban on hunting for the benefit of or for the improvement or development of the land. However, holding that it is a sin to take animal life the authority based the ban on ethical grounds. The court held that by considering moral and ethical issues the council had taken into account irrelevant factors. Therefore, the ban was held to be ultra vires.

3. UNREASONABLENESS

Although the "reaching a decision which is unreasonable" was discussed as a ground for irrationality, it has gradually developed as a separate doctrine where grounds for review would arise when a decision maker makes a decision that no reasonable person would have made.

The principle of unreasonableness as a ground of judicial review developed in the landmark case of ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223***.

In this case, Associated Provincial Picture Houses was granted a license by the Wednesbury Corporation in Staffordshire to operate a cinema on condition that no children under 15, whether accompanied by an adult or not, were admitted on Sundays. Under the Cinematograph Act of 1909, cinemas could be open from Mondays to Saturdays but not on Sundays, and under a Regulation, the commanding officer of military forces in a neighborhood could apply to the licensing authority to open a cinema on Sunday. The Sunday Entertainments Act of 1932 legalized opening cinemas on Sundays by the local licensing authorities **"subject to such conditions as the authority may think fit to impose"** after a majority vote by the borough. Associated Provincial Picture Houses sought a declaration that Wednesbury's condition was unacceptable and outside the power of the Corporation to impose.

In his judgment, Lord Greene justified the decision of the authority on the ground that the authority has a duty to take children's physical and moral health into account and imposition of such a condition was not unreasonable. His Lordship expounded the concept of unreasonableness now called as Wednesbury unreasonableness' as follows :

"It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the Phraseology used in relation to exercise of statutory discretion often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly he said and often is said, to be acting unreasonably. Similarly there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

Therefore, this doctrine is popularly known as the **Wednesbury Unreasonableness**.

The Court of Appeal while holding that the condition imposed was not unreasonable observed that ***"the test is not whether the court believes that decision should be so (unreasonable). The test is whether it is the sort of decision that a reasonable decision maker would come to."***

In order to determine whether the decision was based on reasonableness it is important to consider the following proposition laid down by Lord Goddard in the Wednesbury Case. These are generally known as the ***Wednesbury Rules***.

1. Whether the decision maker has properly addressed the written law.
2. Whether the decision maker has properly addressed the facts.
3. Whether the decision is made having regard to relevant factors.
4. Whether the decision maker has disregard or have not been influenced by irrelevant factors (considerations).

Roberts v. Hopwoods (Supra)

This case, the Borough Council who had power under an enabling Act to pay wages "as they may think fit" and they had paid higher wages during a period when the cost of living was high. But they had continued to pay those wages when the cost of living had gone down. The court hold that the words "think fit" should be interpreted to mean "as the employer think fit and proper for the service performed" and the local authority did not have power to set arbitrary and unreasonable wages for its employees at the expense of the interests of rate payers.

Mohamed v. Land Reform Commission and Another (1996) 2 SLR 124

The Petitioner is in possession of the land in question, after having entered into a lawful transaction with one Nalin Rajendra Ratnayake, the previous owner of the said land. At the request of the LRC, the Petitioner formally handed over possession of the land to the LRC, and LRC on that day itself handed back possession to the Petitioner on the basis of a lease. That lease transaction has been acquiesced in and adopted by the LRC, as it has accepted and received rents from the Petitioner. On 23th Sep 87, the Legal Director LRC has written to the Petitioner stating that the Petitioner had agreed to accept the return of a sum of Rs. 100,000/- which had earlier been paid by the Petitioner to the said Nalin Rajendra Ratnayake and that on payment of the said sum he had agreed to handover possession of the said land to the LRC. As the Petitioner did not vacate the said land, steps were taken (a quit notice was issued) under the provisions of the State Lands (Recovery of Possession) Act to recover possession of the land.

Per Jayasuriya, J. : "The Petitioner was in lawful and authorized occupation and possession of the said land as a monthly lessee of the said land under the LRC and in the circumstances the Notice issued by the LRC is ultra vires. Further this Notice has also been issued without jurisdiction, mala fide for an indirect and for a collateral purpose. The said Notice issued by the LRC is grossly unreasonable."

Premachandra v. Major Montague Jayawickrema and Another (1994) 2 SLR 90

Three recognized political parties, the United National Party (UNP), the Democratic United National Front (DUNF) and the Podujana Eksath Peramuna (PEP) contested for the Northwestern and Southern Provincial Council Election. No party gained an absolute majority. The Governors of the two Provinces were required to appoint Chief Ministers under Article 154F of the Constitution. The Governors were faced with rival claims for appointment as Chief Minister and they later appointed the UNP contenders as Chief Ministers of the two Provinces.

Two applications were filed, one for *Quo Warranto* questioning the new Chief Minister's legal right to hold office as Chief Minister and the other for *Certiorari* to quash the appointment of the Chief Minister and *Mandamus* to compel the Governor to appoint the Petitioner as Chief Minister.

G. P. S. De Silva, C. J. quoted Lord Wrenbury in Roberts v. Hopwoods (Supra). "A person in whom is vested a discretion must exercise his discretion upon reasonable grounds.

A discretion does not empower a man to do what he likes merely because he is minded to do so. He must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

Procedural Ultra Vires

Statutes give power to public authorities and sometimes lay down the procedure for carrying out such powers. Procedural Ultra Vires means the action or a decision of a public authority being declared valid due to its failure to follow the procedure laid down by the statute or by courts.

Failure to comply with rules of natural justice or mandatory procedure renders the decision or the action invalid and they constitute an integral part of procedural ultra vires.

Ridge v. Baldwin [1964] AC 40 was a UK labor law case heard by the House of Lords. The judges hearing the case extended the doctrine of natural justice (procedural fairness in judicial hearings) into the realm of administrative decision making.

In this case, the Brighton police authority dismissed its Chief Constable (Charles Ridge) without offering him an opportunity to defend his actions. The Chief Constable appealed, arguing that the Brighton Watch Committee (headed by George Baldwin) had acted unlawfully (ultra vires) in terminating his appointment in 1958 following criminal proceedings against him. Ridge also sought financial reparation from the police authority; having declined to seek reappointment, he sought a reinstatement of his pension, to which he would have been entitled with effect from 1960 had he not been dismissed, plus damages, or salary backdated to his dismissal.

The House of Lords held that Baldwin's committee had violated the doctrine of natural justice, overturning the principle outlined by the Donoughmore Committee thirty years before that the doctrine of natural justice could not be applied to administrative decisions.

"Natural Justice" is a legal doctrine which requires an absence of bias *(Nemo Judex In Causa Sua)* and the right to a fair hearing *(Audi Alteram Partem)*. ***Ridge v. Baldwin (Supra)*** was the first time that the doctrine had been used to overturn a non-judicial (or quasi-judicial) decision.

Procedural Impropriety

As discussed earlier the main two headings considered under concept of ultra vires, substantive ultra vires and procedural ultra vires was further classified into four propositions under the GCHQ Case.

One such proposition could be identified as Procedural Impropriety. Procedural Impropriety could be examined under the following headings –

1. Non-compliance with mandatory rules or statutory provisions.
2. Non-compliance with rules of natural justice

(1) Non-compliance with Mandatory Rules or Statutory Provisions

The consequence of a failure to observe procedural rules would depend on whether the procedural rules or provisions are classed as 'Mandatory' or 'Directory' in nature.

While this distinction is important because if the procedural rule is held to be Mandatory, then the breach of the rule with result in the decision being quashed. If the rule is held to be Directory, then the decision may not necessarily or automatically held to be ultra vires (contra procedural impropriety).

Unfortunately, acts of Parliament do not stipulate as to whether a particular rule is Mandatory or Directory. The language used by Parliament such as the use of the words "shall" or "must" (prima facie suggesting that it is Mandatory) and the use of the word "may" (prima facie suggesting that it is Directory) has proved to be inconclusive.

Sometimes where the words "shall" or "must" have been used, courts have held the words to be merely directory, and conversely where the word "may" have been used that the relevant rule is mandatory. However, some illustrations or rules which have been held to be Mandatory, may be given as follows –

1. Where the particular rule or provision affects a person's rights to property, office or liberty.
   Example : Such as giving prior notice before a person is sought to be evicted [Ref. ***Kandiah v. Abeykoon (Sriskantha Law Reports Volume IV Page 96)***] and before a building belonging is a person is sought to be demolished on the basis that it is an unauthorized structure.

2. Where the rule involves the requirement to give notice of a right to appeal against a decision.
   Example : the Rent Act No. 7/1972 - Sec 40(4) and the Ceiling on Housing Property Law of 1973 - Sec 39(1)

3. Where the rule involves publication of a decision within a stipulated time or publication or giving notice of a change in regard to an existing scheme or where a person's rights may be affected.

Dr. Shiranthi Perera v. Postgraduate Institute of Medicine of Colombo and Others (2006 Appellate Law Recorder)

In this case an unsuccessful candidate at the final part of the MD examination challenged the final examination results on the basis that –

a. The scheme adopted by the Postgraduate Institute of Medicine (PGIM) had not followed the procedural rules regarding the examination scheme which had to be approved by a three tiered structure.
b. The changed marking scheme was not brought to the notice of the petitioner.

As opposed to the above, the following illustrations of statutory provisions or procedural rules have been meant to be Directory.

1. Where the breach is of a trivial nature.
2. Which is linked to the earlier one that is where the person who is complaining has not suffered substantial prejudice.
3. Where substantial inconvenience or drastic consequences would follow if the rule was held to be Mandatory.

Thus it could be seen that the use of the words 'may' or 'shall' is not conclusive. The need arises for at least a broad test or criteria that could be implied by courts in determining the matter either way.

Such a broad test or criterion was suggested by Fernando J. in ***Egodawela v. Dissanayake [reported as Mediwake and Others v. Dayananda Dissanayake, Commissioner of Elections (2001) 1 SLR 177]***.

Per Fernando J. : "It is true that Sec. 46(A)(2) of Provincial Council Elections Act No. 2 of 1988 as am ended does not require an automatic annulment of the poll for each and every non-compliance. The word "may" confirms that the 1st respondent has a discretionary power. However, that is a power coupled with a duty; whenever it appears that the proved non-compliance."

6. THE PRINCIPLES OF NATURAL JUSTICE

There are two important Principles (rules) of Natural Justice. They are –

1. *Nemo Judex In Causa Sua (No one should be a judge in his own cause)*
2. *Audi Alteram Partem (Let the other side be heard as well)*

NEMO JUDEX IN CAUSA SUA

Nemo judex in causa sua is a Latin phrase that means, literally, "no one should be a judge in his own cause." It is a principle of natural justice that no person can judge a case in which they have an interest. The rule is very strictly applied to any appearance of a possible bias, even if there is actually none.

A judge is disqualified from determining any case in which he maybe' or may fairly be suspected to be biased. The rationale behind this rule is that an impartial judgment cannot be expected from a personal interest in the subject matter of the dispute.

There are several grounds for this rule. They are –

1. Pecuniary Interest
2. Actual Bias
3. Apparent Bias
4. Ministerial Bias

(1) Pecuniary Interest

Pecuniary interest is bias that involves pecuniary interest (as in money, financial interest, monetary terms), howsoever small it is. Several decisions of the English Courts have laid that involvement of pecuniary bias will invalidate the proceedings.

Dimes v. Grand Junction Canal Co. (1852) 3 HLR 759

The appellant was engaged in a prolonged litigation against the respondent company. The Lord Chancellor gave a decision against the appellant. It later became known the Lord Chancellor has a share in the respondent company. In appeal, their Lordships of House of Lords held that though Lord Chancellor forgot to mention about the his interest/share in the respondent company by mere inadvertence, yet the interest was sufficient to invalidate the decision given by the Chancellor.

Vassailliadas v Vassailliadas AIR 1945 SC 38

Privy Council in India made a reference to pecuniary bias in this decision. Lord Wright held that, "The simplest type of bias, is where the Judge is shown to have pecuniary interest in the results of the proceedings, there it will be held at once that he is disqualified, howsoever small the interest and howsoever clear it may be that his mind could be affected."

(2) Actual Bias

This is when the decision maker's mind is so closed to persuasion that argument against that view is ineffectual. Actual bias is rarely encountered because of the difficulty of proving it, which is compounded when the decision is made in conjunction with others.

(3) Apparent Bias

Apparent bias is present where a judge or other decision maker is not a party to a matter and does not have an interest in its outcome, but through his or her conduct or behavior gives rise to a suspicion that he or she is not impartial. An issue that has arisen is the degree of suspicion which would provide the grounds on which a decision should be set aside for apparent bias.

In ***Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet (No. 2)***, a petition was brought to request that a judgment of the House be set aside because the wife of one their lordships, Lord Hoffmann, was as an unpaid director of a subsidiary of Amnesty International which had in turn been involved in a campaign against the applicant, and as a party.

It was held that the House is unfettered by statute in its freedom to correct an injustice it had itself created. No financial interest was involved. Here there was a distinction between the two arms of the Amnesty International organization, but that was not sufficient. Lord Hoffmann was an officer of the charitable arm, and that was sufficient to make him a party to the case. The maxim 'nemo judex in sua causa' was to be applied. The fact that a person has the necessary training and qualifications to resist any tendency towards bias is not relevant when considering whether there was an appearance of bias. The decision was set aside.

Currently, cases from various jurisdictions apply two different tests.

1. **Reasonable Suspicion of Bias**

   In ***Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 KB 256***, McCarthy, a motorcyclist, was involved in a road accident which resulted in his prosecution before a magistrates court for dangerous driving. Unknown to the defendant and his solicitor, the clerk to the justices was a member of the firm of solicitors acting in a civil claim against the defendant arising out of the accident that had given rise to the prosecution. The clerk retired with the justices, who returned to convict the defendant.

   It was held that the appeal was essentially one of judicial review and was heard at the King's Bench division by Lord Chief Justice Hewart. Per Lord Hewart C. J. : "The ruling is derived from the principle of natural justice and has been followed throughout the world in countries that use the English legal system. It has been applied in many diverse situations, including immigration cases, professional disciplinary cases, domestic tribunals such as members' clubs, and perhaps most famously in the Pinochet Case, where the House of Lords overturned its own decision on the grounds of Lord Hoffman's conflict of interest."

2. **Real Likelihood of Bias**

   In ***Metropolitan Properties Company (FGC) Limited v. Lannon [1968] RVR 490***, tenants of apartments asked the Rent Officer to fix the fair rents. On appeal, the rents were then set at a rate lower even than they had requested. The rents would serve as a guide for other local rents. The landlords now complained that the chairman of the Rent Assessment Committee had been assisting his own father in negotiating a rent for such a local property, and had represented other tenants. They complained of bias.

   It was held that he should not have sat. It was accepted that he had had no pecuniary interest himself, and had acted scrupulously. It was a question of whether there was any appearance of bias. Lord Denning considered the test for apparent bias, and said "The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would

think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."

	Reasonable Suspicion of Bias	Real Likelihood of Bias
Perspective from which the Test is Conducted	The reasonable and fair-minded layman sitting in court and knowing all the relevant facts.	The court, which is personification of the reasonable man.
Substantive Difference	The question, addressed by the court is whether justice was both done and manifestly seen to be done.	The question, addressed by the court is whether there was a real danger, in the sense of probability, of actual bias.

In ***Regina v. Gough (1993) AC 646***, the House of Lords chose to state the test in terms of a **"Real Danger of Bias"**, and emphasized that the test was concerned with the possibility, not probability, of bias. Lord Goff also stated that "the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man." However, this test has been disapproved of in some Commonwealth jurisdictions. One criticism is that the emphasis on the court's view of the facts gives insufficient emphasis to the perception of the public.

(4) Ministerial Bias

AUDI ALTERAM PARTEM

Audi alteram partem is a Latin phrase meaning "listen to the other side" or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

It is considered to be a principle of fundamental justice or equity or the principle of natural justice in most legal systems. This principle includes the rights of a party or his lawyers to confront the witnesses against him, to have a fair opportunity to challenge the evidence presented by the other party, to summon one's own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make one's case properly.

Historical Background of Audi Alteram Partem

Rules of natural justice are standards introduced by courts to ensure that court proceedings are conducted fairly.

Rex v. Bagg (1615)

A voter was disenfranchised for insulting the mayor in an uncivilized manner. He had turned the hind part of his body in an uncivilized manner toward the mayor and said "come and kiss." The voter challenged the disenfranchisement. The particular statute did not confer power on the mayor to deprive the petitioner of his right to vote.

The significance of this judgment was that it was observed that even assuming that the local authority had power to disenfranchise the petitioner, it could only be done after

giving the petitioner a hearing.

Cooper v. The Board of Works for the Wandsworth District (1863) 143 ER 414

Where a land-owner owner had failed to give proper notice to the Board, the Board had, under the 1855 Act, power to demolish any building he had erected and recover the cost from him. The plaintiff said that the Board had used that power without giving the owner an opportunity of being heard. The Board maintained that their discretion to order demolition was not a judicial discretion and that any appeal should have been to the Metropolitan Board of Works.

The claim succeeded. Erie C. J. said that the power was subject to a qualification repeatedly recognized that no man is to be deprived of his property without his having an opportunity of being heard. This rule had been applied to 'many exercises of power which in common understanding would not be at all a more judicial proceeding than would be the act of the district board in ordering a house to be pulled down.'

Rex v. University of Cambridge (1913)

In this case a university scholar was deprived of his degrees on accidently having insulted the vice chancellor. He had not been given a hearing. On challenging the decision to deny his degrees the court ordered that he be restored back all his degrees on the ground that the vice chancellor's decision was in violation of the rule *audi alteram partem*.

Emergence of the Doctrine of Classification of Functions (Decline in the Development of Audi Alteram Partem)

The courts' slide into a function-oriented analysis, 'judicial' and 'administrative' as functional tests to be applied, rather than conclusionary labels attached to powers.

1. ***Nakkuda Ali v. Jayaratne [1951] AC 66*** (Trading license could be revoked without a hearing)
2. ***Rex v. Metropolitan Police Commissioner, Ex Parte Parker [1953] 1 WLR 1150*** (Taxi driver's license could be revoked without a hearing despite the impact that this would have on his career)
3. ***Franklin v. Minister of Town and Country Planning [1948] AC 87*** (Minister could not be challenged on apparent bias grounds because the minister was not exercising a 'judicial' function)

Over time, the courts began to mistake the impact-orientated basis of the distinction. It was decided that where you have issues like the revocation of licenses, this is not something that can trigger the requirement for a fair hearing because that is a purely administrative (in the governmental sense of the word) function.

The impact orientated analysis on the other hand considers the importance of the interests affected, is it important or otherwise interest that the decision impacts? Only the former would attract the right to a fair hearing – only the former would be judicial.

The functions oriented analysis is different in the fact that the 'judicial' actually becomes the center of the analysis. It is not the nature of the right affected that decides whether a fair hearing is due, but the kind of function that is being exercised by the decision maker – administrative or judicial.

Revival of Audi Alteram Partem

Ridge v. Baldwin [1964] AC 40 was a UK labor law case heard by the House of Lords. The

judges hearing the case extended the doctrine of natural justice (procedural fairness in judicial hearings) into the realm of administrative decision making. As a result, the case has been described as 'the landmark case' that opened up decisions taken by the UK executive to judicial review in English law.

In this case, the Brighton police authority dismissed its Chief Constable (Charles Ridge) without offering him an opportunity to defend his actions. The Chief Constable appealed, arguing that the Brighton Watch Committee (headed by George Baldwin) had acted unlawfully (ultra vires) in terminating his appointment in 1958 following criminal proceedings against him.

Ridge also sought financial reparation from the police authority; having declined to seek reappointment, he sought a reinstatement of his pension, to which he would have been entitled with effect from 1960 had he not been dismissed, plus damages, or salary backdated to his dismissal.

The House of Lords held that Baldwin's committee had violated the doctrine of natural justice, overturning the principle outlined by the Donoughmore Committee thirty years before that the doctrine of natural justice could not be applied to administrative decisions.

Per Lord Morris : "It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet (Kanda v. Government of Malaya)."
In Sri Lanka judicial advancement, ***Ridge v. Baldwin [1964] AC 40*** was followed and applied in cases such as –

1. ***Fernandopulle v. Minister of Lands 79 (II) NLR 115***

   It was held that an order by the Minister under the proviso to Sec. 38 of the Land Acquisition Act can be made only in cases of urgency and an order made under this proviso can be reviewed by the Courts. Per Tambiah J. : "Recent decisions, in England and in this country, have advanced the frontiers of natural justice. The Writ of Certiorari is not confined to judicial or quasi-judicial acts. It extends even to administrative acts that affect the rights of subjects."

2. ***Jayasena v. Punchiappuhamy and Another (1980) 2 SLR 43***

   At a gem auction held by the State Gem Corporation, Ratnapura Branch the petitioner purchased the right to prospect for gems in an area depicted as Lot 17 on a Plan. A license was issued to him valid for one year. After a period of over 7 months the license was recalled and the 2nd respondent who was the Regional Manager of the Corporation's Ratnapura Branch, informed the petitioner that he was cancelling the same. The petitioner was not given an opportunity to show cause against the said cancellation.

   The petitioner thereupon filed this application for a writ of certiorari to quash the decision of the 2nd respondent; and for a writ of mandamus to compel the respondents to issue his license allowing him to prospect for the balance period of the one year which was unexpired when the license was recalled.

   It was submitted on behalf of the respondents that the revocation of the license was an administrative act and therefore not subject to any requirement of natural justice.

   It was held that the petitioner had the right to prospect for gems and a license valid for one year had been issued. The revocation of the petitioner's license took away his existing right to prospect for a further period of about four months and this was

done without his being heard. In these circumstances the petitioner had made out a case for the issue o f a writ of certiorari quashing the order cancelling his license.

Extension of Ridge v. Baldwin

In ***Schmidt and Another v. Secretary of State for Home Affairs [1969] 2 WLR 337***, Lord Denning stated that –

1. There is now no distinction between judicial and administrative decisions.
2. The rules of Natural Justice applied whenever an individual has some right, interest or legitimate expectation.

Duty to Act Fairly

Cases subsequent to ***Ridge v. Baldwin (Supra)*** introduced the concept of the duty of care to act fairly.

In Re HK (An Infant) [1967] 2 QB 617, it was held that a Commonwealth citizen had a right to be admitted to this country if he was (as this party claimed to be) under the age of 16. The immigration officers were not satisfied that he was under 16 and refused him admission. The Lord Chief Justice said that even if they were acting in an administrative capacity, they were under a duty to act fairly – meaning that they should give the immigrant an opportunity of satisfying them that he was under 16. Part of the duty to provide a fair hearing includes disclosure to a party of prejudicial information, in order that the party may respond.

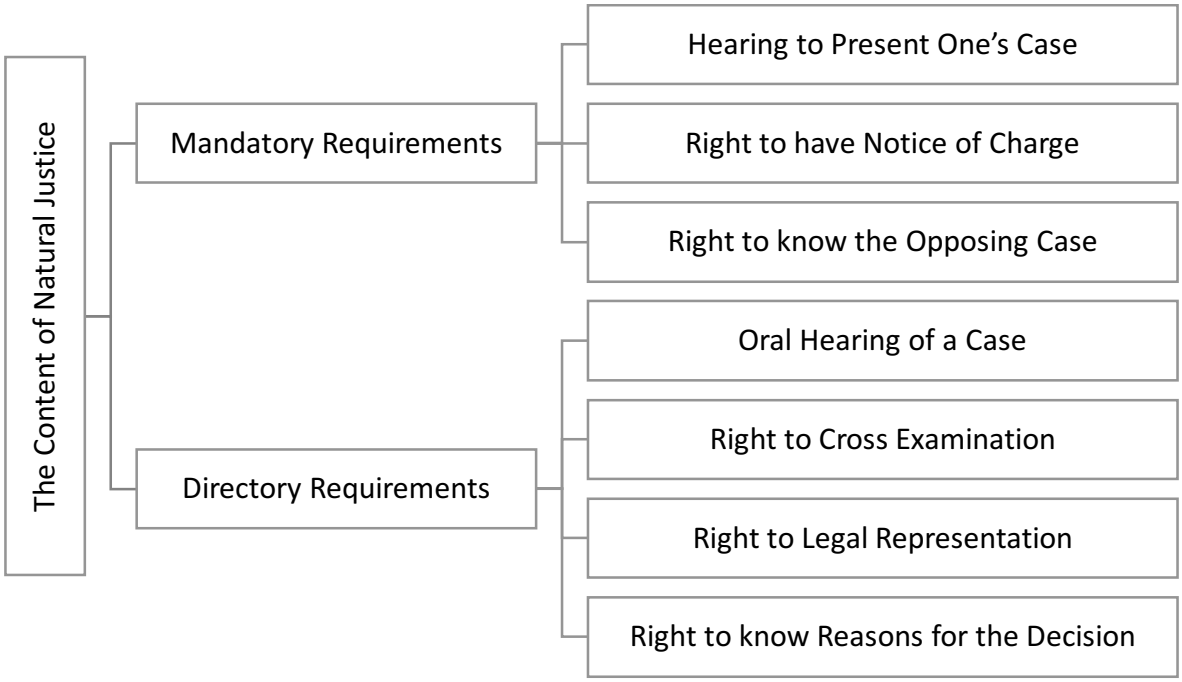
In ***McInnes v. Onslow-Fane [1978] 3 All ER 211***, the applicant had been granted a boxing manager's license for several years. He appealed its refusal now over a few years. It was held that the case was in the application for a license rather than in a forfeiture or an expectation class, and there was no obligation to provide reasons for the decision. The exercise of a power revoking a license will attract the rules of natural justice, particularly when the revocation results in the loss of a right to earn a livelihood or to carry on a financially rewarding activity.

In ***E. B. P. Fernando v. B. C. F. Jayaratne 78 NLR 123***, Sharvananda J. stated that "To prevent abuse of power by administrative bodies, Courts are gradually evolving guidelines based on principles of natural justice for the just exercise of their power. Observance of principles of natural justice serves twofold purpose. It satisfies the requirement of fairness and also helps the administrator or commissioner to take a better and more informed decision." He further noted in the *obiter* that "I am constrained to add that while there may be no duty to act judicially, it doesn't follow that there is no duty to act fairly by observing the principles of natural justice."

In ***Mendis, Fowzie and Others v. Goonewardena and G. P. A. Silva (1978-79) 2 SLR 322***, it was held that the requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The Commissioners had a duty to act fairly by observing the rules of natural justice.

7. THE CONTENT OF NATURAL JUSTICE

Some requirements maybe mandatory or directory depending on the circumstances.



Mandatory Requirements

1. **THERE MUST BE A HEARING WHICH UPHOLDS THE RIGHT TO PRESENT ONE'S CASE**

   The affected person must be allowed the opportunity to put forward his/her case.

2. **THE RIGHT TO HAVE NOTICE OF THE CHARGES**

   The party affected must be informed of the matter which is going to affect him (Notice of Inquiry). The right to have a Notice of the Charges is an essential part of *Audi Alteram Partem*, for without knowing the charges made against a person he/she cannot answer them and is unable to present his/her case. The notice must be adequate to prepare one's defense and is also essential.

3. **THE RIGHT TO KNOW THE OPPOSING CASE**

   The party must be informed of the full case against him/her so that the case could be fully answered.

Surinder Singh Kanda v The Government of the Federation of Malaya (1962) 28 MLJ 169

Officer Surinder Singh Kanda was supplied with a report of the board of inquiry and he has been dismissed after a hearing before an adjudicating officer. The question arose whether the hearing by adjudicating officer was vitiated by Insp. Kanda not being given any opportunity of correcting or contradicting the report. The Privy Council declared the dismissal void because the adjudicating officer was in possesion of a report of a board of inquiry which made charges of misconduct but which was not available to the Officer.

Lord Denning noted that "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made

against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."

Directory Requirements

1. ORAL HEARING OF A CASE

In ***Regina v. Race Relations Board, Ex Parte Selvarajan [1975] 1 WLR 1686*** it was held that if the facts are not disputed then an oral hearing is not mandatory.

Lord Denning stated that "In all these cases it has been held that the investigating body is under a duty to act fairly but that which fairness requires depends upon the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely afflicted by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."

In ***Lloyd v McMahon [1987] AC 625***, an auditor made a determination that councilors should reimburse Liverpool Council for a loss of over £ 100,000 caused by their misconduct (delay in setting a rate). The councilors claimed the auditor's failure to offer them an oral hearing made his determination a nullity. The House of Lords held that an oral hearing was unnecessary. Though the courts will readily imply into a statute additional procedural safeguards to secure fairness, what fairness requires depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework. Given that the councilors had not requested an oral hearing and had made full written representations to the auditor, which would not be supplemented in any material respects by an oral hearing, the auditor had not acted unlawfully in not affording an oral hearing.

In ***Regina v. Army Board of Defense Council, Ex Parte Anderson [1992] QB 169***, the members of the Armed Forces who alleged discrimination did not have access to Industrial Tribunals. The only recourse was to make a service complaint which would then be considered by the Army Board. Anderson complained of race discrimination. His service complaint had been dismissed and in his application for judicial review he challenged the procedure which the Panel had adopted including not holding an oral hearing.

Lord Chief Justice Taylor noted that "The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."

2. RIGHT TO CROSS EXAMINATION

English Law

In ***Regina v. Board of Visitors of Hull Prison, Ex Parte St Germain [1979] QB 425***, the court discussed the proper limits of imprisonment. "Despite the deprivation of his general liberty, a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. An essential characteristic of the right of a subject is that it carries with it a right of recourse to the courts unless some statute decrees otherwise."

The disciplinary decisions of Prison Boards of Visitors could be distinguished from those of prison governors and were amenable to judicial review. In exceptional cases, where a disciplinary hearing may depend on the disputed factual evidence of a witness, natural justice itself may require that the employee should be allowed to cross examine the witness.

In ***Bushell v. Secretary of State for the Environment [1981] AC 75***, the House of Lords considered planning procedures adopted on the construction of two new stretches of motorway, and in particular as to whether the Secretary of State had acted unlawfully in refusing to allow objectors to the scheme to cross-examine the Department's witnesses. It was held that he had not acted unlawfully.

Sri Lankan Law

In ***The University of Ceylon v. E. F. W. Fernando 61 NLR 505 (Privy Council)***, it was held that *Audi Alteram Partem* does not generally require that the witnesses who had given evidence against the Plaintiff should be tendered to him for cross-examination unless he requests. If the party affected failed to make a request to cross examine then there would be no violation of the Principles of Natural Justice.

In ***Nanayakkara v. University of Peradeniya and Others (1985) 1 SLR 174***, the court held that in a situation where several witnesses testified before a committee of inquiry against the petitioner and hardly a witness can be said to be free of personal or political bias. This was a very glaring instance in which the testimony of the witness ought to have been scrutinized and tested by cross-examination. Ex-parte statements made by such biased and prejudiced witnesses would have undoubtedly caused great prejudice to the petitioner, who was a leader of one of two rival student groups.

The court further held that this was an instance in which the committee should have volunteered the suggestion that the plaintiff might wish to question the witnesses or in other words tendered the witnesses unasked for cross-examnination by the petitioner and that the failure to do so has caused irreparable prejudice to the petitioner.

In ***Ganeshanathan v. Vivienne Gunawardene (1984) 1 SLR 319***, the right to cross-examine is not recognized of as a right in the case of an administrative tribunal.

3. RIGHT TO LEGAL REPRESENTATION

In England, the right to legal representation before administrative authorities have not yet been recognized as an absolute right.

In ***Maynard v. Osmond [1977] QB 240***, the court upheld statutory rules denying legal representation. Even in situations where no statutory rule covering legal representation were involved, the English courts have refused to recognize this as an absolute legal right.

Sri Lankan Law

In ***Chulasubadra De Silva v. The University of Colombo and Others (1986) 2 SLR 288***, the petitioner, a university student, was found guilty of taking into the Examination Hall three unauthorized loose sheets containing information relating to the subject of the question paper which were found by the examiners attached to her answer scripts. She was suspended from sitting any Unit Examination for three years. She appealed against this finding and punishment to the Vice Chancellor who appointed a sub-committee to hear it. The sub-committee affirmed the findings of the Examination Committee and the punishment imposed. She sought in, the Court of Appeal a quashing of these orders by way of certiorari and an order directing release of her results by way of mandamus alleging that natural justice was denied to her and that she had been denied the assistance of legal representation.

The Court of Appeal refused her application and from this order she preferred an appeal to the Supreme Court. It was held that there was no failure to observe the principles of natural justice. There is no right to legal or other representation but this maybe allowed at the discretion of the Tribunal.

4. RIGHT TO KNOW THE REASONS FOR DECISIONS

If a decision maker fails to give reasons for a decision, the said decision could be viewed as procedurally flawed. The giving of reasons for a decision would assist the person to prepare his/her case. Reasons themselves provide grounds for some judicial review. An administrative authority can only justify its actions if it is able to show reasons for its decisions. If it fails to give reasons for its decision, a reasonable suspicion would arise in the minds of ordinary citizens as regards the justifiability of the decision.

In ***Regina v. Universities Funding Council, Ex Parte Institute of Dental Surgery [1994] 1 WLR 241***, it was held that when considering whether a disciplinary board should have given reasons, the court may find the absence critical 'where the decision appears aberrant'. The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; show that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process. A body not giving reasons for its decision was not acting inherently unfairly, and particularly not where the decision was a collective one. It could be artificial to try to set out reasons made by a body of people.

In ***Regina v. Secretary of State for the Home Department, Ex parte Doody [1994] 1 AC 531***, applications for judicial review were made by four prisoners serving mandatory life sentences. The Home Secretary refused to release the convict after

serving his minimum term, but gave no reason for the decision. Lord Mustil judged that the Home Secretary must give reasons for their decision. He argued that decisions made using a statutory power must be reached fairly, because all statutory powers are granted with the implicit assumption that they will be wielded fairly.

As a result, he concluded it will often be necessary to allow a person to make representations, and therefore to allow them to know what they are responding to, they must be permitted to hear the reason they are having to make the representations at all.

Thus under the English Law there is no right to reasons for decisions. However, depending on the circumstances reasons could be demanded.

Sri Lankan Law

In ***E. M. Wijerama and Others v. A. T. S. Paul 76 NLR 241***, it was held that even in the absence of a legal requirement, it is desirable that any tribunal against whose decision an appeal is available should, as a general rule, state the reasons for its decision, a course of action which has the merit of being both fair to the petitioner and complainant concerned and helpful to the appellate authority.

In ***Karunadasa v. Unique Gem Stones Ltd and Others (1997) 1 SLR 256***, it was held that Natural Justice means that a party is entitled to a reasoned consideration of his case; and whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision may be condemned as arbitrary and unreasonable.

In ***Lal Wimalasena v. Asoka Silva and Others [S. C. (Application) No. 473/2003 - S.C. Minutes of 04/08/2005]***, the majority of the court held that reasons for decisions must be disclosed to court.

8. LEGITIMATE EXPECTATION

The courts have held that it is in the interest of fairness for decision makers to honor promises, representations and established facts. If the decision makers proposed to change policy on which someone is relying on the affected persons should be allowed the opportunity to make representations as to why a policy should not be altered. This is referred to as Doctrine of Legitimate Expectation.

It means that when a decision is taken by an administrative authority affecting some legal right, liberty or interest, or some rules of fair procedure will be applied in taking a decision by the relevant administrative authority. Persons affected can legitimately expect that they will be treated fairly.

Ironically, the Doctrine of Legitimate Expectation found its way into the law for the purpose of restricting the right to be heard.

According to Wade and Forsyth, this concept first appeared in the case of ***Schmidt and Another v. Secretary of State for Home Affairs [1969] 2 Ch. 149***.

The plaintiffs had come to England to study at a college run by the Church of Scientology, and now complained that their student visas had not been extended so as to allow them to complete their studies. They said that the decision had been made for improper reasons. They now appealed against an order striking out their claim.

The alien students argued that they had a legitimate expectation and that their permits should be extended and therefore they should have been heard before the extensions were denied. The court of appeal held that they had no legitimate expectation beyond the permitted time and so no right to a hearing. Similarly, the court held that revocation of their permit within that time would have been contrary to legitimate expectation. It is also to be noted that violators as law are not entitled to legitimate expectations.

Legitimate Expectations may arise from –

1. A promise or and order by an authoritative body
2. A customary and well accepted practice or an express policy
3. Created rights
4. Legislative rights
5. The sphere of employment

Grero J. in the case of ***Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others (1994) 3 SLR 316*** stated that "One may have, a mere hope. But that does not mean he has a right to be heard. But a person who has a legitimate expectation comes within the principle of 'right to be heard'. Therefore, **a mere hope does not create a legitimate expectation in law**."

Regina v. Secretary of State Ex Parte Khan [1984] 1 WLR 1337

The Secretary of State had refused an entry clearance for a child to be allowed into the United Kingdom for the purpose of adoption by the applicant, but had done so upon grounds nowhere mentioned in a Home Office circular letter apparently setting out the policy or criteria to be applied in dealing with such applications.

It was held that legitimate expectation should be subject to the procedures of circulars/laws specifying certain conditions.

In England, there is an academic and judicial disagreement with regard to the content of the Doctrine of Legitimate Expectation.

Rex v. Secretary of State for Transport, Ex Parte Richmond upon Thames London Borough Council and Others [1993] EWHC QB 1

The court held that legitimate expectation was a ground for judicial review under procedural impropriety.

Rex v. Ministry of Agriculture, Fisheries and Food, Ex Parte Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714

Judicial review was requested of a decision of the Minister to declare a moratorium on the permitted transfer of certain fishing licenses.

Per Sedley J. : "The court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations."

Regina v. Liverpool Corporation, Ex Parte Liverpool Taxi Fleet Operators Association [1972] 2 QB 299 and [1972] 2 All ER 589

A number of taxi cab owners challenged a decision of the Council to increase the numbers of hackney cabs operating in the city. At a public meeting with the council prior to the decision, the chairman had given a public undertaking that the numbers of hackney cabs would not be increased until the proposed legislation, which included provisions for controlling private hire vehicles, had been enacted by Parliament.

The House of Lords recognized the principle of legitimate expectation as giving rise to a right to make representations before any existing right or interest was taken away, but did not go as far as in the case of *Regina v. Secretary of State Ex Parte Khan (Supra)* and granted a substantive relief sought by the petitioner.

Council of Civil Service Unions v. Minister for the Civil Service [1983] UKHL 6

This case confirmed that non-legal conventions might be subject to legitimate expectation. A convention would not have usually been litigable, and it was necessary for the court to demonstrate that it was in the present case : such a rule had been established in respect of Cabinet conventions in *Attorney General v. Jonathan Cape Ltd*. Although the court ruled against the union, it was accepted that the invariable practice of the executive as forming a basis for legitimate expectation.

The case also shows that National Security remains a political issue and not a legal one, it is not to be determined by a court. And held that national security overrides legitimate expectations.

Legitimate Expectation in Sri Lankan Case Law

Jayasena v. Punchiappuhamy and Another (1980) 2 SLR 43

At a gem auction held by the State Gem Corporation, Ratnapura Branch the petitioner purchased the right to prospect for gems in an area. A license was issued to him valid for one year. After a period of over 7 months the license was recalled and the Regional Manager of the Corporation's Ratnapura Branch, informed the petitioner that he was cancelling the same. The petitioner was not given an opportunity to show cause against the said cancellation.

The petitioner thereupon filed this application for a writ of certiorari to quash the decision of and for a writ of mandamus to compel the respondents to issue his license allowing him to prospect for the balance period of the one year which was unexpired when the license was recalled.

It was submitted on behalf of the respondents that the revocation of the license was an administrative act and therefore not subject to any requirement of natural justice.

It was held that the petitioner had the right to prospect for gems and a license valid for one year had been issued. The revocation of the petitioner's license took away his existing right to prospect for a further period of about four months and this was done without his being heard. In these circumstances, the petitioner had made out a case for the issue of a writ of certiorari quashing the order cancelling his license.

Sundarkaran v. Bharathi and Others (1989) 1 SLR 46

The petitioner was an applicant for a liquor license. He had been granted liquor licenses for the two preceding years and he was written to and asked to pay the license fees. When he went to the office of the Government Agent, he was informed by the accountant that no license could be issued to him as he failed to obtain the consent of all the members of Parliament in the constituency in terms of a new circular.

He appealed to the Minister of Finance but received no response. He then moved for a writ of mandamus to compel issue of the license.

The Court of Appeal refused the application holding that the consent of all the members of the constituency this being a multi member constituency was an absolute imperative and judicial review was inappropriate because this was a matter of executive policy.

But the Judgment of Court of appeal set aside by the Supreme Court. The decision of the respondents was quashed and they were directed to make due inquiry upon merits in future applications for a license.

Desmond Perera and Others v. Karunaratne, Commissioner of National Housing and Others (Supra)

Sec. 9 of the Ceiling on Housing Property Law No. 1 of 1973 conferred a right on a tenant of a residential premises (subject provisions) to make an application to the Commissioner of National Housing to purchase a house within four (4) months of the law

coming into operation i. e. four (4) months from 13th Jan 1973. A tenant made an application under this on 27th Mar 1981 to purchase an apartment he was in occupation.

The tenant (the Petitioner) was divested by the Commissioner of National Housing with the written approval of the Minister to Housing and Construction without giving an opportunity to the Petitioner to be heard. The question was whether the petitioner had a legal right or a legitimate expectation of being heard before the Commissioner of National Housing made the divesting order.

It was held that the tenant might have a hope that the Commissioner, if he proposes to sell the house, will offer it to him in the first instance but he cannot have a legitimate expectation which includes the right to be heard. A hope does not create a legitimate expectation in law.

Waas Gunawardena v. Perera and Another (1997) 2 SLR 222

When the appointment made was one outside the normal cadre of the Bank and there are no rules regulating the procedure for such appointments, the petitioner challenging the appointment and claiming it as being more qualified and experienced cannot be said to have a legitimate expectation of being appointed to the post. There was no evidence that the Board of Directors abused its powers. There, a writ of certiorari cannot be issued.

Nagalingam Rameshwaran v. University of Jaffna C. A. Writ Application No.515/2008

The University of Jaffna published an advertisement calling for applications for the post of Lecturer (Probationary) in Arts & Design for Painting and Sculpture. The Petitioner applied for the post and was called for an interview. After the interview the appointment was not made for more than six months. The University of Jaffna re-advertised for the said post in which advertisement, it was expressly stated, that the candidates, who had applied when it was advertised before, need not apply again and later the post was filled. The Petitioner contended that the conduct of the University of Jaffna in the said appointment is unreasonable and arbitrary.

The Court of Appeal issued a writ of certiorari to quash the appointment for the post of Lecturer (Probationary) in Arts & Design for Painting and Sculpture made by the University of Jaffna.

Multinational Property Development Ltd v. Urban Development Authority C. A. 891/94

'Chalmers Granaries' was vested with the Urban Development Authority. The UDA approved a project by the Petitioner Company to construct a complex car park on the said land and decided to allocate the said land on a 99-year lease. The sums agreed were paid and the final draft was ready. After the change of Government the UDA decided not to allocate the said land to the Petitioner Company. The Petitioner complained that the Respondent had arrived at the said decision without affording it an opportunity of being heard and the decision was arbitrary and mala fide.

The Court of Appeal held that a substantive change to policy resulting from a change in the Executive Presidency cannot be avoided, but where a New Policy is to be applied, the individuals who have legitimate expectations based on promises made by public bodies that

they will be granted certain benefits, have a right to be heard before those benefits are taken away from them on the ground that there had been a change of policy. In the public law field, individuals may not have strictly enforceable rights but they have legitimate expectations. Decisions affecting such legitimate expectations are subject to judicial review.

The Expanding Canvas of Doctrine of Legitimate Expectation of Sri Lanka

Both in the context of fundamental rights jurisdiction and writ jurisdiction (Art. 140), it is clear that the Doctrine of Legitimate Expectation has acquired not only a meaning confined to a procedural right (linked with the Principle of Natural Justice) but a meaning of substantive caliber (in the sense of enforcing legitimate expectation complaint).

Wickremasinghe and Another v. The Urban Development Authority C. A. No. 856/99

The planning and development within the Kataragama Pradeshiya Sabha was transferred to the Chairman and the Secretary in terms of the Urban Development Authority (Amendment) Act No. 4 of 1982. The said powers were withdrawn without any reason being assigned.

It was held that the Rules of Natural Justice demand that there has to be a fair hearing before an administrative authority acts or makes decisions affecting the rights of subjects.

Legitimate expectation is pivoted on fairness and reasonableness. As long as these two components coexist, there can and always will be legitimate expectation.

A public authority has a duty to act with fairness and consistency in dealing with the public and if it makes inconsistent decisions unfairly and unjustly, it misuses its powers.

Lancelot Perera v. National Police Commission

In this case the petitioner, an SSP applied for the post of DIG and came third in the interview but was not promoted to the rank due to the rigid policy of the National Police Commission. It was the policy of the NPC not to promote the petitioner to the rank of DIG because his functions in the police force was to direct music and therefore was not involved in combat and other police related duties. Thus, the petitioner who was initially recruited as the Director of Music in the Police and continued in such functions as informed that he would not receive any further promotions beyond the rank of SSP.

In considering these circumstances, the Supreme Court found that the petitioner had been meted out unequal treatment as envisaged in Article 12(1) of the Constitution. It was observed that adherence to administrative policy in a rigid manner would attract judicial review.

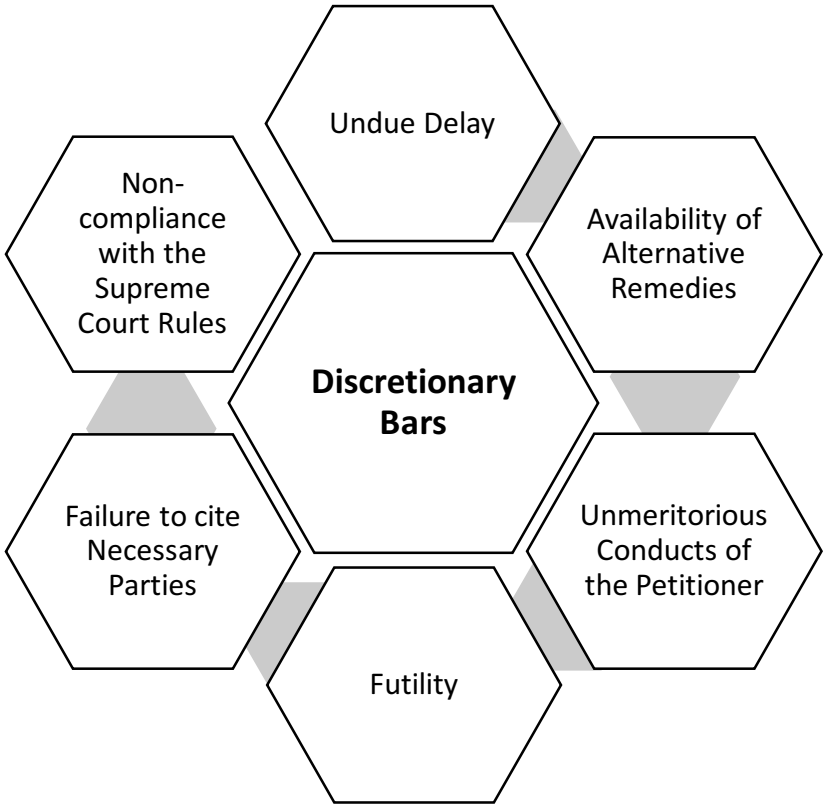
Lorna Gunasekera v. People's Bank S. C. FR No. 524/2002

Legitimate expectation is based on the principles of procedural fairness and was closely related to hearings in conjunction with the Rules of Natural Justice. It is necessary for the presence of a promise or an undertaking to give rise to a legitimate expectation.

9. DISCRETIONARY BARS

What are these Discretionary Bars?

The courts' supervisory jurisdiction over administrative decision is a discretionary power, and despite judicial review, the courts may refuse to exercise their supervisory jurisdiction or to grant relief. There are circumstances in which the courts will refuse to exercise their discretion. The following are examples of circumstances where courts may refuse to exercise their discretion even in cases where the judicial review has merit.



(1) Undue Delay

K. A. Gunasekera v. T. B. Weerakoon (Assistant Government Agent, Kurunegala) 73 NLR 262

The petitioner applied for writs of certiorari and mandamus to enhance the compensation awarded to him seven months earlier by an Acquiring Officer under the Land Acquisition Act.

It was held that the application should be refused because the petitioner was guilty of undue delay in making the application and the petitioner had an alternative remedy.

Biso Menika v. Cyril de Alwis and Others (1982) 1 SLR 368

It was held that writ of certiorari lies at the discretion of the court and will not be denied if the proceeding were a nullity; even if there is delay, especially where denial of the writ is likely to cause great injustice, it will be issued.

Per Sharvananda J. : "An application for a writ of certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However, the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law. When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loath to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically."

(2) <u>Availability of Alternative Remedies</u>

K. A. Gunasekera v. T. B. Weerakoon (Assistant Government Agent, Kurunegala) 73 NLR 262

Per Sirimane J. : "We are in agreement with the contention of the learned Crown Counsel that this application for a writ of certiorari quashing the award, and a writ of mandamus ordering the Acquiring Officer to hold an inquiry under Section 9 of the Act, should be refused because (a) the petitioner has been guilty of undue delay and (b) an inquiry, however imperfect has been held and the petitioner has an alternative remedy which lie has sought."

V. Ramasamy v. Ceylon State Mortgage Bank 78 NLR 510

Per Wanasundera J. : "It may be noted that where the Courts of Equity were concerned, one defeated in equity by reason of the doctrine of laches, may still have his remedy in common law. As for the common law courts they have invariably taken into consideration such factors as the availability of an alternative remedy along with acquiescence and the existence of facts such as the conduct of the parties and any developments which may render it inequitable to grant relief, when applying this doctrine."

Somasunderam Vanniasingham v. Forbes and Another (1993) 2 SLR 362

A party to an arbitration award under the Industrial Disputes Act is not required to exhaust other available remedies before he could challenge illegalities and errors on the face

of the record by an application for a writ of certiorari. This is so even though he had the right to repudiate the award under Sec. 20(1) of the Industrial Disputes Act. The difference between review as to the legality of the matter and an administrative appeal on the facts must be borne in mind. Delay in securing an effective other remedy has been considered unsatisfactory. The mere existence of some power to resist the binding effect on an unacceptable settlement order should not itself be hastily regarded as a satisfactory alternative remedy to the Court's discretionary powers of review. There is no rule requiring the exhaustion of administrative remedies.

Per Bandaranaike J. : " As I have said there is no rule requiring alternative administrative remedies to be first exhausted without which access to review is denied. A Court is expected to satisfy itself that any administrative relief provided for by statute is a satisfactory substitute to review before withholding relief by way of review."

(3) <u>Unmeritorious Conducts of the Petitioner</u>

Gamini Dissanayake v. M. C. M. Kaleel and Others (1993) 2 SLR 135

Eight members of a political party were expelled froth the party for signing an impeachment motion against the President who was their party leader, without a hearing. The decision was challenged. The Supreme Court held that two out of the eight Members of the Parliament who were Cabinet Ministers were guilty of unmeritorious conduct for violating the collective responsibility of the government (having lied at a cabinet meeting and misleading the President) and therefore were disentitled from obtaining relief.

Per Fernando J. : "It is within the discretion of the Court where to grant him such a remedy or not. He may be debarred from relied if he has acquiesced in the invalidity or has waived it. If he has not come with due diligence and ask for it to be set aside, he may be sent away with nothing."

Borella Private Hospital v. Bandaranayake and Two Others 2005 (1) Appellate Law Recorder 27

In this case, K. Sripavan J. observed that, the writ of certiorari and mandamus being discretionary remedies will not be granted where the party applying lacks *uberrima fides* (utmost good faith) and fails to disclose material facts to the court.

Sarath Hulangamuwa v. Siriwardena (1986) 1 SLR 275

In this case, Siva Selliah J. stated that "A petitioner who seeks relief by writ which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised. In the instant case, the fact that the petitioner had a residence at Dehiwela is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory. On this ground too the application must be dismissed for lack of *uberrima fides*."

(4) Futility

Shamsudeen v. Minister of Defence 63 NLR 430

The petitioner applied for registration as a citizen of Ceylon under the provisions of the Citizenship Act No. 18 of 1948, on the ground that his mother was a citizen of Ceylon by descent and that he has the necessary residential qualification. He supported his application with certain documentary evidence. But the Minister dismissed his application and he applied for a writ of mandamus.

It was held by the Court that the words "resident in Ceylon throughout a period …" in the said Act meant uninterrupted residence in truth and in fact. Per L. B. De Silva J. : "The issue of a writ of mandamus is within the discretion of the Court and will not be issued if it will be futile to do so. In this case, I am satisfied that the petitioner has grossly failed to prove that his mother was a citizen of Ceylon by descent."

Sethu Ramasamy v. A. E. G. Moregoda (Controller of Immigration and Emigration) 63 NLR 115

Where a person deported upon an Order made in terms of Sec. 31 of the Immigrants and Emigrants Act is subsequently authorized by the Prime Minister (who is also the Minister of Defense and External Affairs) to be granted visas to re-enter and reside in Ceylon, such visas, although they are bound to be issued by the Controller, may be cancelled later by the Controller in his absolute discretion by virtue of Regulation 20 (1) of the Regulations made under the Immigrants and Emigrants Act. In this case, the petitioner applied for a writ of mandamus directing the Controller of Immigration and Emigration to issue to the petitioner a residence visa for 2 years.

Per Gunasekara J. : "I agree with this contention and with the further contention that it is the Controller's duty to obey the direction given to him by the Prime Minister to issue such a visa to the petitioner. This view of the matter, however, cannot conclude the question whether the application should be granted; for, as has been pointed out by the Counsel, a mandamus will not be granted when it appears that it would be futile in its result."

P. S. Bus Co. Ltd. v. Members and the Secretary of Ceylon Transport Board 61 NLR 491

In this case, it was held that a prerogative writ is not issued as a matter of course and it is in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ, for instance, will not issue where it would be vexatious or futile.

(5) Failure to cite Necessary Parties

If a petitioner who seeks judicial review fails to name as respondents, parties who might be affected by a court decision regarding the application for judicial review then such application would be rejected.

Abayadeera and 162 Others v. Dr. Stanley Wijesundera, Vice Chancellor of University of Colombo (1983) 2 SLR 267

The Supreme Court held that the addition of the 45 students of the University of Colombo who have not joined the petitioner as parties to the application was not necessary as the relief sought for will not affect them adversely but failure to include the University of Colombo and the 115 students as respondents was fatal to the application and therefore it was dismissed.

(6) <u>Non-compliance with the Supreme Court Rules</u>

Two main sets of rules must be discussed in this context –

1. Rules 46 and 47 of the 1978 Supreme Court Rules
2. Rules 3(1)(a) and 3(2) of the Court of Appeal (Appellate Procedure) Rules 1990 which replace the 1978 Rules

Rule 46 of the 1978 Supreme Court Rules

Every application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition and affidavit in support of the averments set out in the petition and shall be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits. Application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner and be accompanied by two sets of copies of proceedings in the Court of first instance, tribunal or other institution.

Rule 47 of the 1978 Supreme Court Rules

The petition and affidavit except in the case an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. Where such an averment is found to be false and incorrect the application may be dismissed.

Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990

Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 and 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibit. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application.

Rule 3(2) of the Court of Appeal (Appellate Procedure) Rules 1990

The petition and affidavit, except in the case of an application for the exercise of the powers conferred by Article 141 of the Constitution shall contain an averment that the jurisdiction of the Court of Appeal has not previously been invoked in respect of the same matter. If such jurisdiction has previously been invoked the petition shall contain an averment disclosing relevant particulars of the previous application. Where any such averment as aforesaid is found to be false or incorrect the application may be dismissed.

Rasheed Ali v. Mohamed Ali and Others (1981) 2 SLR 29

It was held that the provisions of Rule 46 of the Supreme Court Rules 1978 are imperative and should be complied with by a party who seeks to invoke the revisionary powers of the Court of Appeal. This is subject, of course, to the proviso that where a matter of great urgency arises and a party has no time to obtain the documents required by the Rule, the Court would extend such indulgence as was necessary in order to enable a petitioner to make compliance subsequent to the filing of the petition.

In a case where circumstances beyond the petitioner's control prevent compliance in this manner, the petitioner should comply with the Rule as soon as possible. In the circumstances of the present case, the petitioner failed to comply with the Rule at the time he filed his petition and even though he could be excused for non-compliance because of the urgency of his application he had made no efforts since then to comply with the Rule. The preliminary objection was therefore entitled to succeed.

Nicholas v. O. L .M. Macan Markar Ltd and Others (1981) 2 SLR 1

Rile 47 of the Supreme Court Rules 1978, which requires the petition and affidavit filed in the Court of Appeal to contain an averment that the jurisdiction of that Court has not previously been invoked in respect of the same matter is mandatory. Non-compliance with the said Rule which is in imperative terms would render such application liable to be rejected.

Kiriwanthe and Another v. Navaratne and Another (1990) 2 SLR 393

The case of *Rasheed Ali v. Mohamed Ali and Others (Supra)* was reversed in this. It was held that the insistence of certified copies to reject an application is against the principle that sovereignty is in the people and court must give effect to their rights.

10. LOCUS STANDI

In law, standing or *locus standi* is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. A person applying for an order in the nature of a writ must be a person entitled to do so or else the application will be dismissed on that ground alone. The question posed is whether the petitioner has locus standi or not.

If a person's rights have been affected (the right to property, office or freedom) by an action of a public authority, he has the necessary *locus standi*.

Prof. Peter Cane classifies standing into three (3) categories –

1. Surrogate standing
2. Associational standing
3. Citizen standing

SURROGATE STANDING refers to a situation in which the applicant purports to represent an individual with a personal interest in the claim.

ASSOCIATIONAL STANDING refers to a circumstance where the applicant purports to represent a group of individuals who have a personal interest in the claim (that is, who are directly affected by the disputed decision).

Regina v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd [1966] 1 QB 380

Per Lord Denning : "The question is whether the Peachey Property Corporation are 'persons aggrieved' so as to be entitled to ask for certiorari or mandamus. Ms. Blain contended that they are not persons aggrieved because, even if they succeeded in increasing all the gross values of other people in the Paddington area, it would not make a pennyworth of difference to them. But I do not think grievances are to be measured in pounds, shillings and pence. If a ratepayer or other person finds his name included in a valuation list which is invalid, he is entitled to come to the court and apply to have it quashed. He is not to be put off by the plea that he has suffered no damage, any more than the voters were in *Ashby v. White*. **The court would not listen, of course, to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done. So here it will listen to any ratepayer who complains that the list is invalid**."

Regina v. Inspectorate of Pollution, Ex Parte Greenpeace Ltd [1994] 1 WLR 570

The environmental pressure group, Greenpeace Limited, sought to bring judicial review proceedings against the decision of the Inspectorate of Pollution to authorize the discharge of radioactive waste from the Thorp nuclear plant in Cumbria. Greenpeace had

2500 members or supporters living in the area likely to be affected by the decision. The Divisional Court held that the court should take into account the nature of the applicant, its interests in the issues raised, the remedy it sought to achieve and the nature of the relief sought. Greenpeace was a responsible organization with an established reputation for its interest in environmental matters and some of its members, who would have had standing in their own right, lived in the area affected.

A. T. Duray Appah (Mayor of Jaffna) v. W. J. Fernando 69 NLR 265

An order had been made by a Minister that the Council of a local authority be dissolved. The Council did not seek to challenge the order, but the appellant, the Mayor, brought proceedings in his individual capacity to challenge the Minister's decision.

It was held that he did not have the necessary standing. Per Lord Upjohn : "Apart altogether from authority their Lordships would be of the opinion that this was a case where the Minister's order was voidable and not a nullity. Though the Council should have been given the opportunity of being heard in its defense, if it deliberately chooses not to complain and takes no step to protest against its dissolution, there seems no reason why any other person should have the right to interfere. Their Lordships therefore are clearly of opinion that the order of the Minister was voidable and not a nullity. Being voidable it was voidable only at the instance of the person against whom the order was made, that is the council. But the council have not complained. The appellant was no doubt mayor at the time of its dissolution but that does not give him any right to complain independently of the council. He must show that he is representing the councilor suing on its behalf or that by reason of certain circumstances, such, for example, as that the council could not use its seal because it is in the possession of the Municipal Commissioner, or for other reasons it has been impracticable for the members of the council to meet to pass the necessary resolutions, the council cannot be the plaintiff. Had that been shown then there are well-known procedures whereby the plaintiff can sue on behalf of himself and the other corporators making the council a defendant and on pleading and proving the necessary facts may be able to establish in the action that he is entitled to assert the rights of the council. That, however, is not suggested in this case. The appellant sets up the case that as mayor he is entitled to complain but as such he plainly is not. If the council is dissolved, the office of mayor is dissolved with it and he has no independent right of complaint; because he holds no office that is independent of the council. If the mayor were to be heard individually he could only deal with complaints against the council with which *ex hypothesi* the council itself did not wish to deal. So, accordingly, it seems to their Lordships that on this short ground the appellant cannot maintain this action."

CITIZEN STANDING refers the situation where the applicant purports to represent 'the public interest' as opposed to the interests of any particular individuals.

Environmental Foundation Ltd v. Minister of Public Administration and Six Others (1997) 2 SLR 306

The petitioner, a public interest environmental law and advocacy organization sought a writ of certiorari to quash the authorization issued by the Director of Department of Wild Life Conservation (2nd respondent) granted to the 3rd respondent to possess and display 30 species of mammals, reptiles and birds and the decision of the 1st respondent Minister to restore the Permit which was earlier revoked. It was contended that a permit

cannot be issued to run a private zoo, in terms of Act No. 49 of 1993. It was also contended that, it is an offence to take writ to have in one's possession 26 species of mammals, reptiles and birds listed in the permit except for the purpose of protection, preservation, propagation, scientific study or investigation, unless the zoo is a National Zoo. It was held that as a party genuinely interested in the matter complained of, the petitioner has locus standi to make this application.

Wijesiri v. Siriwardene (1982) 1 SLR 171

P is a Member of Parliament. He took up the case of 53 candidate who were selected for appointment of Grade II Class II of the Sri Lanka Administrative Service on the results of an Open Competitive Examination but whose letters of appointment were not issued by the Respondent. R who was the Secretary in Ministry of Public Administration contended that the letters were not issued because the Cabinet decided to withhold them consequent to a number of complaints that there were certain irregularities in the conduct of the examination. P contended that the letters were not issued because a powerful Trade Union objected that the selectees were not members of their Trade Union.

Per Wimalaratna and Ratwatte J. : "To apply for a writ of mandamus it is not necessary to have a personal interest but it is sufficient if the applicant can show a genuine interest in the matter complained of and that he comes before the Court as a public spirited person, concerned to see that the law is obeyed in the interest of all."

Regina v. Secretary of State for the Environment, Ex Parte Rose Theatre Trust Co. [1990] 1 QB 504

The remains of an ancient theatre had been discovered during the development of a site. The respondent declined to schedule the building as a monument, saying a balance had to be found between preservation and the need to ensure the prosperity of the city, the site was not itself under threat from the developers, and compensation would be payable for any ensuing delays.

It was held that the Secretary of State was exercising a discretion given to him under the Act. That discretion had not been shown to have been exercised improperly. Members of the public at large had insufficient locus standi to seek judicial review, and locus could not be obtained by applying to have the building scheduled under the Act.

S. P. Gupta v. President of India AIR 1982 SC 149

Per Bhagwati J. : "The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born. There have been numerous decisions of the English Courts where this definition has been applied for the purpose of determining whether the person seeking judicial redress had locus standi

to maintain the action. It will be seen that, according to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. Now obviously where an applicant has a legal right or a legally protected interest, the violation of which would result in legal injury to him, there must be a corresponding duty owed by the other party to the applicant. This rule in regard to locus standi thus postulates a right-duty pattern which is commonly to be found in private law litigation."

Regina v. Greater London Council, Ex Parte Blackburn [1976] 1 WLR 550

In this case, a prohibition was sought restraining the Council from illegally exhibiting pornographic films. The locus standi of Blackburn was challenged. Negativing the contention and upholding the locus standi of the applicant, Lord Denning observed that "If Blackburn had no sufficient interest, no other citizen had and in that event no one would be able to bring an action for enforcing the law and transgression of law would continue unabated."

Regina v. Secretary of State for Foreign and Commonwealth Affairs, Ex Parte World Development Movement Ltd [1995] 1 WLR 386

The Movement sought to challenge decisions of the Secretary of state to give economic aid to the Pergau Dam, saying that it was not required 'for the purpose of promoting the development' of Malaysia. It was said to be uneconomic and damaging. It was said by the defendant's advisers to be an abuse of the aid system. The defendant said the plaintiff had no sufficient interest to mount a challenge. The plaintiff said that as a charity itself distributing aid, the diversion of such huge sums affected its own actions, and this amounted to a proper interest.

It was held that the challenge was a meritorious one that ought to be heard by the courts and that this was to be treated as an important factor when considering whether a group had standing. Further factors that supported a finding that the group had sufficient interest to mount a challenge were the likely absence of any other challenger and the prominent role of the group in terms of the knowledge, expertise and resources to mount a challenge.