JUDICIAL REVIEW : LEGAL LIMITS OF OFFICIAL POWER (1986). By C.T. Emery and B. Smythe. Sweet & Maxwell Ltd., London, UK. Pp. xxxi+330. Price £ 11.95.

THE BOOK[1] under review contains a very lucid and illustrative exposition of the judicial review of administrative action. This subject, because of its conceptual similarities, is bound to be relevant and useful to students of administrative law in countries of Anglo-Saxon jurisprudence.

The book is broadly divided into three parts--the first part deals with the nature of judicial review, the second with the grounds of review and the third with the machinery of review.

In the first part, the authors describe various limits of legal official power. They use the terms "remit" and "liability," respectively referring to the extent of power and to civil and criminal liability for acts done by an official.

What is *ultra vires* or beyond the scope of the power? It depends on how the words conferring the power are interpreted. The authors give a number of examples to show how different views could be expressed on the extent of power. For example, a local authority empowered to provide a bus service and to supplement the passenger service by the carriage of parcels takes the view that it is not confined to allowing parcels to be handed over to bus crew and carried to the bus termini for eventual collection by consignees but institutes a further service from the termini by van for parcels to be delivered at their addresses. It may be argued that the use of such vans for home delivery was incidental to its function of carrying parcels. On the other hand, it could be argued that its function must stop once the parcels reach the termini. Another example is where a certain benefit is available to a family. Can the administrative authority define what constitutes a family? Or where an authority empowered to grant licences to use premises for public entertainment allows such houses to run on all days except Sundays, is it acting within its power? The authors, therefore, ask: What sort of errors are reviewable or what errors are immune from review?

A "remit" issue may arise either directly or indirectly. The issue of the lack of power arises directly when an action is challenged as being *ultra vires*. Where civil or criminal liability depends upon the validity of an action, the issue of legal competence comes up collaterally or indirectly. When is an authority said to act *ultra vires*? The development of laws in this area is fascinating. Formerly, courts made a distinction between judicial and non-judicial (administrative) functions. A judicial function could not be interfered with to the same extent as an administrative one. But now these distinctions have almost disappeared from judicial considerations. The tendency is to consider all errors of law as those going to the jurisdiction. Mostly, appellate jurisdiction, which is statutory, is on questions of law and, therefore, extends to all errors of law.

In England, where Parliament is supreme, judicial review can be ousted legislatively. The finality clauses have been interpreted strictly. It has been held

1. C.T. Emery and B. Smythe, *Judicial Review: Legal Limits of Official Power* (1986).

that a clause saying that a decision shall be final and shall not be questioned in any court does not oust the common law supervisory jurisdiction. The reasoning behind such interpretative strategy is an assumption that Parliament could not have intended to confer immunity on a decision which is without jurisdiction. A finality clause is held to preclude an appeal but not supervisory review of acts which are *ultra vires* or without jurisdiction. Since errors of law are being considered as vitiating the jurisdiction, ouster clauses do not exclude review based on error of law. Parliament, instead of asserting that the "shall not be questioned" clause means what it appears to say, has since 1958 made little use of such clauses. The judicial approach towards ouster clauses which oust jurisdictions of courts after a time limit, has, however, been different. In *Smith* v. *East Elloe Rural District Council*,[2] the House of Lords held that the words of the ouster clauses were wide enough to exclude any challenge after the expiration of the prescribed period. The authors then analyse the distinction between supervisory and appellate review and void and voidable decisions. The propositions that void decisions are open to collateral challenge and voidable are not so open has exceptions. Review of prerogative power is another area peculiar to British administrative law. Some exercises of prerogative are not justiciable, not because they are derived from the prerogative power but because of their subject matter. However, courts might intervene on the basis of its unfair exercise, *i.e.*, for breach of the so-called rules of natural justice. The authors elaborately discuss civil and criminal liability that may arise from *ultra vires* acts of public authorities. Such an act causing harm or injury to a civilian is not immune from liability for tort. An *ultra vires* contract, however, may not be enforced because it is in public interest not to do so, but where other persons entered into such contracts believing in their lawfulness, damages for their breach could be given.

The second part deals with grounds for judicial review, which are illegality, irrationality and procedural impropriety. Fact-law dichotomy is perplexing and cannot be answered with certainty. The authors give examples of *Dyson Holdings Ltd.* v. *Fox*[3] where Lord Denning, Master of Rolls, held that a review court with jurisdiction to correct only errors of law could not normally interfere with an elucidation of an ordinary word with which it disagreed. A tribunal must approach the question of the meaning of an ordinary word as a question of fact. Lord Denning held that conclusions drawn from facts were questions of facts if they could be draw n by a layman as by a lawyer; the only question of law that could arise in them was whether there was a proper discretion on point of law and whether the conclusion could reasonably be drawn from primary facts. If, however, such conclusions or inferences could be drawn only by a trained lawyer--the conclusion was a conlusion of law. The authors give a number of examples of error s of law. Regarding jurisdictional questions, they point out how threshold jurisdictional issues raise questions as to the competence of an

2. [1956] A.C. 736.
3. [1976] 1 Q.B. 503. See *supra* note 1 at 107.

authority to determine whether criteria for jurisdiction had been fulfilled.

What is the scope of substantive judicial review? Where a state benefit provided for a family was to be given, the question for the administrative authority's determination was whether Y who lived with X for 10 years as his wife without having been married to him, was entitled to the benefit. Does the authority have the jurisdiction to decide Y's entitlement? In that case does it have jurisdiction to define what constitutes a family? This requires us to know what is a jurisdictional error.

Since *Anisminic Ltd.* v. *Foreign Compensation Commission*,[4] any error of law by an administrative tribunal or authority (as distinct from a court of law) is *prima facie* jurisdictional. Issues of fact, degree or policy are, however, for the authority to decide. It is presumed that tribunals or administrative authorities have no jurisdiction to decide questions of law but such presumption is rebuttable by an express provision which Parliament may make to the contrary. Other questions are whether an authority errs in law if it errs in its statement of a rule or in its elucidation of a statutory word or a phrase? Will such an error be jurisdictional? Consideration of whether errors of law at the fact finding stage may be held to be jurisdictional errors, follows this. The first has been considered as jurisdictional since *Anisminic*.

Regarding questions of fact, usually courts have intervened only when findings are not based on any evidence at all. However, judicial intervention is more willing where individual freedom is likely to be restricted as a result of such a finding.[5] Regarding judicial review of courts as distinguished from that of administrative authorities or tribunals, inferior courts alone are subject to judicial superintendence. So far as such courts are concerned, the *Anisminic* presumption applies to them as much as to tribunals.[6]

The authors then undertake a meaningful discussion of the judicial role in constitutional set up when courts raise a presumption that Parliament did not intend to vest the power of deciding the question of law in subordinate courts or tribunals. When in *Anisminic*, the House of Lords held that a tribunal could not decide a question of law wrongly, the ruling was based on the presumption that Parliament had not intended to vest such power in the tribunal. Does such a presumption stand rebutted when statutory right of appeal on point of law is available? "[I]f the *Anisminic* presumption is held to apply even when there is statutory provision for appeal on point of law, its status as a presumption of legislative intent is not compromised."[7] The authors initiate a discussion as to whether judicial review of errors of law is desirable in view of the specialisation of the tribunal and the wider perspective of superior courts. However, the discussion on such conceptual matters has not been pursued as according to them it would not have been within the scope of their theme. To Indian readers, such a discussion now appears rather too technical because courts in India have held

4. [1969] 2 A.C. 147.
5. See *Salamat Ullah Khawaja* v. *Home Secretary*, [1984] A.C. 74.
6. *Supra* note 1 at 159.
7. *Id.* at 161.

judicial review as a basic feature of the Constitution which cannot be diminished even by a constitutional amendment.[8] There cannot be any ouster clauses in Indian law so far as judicial review is concerned. Even when tribunals are set up and their decisions are made unappealable or unreviewable by High Courts by a constitutional amendment, the Supreme Court has held such an amendment valid only conditionally.[9] The *Anisminic* decision has made "error of law apparent on the face of the record" insignificant.

The authors give a lucid discussion of the exercise of administrative discretion as well as of the rules of natural justice. Whether an action violating natural justice, though going to jurisdictional error, is void *ab initio* or whether its fate depends upon the effects of such violation in terms of substantial injustice, is really a matter for judicial determination. Though theoretically it is void, do we allow it to be pleaded if the other party had colluded in it? Distinction between private and public law, ordinary civil remedies and judicial review or direct and collateral challenge, has been explained cogently.

The book is indeed a very good addition to the literature on English administrative law. It will be of great relevance to students of Indian administrative law because it is more concerned with conceptual explanations than with mere documentation of case law. Its style is lucid which makes it readable. It can be described as a concise, precise and extremely illustrative presentation of the theory of judicial review of administrative action.

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8. *Minerva Mills Ltd.* v. *Union of India,* A.I.R. 1980 S.C. 1789.
9. *S.P. Sampath Kumar* v. *Union of India,* (1987) 1 S.C.C. 124: A.I.R. 1987 S.C. 386.

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