CHAPTER II

EXCLUSION OF JUDICIAL REVIEW

1. Exclusion of judicial review in England

The Court of King's Bench and its successor has always claimed the right to exercise the Crown prerogative of control over the acts of subordinate executive and judicial authorities; it at one time claimed a similar control over statutes, and still exercises control over subordinate legislative bodies. Though Parliament is now regarded as omnipotent and the courts have repulsed attempts to restrain the introduction of private Bills, or impugn private Acts, the concept of Rule of Law still assumes that the judicial power of the state extends to review of executive, judicial and quasi-judicial acts, and that any restriction on this power of review is a menace to the Rule of Law. But the applicants for writs in England in the seventeenth to nineteenth centuries were mostly well-to-do people, and the remedies they secured for their private grievances were not always conducive to the public good. Progressive politicians envisaged the welfare state they wished to create as having the main objective of mass improvement of economic conditions, and, if the common law could not, for instance, prevent a landowner intercepting water percolating through his land to the corporation's land, to display his displeasure at the corporation's refusal to buy his land [1] statutory provisions were necessary to prevent the state and its instrumentalities being thwarted when costly and far-reaching welfare projects were being implemented.

There is therefore a large body of English legislation excluding or restricting judicial review. As instances of exclusion may be cited (a) sec. 5 of the Extradition Act, 1870, which makes an Order in Council applying the Act to any foreign country conclusive evidence that the Act has been complied with "and the validity of such order shall not be questioned in any legal proceedings whatever", (b) sec. 3 of the Parliament Act, 1921, which makes the Speaker's certificate that a Bill is a Money Bill immune from challenge in the court and (c) sec. 3(7) of the House of Commons (Redistribution of Seats) Act, 1949, which provides that an Order in Council delimiting constituencies shall not be questioned in any legal proceedings whatsoever.

Turning to statutes restricting the right of recourse to the courts, the Housing Act, 1930, which empowered local authorities to

1. *Bradford* v. *Pickles*, (1895) A.C. 587.

requisition land, and make other orders necessary to implement schemes to provide homes for working class people, permitted such order to be challenged in the High Court within six weeks, but not after that by prohibition or certiorari or any other legal proceedings whatever.

A later statutory device is seen in the Acquisition of Land (Authorisation Procedure) Act, 1946, which permits a challenge in the courts within six weeks on the ground that the order is not within the powers given by the Act or that the applicant has been substantially prejudiced by failure to comply with any requirement of the Act or any regulation thereunder. Such words, it has been held, provide an exclusive code of judicial review and, though there is no reference to prohibition and *certiorari*, prevents recourse to these remedies within or beyond the six weeks' period. [2]

But there is strong presumption that access to the courts cannot be prohibited except by clear words. The Privy Council held that, when a statute creates an inferior court and declares its decisions "final" or "without appeal", that did not restrict the right to *certiorari* [3] and, where the statute said "any decision of a claim or question........shall be final", Lord Denning said that *certiorari* could never be taken away by statute except by most clear and explicit words. "Final" only meant "without appeal." It made decision final on facts, not on law. *Certiorari* might still issue for excess of jurisdiction or for error of law on the face of the record.[4] A local Act provided that if any person proposed to carry out any operation on land and wished to have it determined whether this would constitute development within the meaning of the Act and whether permission was necessary, he might apply to the local planning authority. The provisions of the Act would apply to such applications as though they were applications to develop land, but if the minister acting under those provisions decided that such operation was development or that permission was necessary, that should be final for the purpose of appeal to the court. It was held that this did not prevent an approach to the court for declaration; it merely provided an alternative method of determining the question by the minister. [5]

Another device designed to restrict judicial review is to enact a provision empowering a minister to make rules which shall have effect

2. *Smith* v. *East Elloe* R.D.C., [1956] A.C. 736.
3. *R.* v. *Nat Bell Liquors Ltd.*, [1922] A.C. 128 at 159.
4. *R.* v. *Medical Appeals Tribunal, ex. p. Gilmour*, [1957] 1 Q.B. 574 at 583.
5. *Pyx Granite Co.* v. *Minister of Housing and Local Government*, [1958] 1 Q.B. 554.

as enacted in the Act. In one case a power to make rules for registration of patent agents was used to make rules for payment of fees, though the statute was silent on the matter of fees. Though it was recognized that if there was conflict between a rule and the Act, the Act would prevail, it was nevertheless held that the rule impugned was binding.[6]

In another case the Housing Act, 1925, gave the minister power to confirm an improvement scheme, his order to have effect as though part of the Act, but the statute in this case did not provide that the scheme was to be laid before Parliament, which might annul it within 40 days, as was the case with the rules in the previous case, which might therefore be regarded as having parliamentary approval. It was said that the court was not debarred from declaring invalid an order whereby the minister went outside his province (as for instance if he attached a condition to an improvement scheme that all proprietors in the affected area should pay £ 5 towards building a hall), nor from declaring the scheme confirmed not one contemplated by the Act.[7] If an ultra vires scheme or order awaits confirmation, it may be restrained by prohibition.[8]

The Committee on Ministers' Powers recommended that the use of clauses designed to exclude the jurisdiction of the courts to enquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases[9] and the Franks Committee advised that no statue should contain words purporting to oust *certiorari*, prohibition and *mandamus*.[10]

Section 11 of the Tribunals and Enquiries Act, 1958, provides that any provision in any earlier Act that no order made under it shall be called in question in any court, or which excludes any power of the High Court, shall not prevent the removal of proceedings to the High Court by certiorari or prejudice the power of the court to make mandamus;[11] this is not to affect the power in the British Nationality Act, 1948, to refuse naturalisation, nor any order or determination of a

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6. *Institute of Patent Agents* v. *Lockwood*, (1894) A.C. 347.
7. *Minister of Health* v. *R., ex. p. Yaffe*, [1931] A.C. 494.
8. *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171.
9. Comd. 4060 (1932) 65.
10. Comnd. 218 (1957) 27, 93.
11. Prohibition was presumably omitted because, except when judicial review is entirely excluded and there are exclusive provisions like those in the Acquisition of Land (Authorisation) Procedure, 1946, referred to above under the existing law, in cases of apparent defect in jurisdiction, there is no bar to the issue of prohibition.

court of law or of the Foreign Compensation Commission, nor any Act which makes special provision for an application to the High Court within a stipulated period.

Another class of statutory provisions which restricts judicial review includes those giving a very wide discretion to executive authorities to act on their subjective satisfaction. The Emergency Powers (Defence) Act, 1939, empowered the King in Council to make such regulations as appeared to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order, the efficient prosecution of the war and the maintenance of essential supplies and services. It was held that all the court could do was to see that an impugned exercise of this power fell within the power given by the statute, and that it had been exercised in good faith (which would be presumed and difficult to disprove). The court could not enquire into the reasonableness, the policy, the sense, or any other aspect of the transaction.[12]

Another type of statutory provision gives an authority power to act if satisfied that it is in the public interest. In one case the statute provided that, where a highway had been stopped up in exercise of emergency powers, the Minister of War Transport might, if satisfied that in the public interest it was necessary or expedient to do so, by order authorise the permanent stopping up of the highway. The minister made an order for the permanent stopping up of a highway, but required a footpath to be dedicated over part of it. The contention that this was a stopping up of part of the highway, not authorised by the statute, was rejected and the court held it could not go into the question whether the minister was satisfied.[13]

In still another type, an authority is empowered to take prescribed action if satisfied that a given state of affairs exists. In a Privy Council case from Singapore, the statute provided that when it appeared to the Board that any building used or likely to be used as a dwelling place was of such construction or in such condition as to be unfit for human habitation, the Board might by resolution declare such building insanitary. In relation to the buildings affected, the Board had applied the standard set out in a manual issued by the Ministry of Health in England for desirable houses, which was held to be a criterion of fitness for human habitation not contemplated by the legislature.

12. *Carltona Ltd.* v. *Commissioners of Works*, [1943] 2 All E.R. 560 at p. 564.
13. *Re Beck & Pollitzer's Application*, [1948] 2 K.B. 339.

Prohibition was held to be admissible to correct this.[14] This case goes beyond any decided in any other English court, where it is usually held that if an authority is to act on its opinion, it must form it on grounds that seem good to it,[15] but in an Australian case it has been held that prohibition will issue if an authority adopts erroneous criteria or acts without any evidence to support the facts on which jurisdiction depends.[16] There are dicta in English cases to the effect that, if there were no grounds on which an authority could be satisfied, the court might infer that he had not applied his mind to the relevant facts or did not honestly hold the view expressed to be taken,[17] and that the court would interfere if there were no material, no information, and no representation before a local authority upon which it could be reasonably satisfied that the order should be made.[18]

Finally there are statutes empowering licensing authorities to attach such conditions to licenses as they think fit and the minister in appeal in licensing cases to make such order as he thinks fit. In such cases the authority must not act on irrelevant considerations, nor make a decision which no reasonable person could have reached.[19] Where the statute authorised local authorities with transport undertakings to charge such fares and pay such wages as they thought fit, it was held that they were bound to act on business principles.[20]

A recent commentator has pointed out that whereas the court has been astute to find reasons for exercising jurisdiction notwithstanding statutory provisions making administrative action final, it has declined to control wide discretionary powers given to executive authorities. This is due to the fact that in cases of the former type the precedents established in a period during which the the court viewed with resentment Parliament's industry in protecting the decisions of inferior courts from interference were followed when the same protection was given by statute to executive authorities. But the leading cases dealing with action on subjective satisfaction

14. *Estate and Trust Agencies Ltd.* v. *Singapore Improvement Trust*, [1937] A.C. 898.
15. *Allcroft* v. *Bishop of London*, (1891) A.C. 666 at 678.
16. *R.* v. *Australian Stevedoring Industry Board*, (1952) 88 C.L.R. 100.
17. *Ross-Clunis* v. *Papadopoullos*, [1958] 1 W.L.R. 560.
18. *Goddard* v. *Minister of Housing and Local Government*, [1958] 1 W.L.R. 1151 at pp. 1153-1154.
19. *Associated Provincial Picture House Ltd.* v. *Wednesbury Corporation*, [1948] 1 K.B. 223.
20. *Roberts* v. *Hopwood*, [1925] A.C. 578.

of an authority arose under war-time statutes, when it was easy to persuade the court that judicial review was uncalled for. To give an authority unqualified discretion is, however, more open to criticism than to exclude judicial review of the acts of an authority, whose powers are explicitly defined by statute, which will normally be complied with. It is, of course, necessary to give the executive unqualified discretion in matters of high policy, but this is not necessary in such cases as when a minister was empowered to close a road, already referred to,[21] and, while judicial review should not normally extend to examination of the merits of administrative action, it should cover its legality.[22]

2. Exclusion of judicial review in America

In the state courts of the United States, the scope of judicial review varies from state to state. In the federal courts the constitutional warrant for judicial review is found in para. 1 of section 2 of Art. 3 of the Constitution defining the judicial power of the United States and in para. 2 of Art. 6 which makes the Constitution the supreme law of the land, though it is claimed to be of older origin than the Constitution. Coke maintained that if a statute was against common right and reason the common law would control it and adjudge it void;[23] this was invoked to justify the resistance to the Stamp Act which led to the American War of Independence and was invoked in the United States Supreme Court as late as 1874.[24]

Any official act which purports to stem directly from the Constitution is a case arising under the Constitution within the meaning of para. 1 of sec. 2 of Art. 3, and subject to judicial review, but only for the purpose of finding the law of the case. The Supreme Court has imposed restrictions of its own creation on its jurisdiction. It will only interfere in clear cases, and when the constitutional issue is unavoidable. It will not comment on political questions, such as whether a statute has been duly enacted, or a constitutional amendment duly ratified, what are the rights of a state to protection from invasion or insurrection, whether state officials have been duly elected, and what are the rights and duties of the United States in relation to other nations. Congress, by exercise of its power to regulate the appellate jurisdiction of the Supreme Court and the entire jurisdiction of the

21. *Re Beck and Pollitizer's Application*, [1948] 2 K.B. 339.
22. de Smith, *op. cit.*, pp. 247, 248.
23. Bonham's Case, Coke, 8 Rep. 107 : 77 E.R. 638.
24. *Loan Association* v. *Topeka*, 20 Wall. 662.

subordinate federal courts, can exercise control over the exercise of the power of judicial review. [25]

Section 10 of the Administrative Procedure Act, 1946, gives a general right of review to any person suffering legal wrong or adversely affected or aggrieved by agency action, except in so far as judicial review is precluded by statute or the agency is by law permitted to act in its discretion. " Agency " includes most executive authorities in the United States. The form which judicial review is taken may be prescribed by the statute, and, in default of such statutory provision, any appropriate existing form of action may be used, including prohibitory and mandatory injunctions and *habeas corpus*. Every act of an agency reviewable by statute and every final order for which there is no adequate remedy in court is subject to judicial review; for this purpose an order is final notwithstanding that it may be subject to review or appeal, unless there is an agency rule to the contrary which also makes the order inoperative in the meantime. The agency, if so authorised, may postpone putting its order into force pending judicial review. To the extent necessary to prevent irreparable injury, the court may make such orders as it thinks necessary to postpone the implementation of the order or to preserve rights and status pending the conclusion of the review proceedings. In exercising the power of review the court, except in so far as it is excluded by statute, or action is committed to the agency's discretion, must decide all relevant questions of law raised, interpret constitutional and statutory provisions, and determine the meaning or application of any order of an agency. It may compel an agency to do what it has unlawfully refused to do or unreasonably delayed. It may set aside acts and decisions of agencies which are arbitrary, an abuse of discretion, capricious, or otherwise not in accordance with law, acts and decisions contrary to constitutional right, power, privilege or immunity, orders and decisions in excess of statutory jurisdiction, authority or limitations, or short of statutory right, and orders and decisions made without observing the procedure established by law. Where an order is made after a judicial hearing as required by other sections of the act or an agency hearing required by statute, it is liable to be set aside if not supported by substantial evidence, or unwarranted by the facts.

But " nearly all the law concerning reviewability of action is judge-made ", [26] and, in addition to the categories of administrative action

25. Corwin, *The Constitution*, pp. 138, 141, 143, 144.

26. Davis, *Administrative Law*, p. 814.

which are reviewable and non-reviewable, there are administrative acts which are only reviewable in certain circumstances, for instance if, fraudulent or arbitrary or beyond the jurisdiction, while some are reviewable excess but not for abuse of jurisdiction.[27] The court sometimes justifies the action of the authority in a reasoned judgment, while holding that the action impugned is not subject to review. Although that clause of sec. 10 of the Administrative Procedure Act which deals with the scope of review is very wide in its terms, it is governed by the opening clause, which allows a partial exclusion by statute, so that an administrative act may be partly reviewable and partly not subject to review.

When a statute is silent on the point, it does not follow that judicial review is available. If a statute gives a person a discretionary power to be exercised on his own opinion of certain facts, the normal construction is that the statute makes him the sole judge of the existence of those facts.[28] Review was denied to an order of the National War Labour Board granting a wage increase mainly on the ground that no property or opportunity had been withheld from the employers, nor was this threatened.[29] In the *Switchmen's* case the statute empowered the Mediation Board to certify who was to represent employees, after an enquiry which might involve a secret ballot in which the Board might designate the electors and make election rules. The Board certified the Brotherhood of Railroad Trainmen, but the Switchmen's Union objected to the Brotherhood representing all yardmen on the railway system, contending that different parts of the system should be separately represented. The case involved interpretation of the statutory provisions defining the Board's jurisdiction. Three judges in dissent thought that as the business of the Board was labour relations rather than interpretation of statutes, review should have been allowed, but the majority denied review, partly because of the history of the legislation, partly on precedent, and partly because the statute provided for judicial review of acts under other parts of it.[30] Though this decision was previous to the Administrative Procedure Code its authority is unaffected. The effect of the statute upon decisions made before its enactment has been negligible.[31]

Review has been granted, in the absence of words in the statute, on the ground that the acts of officials must be justified by law,

27. Davis, *op. cit.*, pp. 815-16.
28. *Martin* v. *Mott*, 25 U.S. 19 at 31-32.
29. *Employers Group of Motor Freight Carriers* v. *National War Labor Board*, 79 App. D.C. 105.
30. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943).
31. Davis, *op. cit.*, p. 826.

and, if an official violates the law to the injury of an individual, the courts generally have jurisdiction to grant relief,[32] though he should not be interfered with unless he is clearly wrong.[33]

When cases dealing with immigration and deportation first came before the courts, they were held not subject to review. The statute said that the inspection officer's decision was final, subject to appeal to the superintendent and review by the secretary of the treasury, but in 1903 the court said it would review the fairness of the administrative hearing,[34] and in 1923 the court held that the secretary's acts were reviewable so as to determine whether he acted within his statutory authority, whether there was any evidence to support his finding, and whether the procedure followed was fair and reasonable.[35] It does not seem however that any doctrine is being developed or that there is any change in the attitude of the court to such questions. Whether, in the absence of specific statutory direction, review will be granted depends mainly on whether the majority of the judges think it called for. If they approve of the actions of the executive, they will set out reasons against review; if what has been done seems to them unjust, especially when the conduct complained of has continued for a long period, they will find some way to correct it.[36]

Even when the statute declares action by an administrative authority "final" or "final and conclusive", the Supreme Court will sometimes allow a limited right of review. When, in relation to compensation for ex-soldiers, the statute declared that the decisions of the Secretary for War and others "on all matters within their respective jurisdictions .. .. shall be final and conclusive", the Supreme Court in effect, added the gloss "unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious".[37] When the statute said that all decisions of fact and law should be conclusive, except as otherwise provided in the statute, the court nevertheless granted review on the ground that the Director of the Veterans Bureau had erred in law.[38]

The Supreme Court has construed "final and conclusive" as meaning "final in the absence of fraud",[39] and applicable only to

32. *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902).
33. *Bates & Guild Co.* v. *Payne*, 194 U.S. 106 (1904).
34. *The Japanese Immigrant* case, 189 U.S. 86 (1903).
35. *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329 (1923).
36. Davis, *op. cit.*, p. 237.
37. *United States* v. *Williams*, 278 U.S. 255 (1929).
38. *Reynolds* v. *United States*, 292 U.S. 443 (1934).
39. *Auffmordit* v. *Hedden*, 137 U.S. 310.

orders within the jurisdiction of those that made them; "final" excluded the customary scope of judicial review; decisions of local draft boards acting under the Selective Service Act of the Second World War were final, even if erroneous, but, if there were no basis of fact for a decision, the board would be acting without jurisdiction.[40]

> "Neither legislative language nor legislative history nor both in combination exert as much influence upon reviewability as the views of the judges concerning desirability or undesirability of reviewing".[41]

Faced with interpretation of the kind mentioned above, Congress has had recourse of stronger legislative language, adding for instance to "final and conclusive" "and no other official or any court of the United States shall have power or jurisdiction to review any such decisions", which was held to exclude review of a decision unsupported by evidence, or a decision on a point of law, or an arbitrary or capricious decision,[42] but a district court, admitting that it was powerless to go into the merits, claimed the right to order a rehearing in its capacity as a court of equity.[43]

The opening words of section 10 of the Administrative Procedure Act read with the subsequent clause which deals with the scope of review, (ignoring words not instantly relevant) says:

> "Except in so far as ...... agency action is by law committed to agency discretion ...... the reviewing court shall...... set aside agency action ..... found to be ...... an abuse of discretion"

which should literally mean that when the agency has discretion, the court cannot review its acts when the discretion is abused. But the probable interpretation is that "committed" implies that the law (not necessarily a statute) says that the exercise of discretion is not reviewable, which would preserve the law in force before the Act.[44] An order of the President prohibiting the shooting of wild geese under the Migratory Bird Treaty was held to be a proper exercise of the "unlimited and unreviewable discretion" vested and reposed by the Administrative Procedure Act.[45]

Probably in most countries such acts as calling out the state militia, taking possession of telephone lines and recognising foreign

40. *Estep* v. *United States*, 327 U.S. 114 (1946).
41. Davis, *op. cit.*, p. 837.
42. *United States* v. *Mroch*, 88 F. 2d. 888.
43. *Siegel* v. *United States*, 87 F. Supp. 555.
44. Davis, *op. cit.*, p. 843.
45. *Lansden* v. *Hart*, 180 F. 2d. 679.

governments would be regarded as matters within the discretion of the executive, exempt from judicial control. Less obvious perhaps are powers to confer privileges, such as to make a special tax assessment when the ordinary rules would work exceptional hardship,[46] or to admit an alien, liable to exclusion, under a bond.[47]

The Tariff Act, 1930, permitted review on questions of law only, and empowered the President on the advice of the Tariff Commission to adjust import duties to equalise differences in costs of production. The Court of Customs & Patent Appeals set aside an order increasing a duty on the ground that the increase was based on invoice prices converted into dollars at a rate not applicable to the relevant period. The Supreme Court held that this could not be done; Congress had authorised a public officer to take action when in his judgment it was necessary to carry out the policy of Congress, and the existence of facts calling for that action was not subject to review.[48]

Where a statute empowers an authority to act "in his discretion" or when satisfied, review can only be had when the action is plainly arbitrary or an abuse of discretion.[49]

The *Procter & Gamble* case[50] introduced the negative order doctrine in 1912. If an executive authority dismissed an application, judicial review would not be admissible, as that would involve the court exercising a power vested in the executive authority. Subsequently it was held that the doctrine applied to orders negative in character, though not grammatically negative. It was finally rejected in 1939, the considerations of policy which caused it to be introduced being, it was said, completely satisfied by the doctrines of "primary jurisdiction and administrative finality".[51] The former implies that administrative remedies must be exhausted before review becomes available; the latter that findings of fact must be supported by substantial evidence.[52]

While both in England and America it would seem that the personal opinions of the court as to what is right and just have greater weight in applications for judicial review than in other branches of litigation, there seems to be a wider discretion in the United States, where the Supreme Court is not bound *stare decisis*. If the Administrative Procedure Act in the United States has had little effect on the

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46. *Heiner* v. *Diamond Alkali Co.*, 288 U.S. 502.
47. *United States ex rel. Ickowicz* v. *Day*, 18 F. 2d. 962.
48. *United States* v. *S. Bush*, 310 U.S. 371 (1940).
49. *Lucas* v. *Kansas City Structural Steel Co.*, 281 U.S. 264 at 271.
50. *Proctor and Gamble Co.* v. *U.S.*, 225 U.S. 282 (1912).
51. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125.
52. Davis, *op. cit.*, pp. 854, 855.

jurisdiction assumed by the courts, it would seem that the Tribunals and Enquiries Act has widened the scope of judicial review in England.

3. Constitutional restriction on judicial review in India

The position in India differs from that in England in that England has no supreme or paramount law like the Indian Constitution; it differs from that in the United States in that the United States Constitution has no provision corresponding to Arts. 32 and 226 of the Indian Constitution. Article 32 guarantees a remedy in the Supreme Court to enforce the other fundamental rights by directions, orders and writs including writs in the nature of the prerogative writs. Article 226 gives similar power to the High Courts for the enforcement of the fundamental rights and for any other purpose. Though the power of the High Courts to issue writs " for any other purpose " suggests the possibility of internal and external restriction, it would seem that any restriction on the right to claim protection for a fundamental right would be *prima facie* unconstitutional. In the matter of rights other than those contained in Part III of the Constitution, the High Courts can exercise their discretion and consider also the question of the availability of alternate remedy.

Article 136 of the Constitution provides for special leave to appeal to the Supreme Court in its discretion from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India, except those constituted by or under a law relating to the armed forces. Such leave can be obtained only if exceptional and special circumstances exist or that substantial and grave injustice has been done and the case presents features of sufficient gravity to warrant a review of the decision appealed against.[52a]

But the Constitution itself excludes many acts from judicial review. Doubts and disputes connected with the election of the President and Vice-President are heard and determined by the Supreme Court whose decision is final;[53] there can be no review of the acts of the Election Commission before the process of election is completed.[54] Executive action of the Government of India must be expressed as taken in the name of the President, and authenticated in accordance with rules made by him. If this is done, the order cannot be called in question as not made by the President.[55] In fact the President is the formal

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52a. *Balwan Singh* v. *Narain and others*, A.I.R. 1960 S. C. 770 at 775.

53. Article 71, Constitution of India.

54. *N.B. Khare* v. *Election Commission*, A.I.R. 1957 S. C. 694.

55. Article 77.

head of the executive, the real power being exercised by the ministers,[56] but the Constitution says there shall be a council of ministers to advise the President, and the question whether, and if so what advice was tendered by ministers shall not be inquired into in any court.[57] *Mutatis mutandis,* the same restriction apply to review of the acts of state ministers.[58] Proceedings in Parliament and state legislatures cannot be questioned on the ground of irregularity of procedure.[59] If amendments have been made to a Bill in contravention of the rules of business, [60] or if members [61] or even the Speaker have not taken the oath, [62] the courts will not hear the objection. When the original Bill had been signed and authenticated by the Speaker, its validity cannot be questioned on the ground that the official report of the proceedings did not record that the question had been put and carried in accordance with the rules of business.[63]

The exercise of powers vested in an officer or member of a legislature for regulating procedure or maintaining order is not subject to the jurisdiction of any court.[64] The courts will not review decisions of a speaker or his interpretation of the rules ;[65] no writ will issue to restrain the enactment of legislation, even though it is unconstitutional.[66] Special procedure is necessary for the enactment of a money bill, but the Speaker's decision is final and is endorsed on it when it is transmitted to the Upper House and presented for assent to the President or Governor.[67]

Then the legislatures and their members have certain privileges, [68] freedom of speech, and ; until others are defined by law, the privileges of the House of Commons in England. While such a law might be subjected to review as repugnant to a Fundamental Right, the privileges of the House of Commons have the force of a provision of the Constitution, so that anything done by virtue of them would not be subject to review as violative of a Fundamental Right.[69]

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56. *Ram Jawaya* v. *State of Punjab,* [1955] 2 S.C.R. 225 at 237.
57. Article 74.
58. Articles 166 and 163.
59. Articles 122(1) and 212(1).
60. *Ram Dubey* v. *Govt. of Madhya Bharat,* A.I.R. 1952 M.B. 57.
61. *Ram Dubey* (supra).
62. *Anand* v. *Ram Sahay,* A.I.R. 1952 M.B. 31 at 44.
63. *State of Bihar* v. *Kameshwar Singh,* 2 [1952] S.C.R. 889.
64. Arts. 122(1) & 212(1).
65. *Rajnarain* v. *Atmaram,* A.I.R. 1954 All. 319.
66. *Chotey Lal* v. *State of U.P.,* A.I.R. 1951 All. 228.
67. Articles 110 and 199.
68. Articles 105 and 194.
69. *M.S.M. Sharma* v. *Sri Krishna Sinha,* A.I.R. 1959 S.C. 395.

The Constitution provides for the nomination of a limited number of members to Upper Chambers, being persons with special knowledge or practical experience of literature, science, art, social service, and, in a state legislature, co-operative movement,[70] but it appears to be impossible to secure judicial review of such nominations.[71] It is not suggested that there is any general rule excluding judicial review of appointments to offices mentioned in the Constitution. *Quo warranto* lies against a person appointed as Advocate-General, for there is no constitutional prohibition, express or implied, of judicial review,[72] but in the case of persons nominated to Upper Chambers, the President and the Governor are immune from answering in any court for acts done in their official capacities [73] and the advice given by ministers on the matter cannot be enquired into in any court.[74] These immunities will exclude judicial review of all official acts of the President and the Governor, where relief cannot be effective except by compelling action by these high officials. It means, for instance, that there can be no judicial review of the power of pardon.[75] However, as pointed out in *K. M. Nanavati* v. *State of Bombay*,[75a] there is an essential difference between the general power to grant pardon and the power to suspend sentence in criminal matters pending before the Supreme Court. The former is an absolute power vesting in the Governor under Art. 161 over which there can be no review. But the latter power vesting as it does in both the court under Art. 142 and the Governor under Art. 161, the majority view inclined to a harmonious construction, namely, that Art. 161 does not deal with the suspension of sentence during the time that Art. 142 is in operation and the matter is *sub judice* in the Supreme Court. In this view it was held that the Governor's order of suspension of sentence was good only till the Supreme Court took seizure of the case, after which it was the latter court that was competent to order suspension. The Governor could however grant a full pardon at any time even during the pendency of the case in the Supreme Court in the exercise of his 'mercy jurisdiction'.

Parliament is empowered to make laws governing election to Parliament, preparation of electoral rolls, and delimiting constituencies,[76] and also to make provision for the same matters in connection

70. Articles 80 and 172.
71. *Bimanchandra* v. *Dr. H.C. Mookherjee*, (1952) 56 C.W.N. 651.
72. *Karkare* v. *Shevde*, A.I.R. 1952 Nag. 330.
73. Article 361.
74. Articles 74 and 163.
75. Articles 72 and 161.
75a. A.I.R. 1961 S.C. 112.
76. Article 327.

with State elections though the Parliamentary legislation may be supplemented by State legislation.[77] The validity of any law relating to delimitation of constituencies or allotment of seats to constituencies cannot be called in question in any court and an election can only be called in question in any court, by an election petition.[78] The consequence is that no matter arising while an election is in progress from nomination to declaration of the result can be questioned in court,[79] and no suit lies to set aside an election.[80] The Representation of the People Act, 1951, in Sec. 80 provides that no election shall be called in question except by an election petition, but proceeding before an Election Tribunal are not part of the election ; they are not protected by the Constitution from review by the superior courts.[81]

After observing the working of the 1951 Act for about five years, an appeal has been provided by Parliament on merits from the decision of an election tribunal to the High Court under Sec. 116A of the Representation of the People (Second Amendment) Act, 1956.[81a]

4. Legislative restrictions on judicial review in India

The jurisdiction and powers of the Supreme Court are defined in the Constitution. Parliament may enlarge them,[82] but they cannot be curtailed. The power of the Supreme Court to grant special leave to appeal[83] can only be interfered with by constitutional amendment[84] and

77. Article 328.
78. Article 329.
79. *Ponnuswami* v. *Returning Officer*, [1952] S.C.R. 913.
80. *Hari Vishnu* v. *Ahmad*, A.I.R. 1955 S.C. 233.
81. *Tirath Singh* v. *Bachitar*, A.I.R. 1954 Pepsu 118 ; *Rajkrishna* v. *Binod*, [1954] S.C.R. 913.
81a. Clause (2) of Sec. 116A provides—

"The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority and follow the same procedure, with respect to an appeal under this chapter, as if the appeal were an appeal from an original decree passed by a Civil Court situated within the local limits of its civil appellate jurisdiction:

Provided that where the High Court consists of more than two judges, every appeal under this chapter shall be heard by a Bench of not less than two judges".

Clause 3 prescribes that the appeal should be preferred within 30 days from the date of the order of the Tribunal, except for sufficient cause shown.

82. Articles 138-140.
83. Article 136.
84. *Durga Shankar* v. *Raghuraj*, A.I.R. 1954 S.C. 520.

"when the court reaches the conclusion that a person has been dealt with arbitrarily or that a court or tribunal has not given a fair deal to a litigant, then no technical hurdles of any kind like the finality of findings of facts or otherwise can stand in the way of the exercise of this power because the whole intent and purpose of this Article is that it is the duty of the court to see that injustice is not perpetrated or perpetuated by decisions of courts and tribunals because certain laws have made these courts or tribunals final and conclusive".[85]

In the appeal in which the Supreme Court gave judgment in these terms, notwithstanding a provision in the Income-tax Act prohibiting any suit to set aside or modify an assessment because there was no evidentiary material to support it, the Supreme Court set aside the impugned assessment.

The Indian Railways Act, 1890, empowers the Railway Tribunal to deal with complaints as to rates, classification of goods, and undue preferences. Section 66A provides for an appeal from a single member to the full bench, whose decision is "final". This does not, however, affect the jurisdiction of the Supreme Court to grant in its discretion special leave to appeal.[86] The jurisdiction under Art. 136 is limited to control of judicial and quasi-judicial tribunals, ie, to tribunals against whose decisions it may issue *certiorari* and prohibition.[87]

Thus the jurisdiction under Art. 136 does not apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces.[87a]

Whereas the Constitution leaves to the discretion of the Supreme Court the limits which it will set to its own jurisdiction to grant special leave to appeal, it restricts the power to issue writs and grant other remedies under Art. 32 to the enforcement of the Fundamental Rights, whether the necessity arises out of action by the executive or the legislatures. But Art. 32 does not create machinery designed to examine the constitutionality of legislation; it is only when the petitioner's own fundamental right is affected that this jurisdiction can be invoked.[88]

85. *Dhakeshwari Mills* v. *Commissioner of Income-tax*, [1955] 1 S.C.R. 941.

86. *Raigarh Jute Mills* v. *Eastern Railway*, A.I.R. 1958 S.C. 525.

87. *Bharat Bank* v. *Employees*, [1950] S.C.R. 459.

87a. *Vide* Article 136, Cl. (2).

88. *Chiranjit Lal* v. *Union*, [1950] S.C.R. 869 ; See also *K. K. Kochunni's* case, A.I.R. 1959 S.C. 725 and a comment in Ch. IV, Certiorari in India, p. 111 under (f) 'Evidence not on the record'.

89. *Chiranjitlal* (supra).

The right is not lost by failure to apply for the appropriate writ[89] nor affected by the existence of the same right in the High Court under Art. 226.[90] Even when the remedy has been refused in the High Court and no appeal has been filed, it seems that the right to move the Supreme Court under Art. 32 will not be denied.[91]

Section 14 of the Preventive Detention Act, 1950, forbade the publication of the grounds of detention or the representation made by the detenu. This was declared unconstitutional as it prevented the court when exercising its powers under Art. 32 from determining whether the fundamental right in Art. 22 (5) had been infringed.[92] However, a similar device has been employed in Sec. 10 of the Act as amended up to date; the report of an Advisory Board, other than the statement of its opinion, whether or not the detention is warranted, is confidential.

The powers and jurisdiction of the High Courts are not all entrenched by the Constitution in the same way as those of the Supreme Court. The jurisdiction of a High Court and the law administered by it immediately before the Constitution is continued; the old restriction on exercising original jurisdiction in revenue matters has been abolished, but all this is subject to alteration by the legislatures.[93] Parliament may legislate on jurisdiction over matters on the Union List, the State Legislature in matters on the State List, and there is concurrent jurisdiction in matters on the Concurrent List.[94] It has also been thought necessary to require the Governor to reserve for the consideration of the President any State Bill which, in his opinion, if it became law, would so derogate from the powers of the High Court as to endanger its constitutional position.[95]

Apart from the political control of State legislation thus provided, it has been said, in rejecting a submission that judicial review was excluded by words in section 105 of the Representation of the People Act, 1951, to the effect that orders of an election tribunal are conclusive and final :—

"powers conferred on us by Art. 136 of the Constitution and on the High Courts under Art. 226 cannot be taken away or

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90. *Romesh Thappar* v. *State of Madras*, [1950] S.C.R. 594.
91. *M. K. Gopalan* v. *State of M.P.* [1955] 1 S.C.R. 168.
92. *Gopalan* v. *State of Madras*, [1950] S.C.R. 88.
93. Article 225.
94. Sch. VII, I. 95, II. 65, III. 46.
95. Article 200.

whittled down by the legislature. So long as these powers remain, our discretion and that of the High Courts is unfettered ".[96]

This, of course, applies also to the jurisdiction of the High Court to issue writs and orders under Art. 226 and to its power of superintendence under Art. 227. These are vested in the High Courts by the Constitution and could only be taken away by constitutional amendment, but the other powers of the High Courts are subject to legislative control as explained above.

In dealing with control of judicial review of administrative action, statutes enacted before and after the Constitution came into force may be divided into six main classes. The statute may remain silent on the matter. Section 2 of the Poisons Act, 1919, empowers a State Government to make rules regulating the sale of poisons by licensees. Section 24 of the Dangerous Drugs Act, 1930, gives power to seize dangerous drugs in transit or in a public place and section 32 provides for their confiscation in certain circumstances, but neither statute makes any reference to judicial review of the very wide powers exercisable under these statutes. Other statutes coming within this category are the Arms Act, 1878, the Foreign Exchange Regulations Act, 1947, and the Forward Contracts Regulation Act, 1952.

Where the statute is silent on the subject of judicial review, as is the case with the Poisons Act and the Dangerous Drugs Act, there can be no question of exclusion of the High Court's power to issue writs to protect a Fundamental Right or "for any other purpose"; any restrictions must be self-imposed by the court in its interpretation of "for any other purpose".

A second category of statute is exemplified by the Essential Commodities Act, 1955, and the Essential Supplies (Temporary Powers) Act, 1946. These statutes provide for very wide delegation of legislative power to the Central and State Governments, with power of subdelegation. The orders which may be made under these statutes cover every aspect of production, supply and distribution of a number of essential articles. Section 15 of the former statute and sec. 16 of the latter provide that no suit, prosecution or other legal proceedings shall lie against any person for anything done or intended to be done in good faith under any order made under the Act or against Government for any damage caused or likely to be done in good faith in pursuance of any such order. A more comprehensive exclusion is seen in the Administration of Evacuee Property Act. Section 46 denies

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96. *Raj Krishna Bose* v. *Binod*, A.I.R. 1954 S.C. 202.

jurisdiction to a civil court over the questions whether particular property is evacuee or intending evacuee; no civil court has jurisdiction in any matter which the Custodian or Custodian-General is empowered to act, nor may it question the legality of action taken by these officials under the Act. Section 28 provides that every order made by the officials appointed under the Act shall be final and not called in question in any court by way of appeal or revision in any original suit, application or execution proceedings. The Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, gave the rent controller jurisdiction to determine if rent had not been paid, and to order eviction. The Act provided for an appeal to the commissioner, but his decision, and, subject only thereto, the controller's decision was final and could not be called in question in any court of law, whether in a suit or other proceeding or by way of appeal and revision. Among other statutory provisions coming within this category are sec. 8 of the Co-operative Societies Act, 1912, sec. 7 of the Inland Steam Vessels Act, 1917, sec. 20 of the Indian Boilers Act, 1923, sec. 24, of the Cantonments Act, 1924, sec. 16 of the Indian Forests Act, 1927, secs. 6 and 13A of the Industrial Employment (Standing Orders) Act, 1946, sec. 10 of the Banking Companies Act, 1949, sec. 5 of the Public Premises Eviction Act, 1950, secs. 10 and 11 of the Displaced Persons Claims Act, 1950, and sec. 19A of the Employees Provident Fund Act, 1952. Statutory provisions excluding judicial review do not necessarily apply to every kind of administrative action which can be taken under the statute.

The restrictive provisions in sec. 16 of the Essential Supplies (Temporary Powers) Act, 1946, and sec. 15 of the Essential Commodities Act, 1955, have not prevented orders made under it being held void for repugnancy to Fundamental Rights, and for being *ultra vires* the statute.

The Cotton Textiles (Control) Order, 1948, made under powers in the Essential Supplies Act was held not to be a reasonable restriction on right to hold property in Art. 19(1)(g) in that it gave the Textiles Commissioner an arbitrary discretion to grant or refuse permission to install a power-loom.[97] A Foodgrains Order, made under the same statute was held to be an unreasonable restriction on the right to follow a trade in Art. 19(1)(g), because it enabled Government to requisition stocks at a price which would cause loss to the stockist, and to sell at a profit.[98] In a more recent case, the Iron and Steel Control Order, 1941,

97. *Balakrishna* v. *Madras*, A.I.R. 1952 Mad. 565.

98. *Rajasthan* v. *Nath Mal*, A.I.R. 1954 S.C. 307.

made under the same statute, was under attack on the ground that the Control Order laid down no principles for fixing prices. It was held that this was not sufficient ground for declaring that prices unreasonable, but it would be feasible to attack them as unreasonable on other grounds.[99]

To cite a recent instance of judicial review by a High Court on a ground other than infringement of a Fundamental Right, notwithstanding the restriction in sec. 15 of the Essential Commodities Act, an order made by the West Bengal Government to the holder of a stock of rice to deliver it to its Director of Food was held *ultra vires* its powers under s. 3 of the Essential Commodities Act, which contemplated a sale to such person or persons as was specified in the order. Government was not a "person", but was admittedly the purchaser.[100]

Where the Supreme Court is exercising its powers of review under Art. 32, it is restricted by the Constitution to interference only when a Fundamental Right is involved. Though, in appeal on a point of constitutional law under Art. 132 the appellant may, with leave of the court, press any other ground, there is no similar indulgence available to the petitioner in proceedings under Art. 32. Yet, just as the American Supreme Court will declare an order not subject to review, and then proceed to deliver a reasoned judgment upholding the legality of the order attacked, so the Indian Supreme Court has permitted the argument to range outside the question of repugnancy to the Fundamental Right. It is not possible to cite a case of an order being avoided for a reason other than repugnancy to a Fundamental Right, but there is a recent instance of an order being upheld and objections not exclusively related to Fundamental Rights being rejected.[1]

Even the very comprehensive language of exclusion used in secs. 28 and 46 of the Administration of Evacuee Property Act cannot interfere with the jurisdiction of the High Courts under Art. 226,[2] but the jurisdiction of courts subordinate to the High Court is governed by sec. 9 of the Code of Civil Procedure and this excludes from their competence civil suits cognizance of which is expressly or impliedly barred. There is no conflict between this and the provisions of secs. 28 and 46 of the Administration of Evacuee Property Act, so that if the custodian decides, even wrongly, that a person is an evacuee or that

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99. *Bhagwati Saran* v. *State of U.P.*, A.I.R. 1959 All. 332.
100. *Ramrichpal* v. *State of W. Bengal*, A.I.R. 1958 Cal. 257.
1. *Tikka Ramji* v. *State of U.P.*, [1956] S.C.R. 393.
2. *Asiatic Engineering Co.* v. *Achhruram*, A.I.R. 1951 All. 746 ; *Masalkhana* v. *Custodian*, A.I.R. 1959 M.P. 256.

particular property is evacuee property, the jurisdiction of a civil court is ousted by the express provisions of the Act,[3] but secs. 28 and 46 are strictly construed so as not to bar all suits whatsoever relating to evacuee property. A sale whereby property passed to the person who ultimately became the evacuee can be challenged[4] and when a custodian takes action in relation to property on the basis of a judgment of the court of first instance, there is no bar to an appeal.[5]

Government, under sec. 3 of the Foreigners Act, 1946, may, *inter alia*, order a foreigner to leave India. Section 8 provides that when the nationality of a foreigner is in doubt, Government may decide what his nationality shall be in accordance with certain rules, and a decision on the matter shall be final. Articles 5 to 11 of the Constitution conferred rights of citizenship on certain persons, and this was supplemented by the Citizenship Act, 1955, which deals with acquisition, renunciation, termination and deprivation of citizenship. Section 15 gives any person aggrieved by any order made under the Act a right of revision by the Central Government "and the decision of the Central Government shall be final".

A man, who was a citizen under Art. 5 of the Constitution, was ordered to leave India; he filed a writ petition under Art. 226 of the Constitution. It was held that the Foreigners Act did not apply to citizens, and laid down no procedure for depriving anyone of citizenship. Before the Citizenship Act became law, a party alleging that a person had lost his citizenship would have to prove it in a court, but now, by sec. 9 of the Act and the Rules under it, the burden of proof is on the citizen, but the decision rests with the Central Government. There had, however, been no such decision. To deport the petitioner without enquiry and opportunity to show cause that he is not a citizen violates the right of free movement in Art. 19(1)(d).[6] In another case an order was made under sec. 3 of the Foreigners Act to leave India. The person affected brought suit to challenge the order. The trial court decreed the suit on the ground that the petitioner was a citizen. The appellate court expressed no opinion on that finding, but dismissed the appeal on the ground that the Foreigners Act only authorised a deportation order of a foreigner as defined by the statute, and the definition did not include a naturalised British subject, which the plaintiff-respondent was.[7]

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3. *Zaki* v. *State of Bihar*, A.I.R. 1953 Pat. 112.
4. *Narendra Kumar* v. *Custodian-General*, A.I.R. 1956 Punj. 163.
5. *Khalil Ahmed* v. *Nigar Begum* A.I.R. 1954 All. 362.
6. *Nasir Ahmed* v. *Chief Commissioner*, A.I.R. 1959 Punj. 261.
7. *Union* v. *Hassanali*, A.I.R. 1954 Bom. 505.

In both these cases, the executive could, assuming that they had good cause to do so, by following the provisions in the relevant statutes, have created a situation, whereby the person ordered to leave India could have been deprived of his citizenship and this action could not have been questioned in the courts. The order to leave, made subsequent to this, would presumably have been protected by sec. 15 of the Foreigners Act, which forbids legal proceedings against any person for anything done in good faith under the Act, and the right of free movement could not be invoked, as it is only available to citizens.

Even when a statute, after laying down procedure for appeal to and revision by superior administrative authorities, declares the decision of the highest administrative authority final, that does not preclude recourse to Art. 32 when a Fundamental Right is involved, or to Arts. 136 and 226,[8] when the decision may be impugned on other grounds also. The same is true when, as in sec. 12 of the Indian Oilseeds Committee Act, 1946, a mill-owner assessed to excise may apply to the District Judge or Chief Judge of the Small Cause Court in a Presidency town, whose decision is final, and in regard to similar provisions in sec. 10 of the Central Silk Board Act, 1948.

Attempts by the legislatures to impose finality on authorities empowered to control the right to practice a particular calling can be no more successful. Under sec. 35 of the Dentists Act, 1948, an applicant for registration may appeal from a refusal by the registrar to the State Council, whose decision is "final". Section 36(1) of the Pharmacy Act provides an appeal to the State Government whose order is "final[3]".

Section 19A of the Banaras Hindu University Act, 1915, sec. 36 of the Aligarh University Act, 1920, and sec. 45 of the Delhi University Act, 1922, provide that any dispute arising out of the service contract of a teacher at the eponymous university shall be referred to arbitration, and no suit shall lie to a civil court, but the greater part of the Arbitration Act applies, so that this can amount to no more than a partial exclusion of judicial review.

In the third category come statutes in which the form of judicial review is prescribed, with the intention of excluding other forms of judicial review. Sec. 18A of the Sea Customs Act, 1878, empowers a duly authorised customs officer to seize seditious literature. Any person interested may move the State Government for the release of any document seized in purported exercise of this power. If Government rejects

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8. *Raigarh Jute Mills* v. *Eastern Railway*, A.I.R. 1958 S.C. 525.

the application, the applicant may, within two months, apply to the High Court for release of the document on the ground that it contains no seditious matter. Section 181-C forbids any seizure of the kind indicated to be called in question in any court otherwise than by the procedure described above. The Income-tax Act provides for departmental appeals against assessments, but sec. 66 provides that, within 60 days of receiving notice of an order of the Appellate Tribunal, either the assessee or the Commissioner may require the Appellate Tribunal to state a case on a point of law to the High Court. The Appellate Tribunal may refuse, on the ground that no point of law arises; otherwise it must comply with the request within 90 days. If the Appellate Tribunal refuses, the High Court may be moved to direct that a statement of the case be referred. A decision that the request to state a case is time-barred may also be appealed to the High Court. Section 67 provides that no suit shall be brought in any civil court to set aside or modify any assessment.

As has already been indicated, this did not prevent the Supreme Court, in exercise of its powers to grant special leave to appeal, from setting aside an assessment made without evidence to support it.[9]

The Madras General Sales Tax Act, 1939, lays down a similar procedure for bringing questions of law before the High Court in Sec. 12B, but where an order relating to an assessment has been passed by the Board of Revenue, sec. 12C gives a general right of appeal to the High Court, which may, if sufficient cause is shown, extend the period of limitation beyond 60 days.

When land is acquired under the Land Acquisition Act, 1894, the proceedings are conducted throughout by the executive up to the time when the Collector makes his award. Anyone dissatisfied must, under sec. 18, move the collector to refer the matter to the District Court within six weeks of the award, and subject thereto the Collector's award is final. If the matter goes to the District Court, there is an appeal to the High Court. The success of an approach to the courts otherwise than as provided by the Act seems unlikely.

Section 59 of the Madras Revenue Recovery Act, 1920, excludes from the cognizance of a civil court rates of land revenue and assessments, but sec. 59 permits recourse to the civil courts for redress against other acts purporting to be done under the Act, though the period of limitation is only six months.

Under section 4 of the Opium Act, 1857, a person aggrieved by the act of an opium agent or officer subordinate to him must first move

9. *Dhakeshwari Mills* v. *Commissioner of Income-tax,* [1955] 1 S.C.R. 941.

the agent himself. Thereafter he may petition the Central Government or seek redress in a civil court.

In a fourth class of statutory provisions affecting judicial review, statutory presumptions are laid down. As this is a matter of evidence, within the concurrent legislative power, it would be difficult to impugn unless pushed beyond reasonable limits. In sec. 35 of the Indian Companies Act, 1956, the Registrar's certificate of incorporation is conclusive evidence that all requirements of the Act relating to registration, to matters precedent and incidental thereto, have been complied with. Other instances of the *praesumptio juris et de jure* are found in land acquisition legislation. Section 6(3) of the Land Acquisition Act, 1894, makes the Government notification that the land to be acquired is required for a public purpose conclusive evidence of that fact, and sec. 6(4) of the Bombay Land Acquisition Act, 1948, makes the declaration of Government that particular premises were or have become vacant conclusive evidence of the fact.[9a] But this device would not prevent a person interested moving the High Court under Art. 226 or the Supreme Court under Art. 32 on the ground that Art. 31 has been infringed in a post-Constitution statute lacking the protection of cl. 5 of Art. 31 and showing that, in fact, the acquisition is not for a public purpose.[9b] It has been held that the use of the phrase "conclusive evidence" prevents the court going behind the presumption,[10] and this is the meaning of the expression as defined in sec. 4 of the Evidence Act, but the power to issue a notification under sec. 6 of the Land Acquisition Act can only be exercised if the conditions precedent to its exercise are complied with. If the procedure for the preliminary investigation laid down in sec. 5 or 5A has not been followed, for instance by refusing an objector the right to be heard, a writ will issue.[11] The conclusiveness of the notification will also be vitiated by fraud.[12]

Section 17 of the Patents and Designs Act, 1911, makes provision for amendment of a specification on the application of the patentee. The matter must be advertised and objections heard; the amendment must not make the invention substantially different from what was

9a. *State of Bombay* v. *Laxmidoss Ranchoddas*, A.I.R. 1952 Bom. 468; *M. Mohamed Ali* v. *State of Bombay*, A.I.R. 1951 Bom. 303.

9b. *State of Bombay* v. *Bhanji Munji*, A.I.R. 1955 S.C. 41; *State of Bombay* v. *R. S. Nanji*, A.I.R. 1956 S.C. 294.

10. *M. Mohamed Ali* v. *State of Bombay*, A.I.R. 1951 Bom. 303.

11. *Rama Govind* v. *Chief Commissioner*, A.I.R. 1951 V. P. 3; *Ramchandranlal* v. *State of U.P.*, A.I.R. 1952 All. 752; *Rajendra Kumar* v. *Govt. of W. Bengal*, A.I.R. 1952 Cal. 573; *Radha Raman* v. *State of U.P.*, A.I.R. 1954 All. 700.

12. *Vedlapatta Suryanarayana* v. *Province of Madras*, A.I.R. 1945 Mad. 394.

originally declared. If leave to amend is granted, it is conclusive evidence of the right to amend, except in case of fraud. Presumably also failure to follow the procedure for dealing with the application to amend must be followed if the courts are to accept the conclusiveness of the grant.

Section 24 of the Trade Marks Act, 1940, employs a somewhat different device. The original registration of a trade mark is to be taken as valid in all respects seven years after the original registration, unless it was obtained by fraud, or contains matter likely to deceive or hurt religious susceptibilities, or contrary to law or morality. This can hardly be regarded as imposing any great restraint on judicial review.

The Press Act, 1910, now repealed, in sec.4 empowered Government to forfeit any press used for printing any document containing words likely to bring into contempt the Government of the United Kingdom or of British India or the administration of the justice in British India or any Princely State and also any such documents. Section 22 provided:–

> "Every declaration of forfeiture purporting to be made under this Act shall, as against all persons, be conclusive evidence that the forfeiture there referred to has taken place and no proceeding purporting to be taken under this Act shall be called in question by any court, except the High Court on such application as aforesaid, and no civil or criminal proceeding except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act".

Though at first sight it might seem that this might come within the category of statutory provisions prescribing a special method of judicial review, in effect it amounted to a denial of judicial review, for, on an application to the High Court, the person against whom an order of forfeiture had been made was in the impossible position of having to prove that the document which was the ostensible cause of the forfeiture was *not* likely to bring Government into contempt, or that there was nothing in it likely to cause any of the effects justifying forfeiture. Though the courts commented on the unfairness of requiring the publisher to prove a negative, they were powerless to grant redress.[13] Legislation of this kind would not today be regarded as a reasonable restriction on the Right of Free Speech in Art. 19(1)(a).

A sixth class of legislative provisions seeks to exclude judicial review by the grant of very wide discretionary powers to the executive.

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13. *In re Mohammed Ali*, (1913) 41 Cal. 466; *In re Annie Besant*, (1916) 39 Mad. 1164; *Purusottam Narayan* v. *Chief Secretary*, A.I.R. 1919 Pat. 84.

An old instance is the Dramatic Performances Act, 1876, which empowered a District Magistrate to prohibit a theatrical performance if he thought it scandalous or defamatory or likely to deprave or corrupt those present. This particular attempt to exclude judicial review has been held to be an unreasonable restriction on the right of free speech.[14] It has been held that the procedure laid down in Art. 22, Cls. (4) to (7), in relation to preventive detention cannot be approved as a general pattern of reasonable restriction on a Fundamental Right.[15] Though when there is a threat to the public peace the courts will not cavil at a procedure which gives the executive discretion to take action abridging a fundamental right for a short period, generally the procedure for restricting a right guaranteed by Art. 19 must conform to the rules of natural justice.

However, the Constitution, in Cls. (4) to (7) of Art. 22, has authorised the legislature to make preventive detention legislation, with very few safeguards, on the subjective satisfaction of the detaining authority. The Preventive Detention Act, in its present form, is more benign than the Constitution, but, in effect, a review of the merits of the order is only possible before an Advisory Board. The courts' review is restricted to ordering the release of the detenu if he is not given the grounds of detention as soon as may be and in such a form as to enable him to exercise his right to make a representation at the earliest opportunity,[15] and if he is detained beyond three months without the report of an Advisory Board that detention is not justified. If the ground supplied are vague or irrelevant, release will be ordered.[15] In effect judicial review is restricted to fraud, negligence, and failure to comply with procedural provisions demanded by the Constitution and the Statutes.

The Employees Provident Funds Act, 1952, provides for the institution of provident funds for employees in factories, and sec. 19A gave Government power to decide whether an establishment is a factory. The power is not unlimited, as "factory" is defined in the Act as premises in which a manufacturing process is carried on; this would obviously involve disputes which might prejudice the implementation of the object of the Act. Still the fact that an owner of premises was liable to have the obligations under the Act imposed on him by order of

14 *State* v. *Baboolal*, A.I.R. 1956 All. 571.

15. *State of Madras* v. *V. G. Row*, A.I.R. 1952 S.C. 196.

15a. *State of Bombay* v. *Atma Ram* A.I.R. 1951 S.C. 157; see *A. K. Gopalan* v. *State of Madras*, A.I.R. 1950 S.C. 27; *Bhim Sen* v. *State of Punjab*, A.I.R. 1951 S.C. 481.

15b. *Tarapada* v. *State of Bombay*, A.I.R. 1951 S.C. 174; *Ramkrishan Bhradwaj* v. *State of Delhi*, A.I.R. 1953 S.C. 318.

Government, without right of recourse to the civil courts was held to be an unreasonable restriction on the right to carry on a business in Art. 19(1)(g).[16]

There are certain devices which, though employed in the exercise of the power to regulate procedure, indirectly restrict the right of recourse to the court. One obvious method is to enhance court fees. This was done to control the spate of writ petitions after the Constitution came into force. To the extent that this has been used heretofore, it has not been possible to convince the courts that this amounts to an abridgment of the Fundamental Right to remedies for the abridgment of other Fundamental Rights.[17] Other devices are to make notice to a public authority or servant an essential pre-requisite to legal proceedings, to prescribe an abnormally brief period of limitation, six months for instance, to provide for tender of amends, with the threat that if the plaintiff fails to secure more than was tendered he can recover no costs and must pay plaintiff's cost after tender, and finally to indemnify officials for anything done or purporting to be done in good faith in exercise of statutory powers.[18]

The Constitution does not contemplate government by the judiciary, nor do the courts claim the right to perform non-judicial functions.

> " Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine these questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of jurisdiction of the ordinary courts for they never had any; there is no change of the old order of things; a new order is brought into being ".[19]

But what is the position if a statute provides for the decision of specified matters by a special tribunal, and the tribunal has not been constituted. Dealing with this question the Patna High Court cited the following three propositions from an English case [20] :-

1. If the statute affirms a previously existing common law liability, but provides a special remedy different from that

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16. *M/s. Bharat Board Mills* v. *Regional Provident Fund Commissioner*, A.I.R. 1957 Cal. 702.
17. *A. S. Ramaya* v. *State of Mysore*, A.I.R. 1954 Mysore 161.
18. Madras Local Boards Act, 1920, sec. 225.
19. *Bhai Shankar* v. *Municipal Corporation of Bombay*, 1907 I.L.R. 31 Bom. 604.
20. *Wolverhampton New Waterworks* v. *Hawkesford*, (1859) 141 E.R. 486.

existing at common law, then unless the statute provides otherwise, a party can elect between the statutory and common law remedies.

2. If the statute gives a right to sue but provides no forum, the party can sue at common law.
3. Where a liability not existing at common law is created for the first time by the statute which at the same time gives a special and particular remedy for enforcing it, the party will have the statutory remedy and no other.

And proceeded to set out the proposition that where a right and liability have been created by a statute which leaves it to a specified authority to appoint a tribunal, and the tribunal has not been constituted, the party may proceed in the civil court.[21]

But this rule is not of universal application, and may be excluded by the words of the statute. If the intent is that a right created by the statute shall only be enforced by the special tribunal, the ouster of the jurisdiction of the civil courts is absolute and cannot be conditional on the constitution of the special tribunal.[22] If however the rights existed before the statute, and the special tribunal provided for in the statute had not begun to function, the rule laid down by the Patna High Court applies. The civil court would continue to exercise its jurisdiction.

A party seeking to enforce a new statutory right, when the special tribunal for its enforcement has not been constituted may petition for mandamus against the constituting authority. The general principle is that where a statute creating a right provides a remedy for its enforcement, that remedy must be exhausted before any other remedy can be sought.[23]

5. Statutory finality

If an authority is given statutory powers, and it does something which is ultra vires the statute, a provision for administrative finality and exclusion of the jurisdiction of the civil court will not prevent judicial review. A statute provided for assessment of land revenue, excluding land under permanent settlement and permanently settled land which, having been covered with water, had reformed since the period of the settlement. It further stated that the decision of the Board of Revenue on appeal should be final and no action should lie against government or any of its officers on account of anything done in good faith in exercise of the powers conferred by the Act. The

21. *Lachmi Chand* v. *Ram Pratap*, A.I.R. 1934 Pat. 670.
22. *Sultan Ali Nanghiana* v. *Nur Hussain*, A.I.R. 1949 Lah. 131.
23. Markose, *Judicial Control of Administrative Action in India*, pp. 722-727.

revenue authorities proceeded to assess permanently settled land under the statute. The matter was taken to the Board of Revenue, which dismissed the appeal. The Judicial Committee held that the action of the revenue authorities was wholly illegal, and the statutory provision for finality could not exclude the jurisdiction of the civil courts to declare their action *ultra vires*.[24]

But, where a statute creates a new liability and makes special provisions for its enforcement, those provisions alone apply.[25]

An importer objected to the assessment made by a customs official and exhausted the remedies by way of administrative appeal under the Act. He then sued to recover the difference between the sum he had paid under protest and the amount he claimed to be due. The Judicial Committee held that the statute included a self-contained code of appeals from the assessment, culminating in a reference to the executive Government, and it was difficult to see what further challenge the statute could have intended.[26] But the jurisdiction granted to the High Courts by Art. 226 of the Constitution will not be limited by finality provisions in the Sea Customs Act when its provisions have not been complied with, where the tribunals it sets up have not acted in conformity with the principles of natural justice, and where there is an error apparent on the face of the record.[27] Furthermore the statute is liable to attack for repugnancy to the Fundamental Rights.[28]

The bar due to alternative remedy is more applicable to *mandamus* than to *certiorari*. The opinion of the Supreme Court in *State of U. P.* v. *Nooh*,[29] makes this clear when it stated that there was no rule with regard to certiorari as there was with mandamus, that it would lie only when there was no other equal effective remedy. It is well established that provided the requisite grounds exist, *certiorari* will lie although a right of appeal has been conferred by statute. The rule requiring the exhaustion of statutory remedies before the granting of the writ is a rule of policy, convenience and discretion rather than one of law. However, after a petitioner has availed himself of his right to an administrative appeal, he could not, while that appeal was still pending, invoke the jurisdiction of the High Court under Art. 226.[30]

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24. *Secretary of State* v. *Fatamidunnissa*, (1899) 17 I.A. 40.
25. *Wolverhampton New Waterworks* v. *Hawkesford*, (1859) 141 E.R. 486.
26. *Secretary of State* v. *Mask*, (1940) 67 I.A. 222.
27. *Collector of Customs* v. *Lala Gopi Kissen*, A.I.R. 1955 Mad. 187.
28. *F. N. Roy* v. *Collector of Customs*, A.I.R. 1957 S.C. 648.
29. A.I.R. 1958 S.C. 86 at 93.
30. *Radha Kessan* v. *E. Rajaram*, A.I.R. 1955 Cal. 241.

The alternative relief, if it will cause undue delay or is not adequate, can be no ground for refusal of *certiorari.*[31] In cases where the fundamental right of a person is involved[32] or while the inferior tribunal had acted without jurisdiction or in excess of jurisdiction,[33] and this appears on the face of the proceedings[34] or where it is contrary to the fundamental principles of justice,[35] alternative remedy is no bar to grant of *certiorari.*

Even in *mandamus,* so far as enforcement of fundamental rights are concerned, alternative remedy is no bar[36] to the issue of the writ. The same is the case where the executive authority had not applied his mind to the conditions which gave him jurisdiction[37] or when the alternative remedy of filing an appeal was rendered difficult or impossible on account of the impugned order containing no reasons for refusal,[38] or where an alternative remedy was onerous as where deposit of assessed costs was a condition precedent for an appeal,[39] or where the Act which provided the alternative remedy was itself *ultra vires.*[40]

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31. *Subramanyan* v. *Revenue Divisional Officer,* A.I.R. 1956 Mad. 454.
32. *Kochunni Moopil Nayar* v. *State of Madras,* A.I.R. 1959 S.C. 725.
33. *Sambandam* v. *General Manager,* (1952) 1 M.L.J. 540.
34. *National Coal Co.* v. *Dave,* A.I.R. 1956 Pat. 294; *Isaphani* v. *Union of India,* A.I.R. 1957 Cal. 430.
35. *Municipal Corporation* v. *K. C. Sen,* A.I.R. 1952 Bom. 209; *State of M.P.* v. *Nooh,* [1958] S.C.A. 73: A.I.R 1958 S.C. 86.
36. *C. V. Transport* v. *State of H.P.,* A.I.R. 1953 H.P. 8; *Rasheed Ahmed* v. *Municipal Board,* A.I.R. 1950 S.C. 163.
37. *Cooverjee* v. *Excise Commissioner,* A.I.R. 1954 S.C. 220.
38. *Motilal* v. *Uttar Pradesh,* A.I.R. 1951 All. 257 (F.B).
39. *Himmatlal* v. *State of M.P.,* [1954] S.C.A. 654; A.I.R. 1954 S.C. 403.
40. *Bengal Immunity Co.* v. *State of Bihar,* [1955] S.C.A. 1140.