Chapter VI

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THE JURISDICTIONAL PRINCIPAL AND NATURAL JUSTICE

An attempt has been made in this chapter to examine the effect of breach of the principles of natural justice in relation to the concept of jurisdictional principle. Other aspects of the principles of natural justice (i.e., history, development, definition, its limits and classification of function etc.) are beyond the scope of this chapter.

The present inquiry is undertaken because non-compliance of the principles of natural justice amounts to the violation of the jurisdictional principle (violation of procedural ultra vires). Consequently the effect of it is void and not voidable. Some decisions discussed below declare that the effect of breach of the doctrine that bias is voidable and not void. This trend has been described as a 'new question which had suddenly begin to complicate administrative law'. In fact, in the light of recent developments particularly in the concept of jurisdictional principle (Chapters - III, IV and V), there are two effects involved in the concept of jurisdictional principle vis. (1) valid and (2) void.
One of the prime functions of the judicial control of administrative action is to ensure that the "fundamentals of fair play have been preserved and observed". The courts in India and England endeavoured to assure fair play through the concept of natural justice. "It has been truly said", as the Committee on Ministers' Powers pointed out, "that, however a Minister in exercising such (i.e. judicial) functions may depart from the usual forms of legal procedure from the common law rules of evidence, he ought not to depart from or offend against 'natural justice'.

Review to ensure compliance with the principle of natural justice is based on the doctrine of ultra vires. It has been observed in the previous pages that the observance of procedural essentials is fundamental to the proper exercise of jurisdiction. Thus it can be said that the principles of natural justice are the procedural requirements both under English and Indian law. These principles are recognised as a condition precedent to the lawful exercise of power by the administrative authority.

A brief historical account will demonstrate the true position. Under the common law, the rules of procedure were

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1) Report P.75
within the discretion of the tribunal. The tribunals had power to adopt suitable procedure. It is true that the rules of procedure adopted by the tribunal need not follow the standard of the judicial procedure. At the same time minimum standard must be followed by the administrative tribunal or authority though they are free to adopt procedural rules. These rules of procedure should not be contrary to the recognised concept of natural justice i.e., fair play.

If they are allowed to adopt any rule of procedure, there is a possibility of using arbitrary power which is against the rule of law. Therefore, the superior courts compel the statutory authority to follow minimum standard of natural justice in the absence of express provision in the statute. It has already been pointed out that there is no need on the part of the authorities to follow strict rules of evidence. The only restriction in this regard is that their findings should be supported by some probative legal evidence. If the findings are not supported by any legal evidence, the action is ultra vires. The courts have developed the principle of the no-evidence rule as a head of judicial control.¹

We shall examine in detail the working of the concept of natural justice in Administrative law in relation to jurisdictional principle. Keeping in view the fact that the effect of breach of natural justice renders the decision void and not voidable.

¹) A note on Natural Justice (1965) 81, L.R.I. 266-67
The two main rules which the courts have laid down will be discussed in their traditional order. First the rule against bias and secondly the right to a hearing. The second rule has greater scope in the sphere of administrative action and is the subject of the more difficult case law.

Basis of the Rule against Bias:

An attention has been focused on the point that in spite of recognition of the rule against bias in English law there exists in the recent legal literature uncertainty as to the foundation and effect of this principle. Prof. de Smith¹ says, "There is some authority² for the view that adjudication by one who is disqualified at common law for interest or likelihood of bias makes the proceedings voidable, not void". It seems that Prof. de Smith relies upon the decision in Dimes v. Grand Junction Canal Proprietors.³ In this case the question arose whether a decree made by the Lord Chancellor should be set aside on account of the pecuniary interest which his Lordship was alleged to have had in the case. A subsidiary question was whether such a defect went to jurisdiction and rendered the proceedings void. The House of Lords set aside the decree of the Chancery on the ground that the Lord Chancellor Lord Cottenham had pecuniary interest in the company. The House of

1) Prof. de Smith: Judicial Review of Administrative Action, 3rd Edn. 1973 P. 241
2) Rubinstein: Jurisdiction and illegality 1965 F.202-203
3) (1852) 3 H.L.C. 789
Lords further laid down the rule that the bias or pecuniary interest did not go to jurisdiction and did not render the proceedings void but merely voidable. As Lord Campbell J. observed in the above case:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own case, should be held sacred. ... And it will have a most salutary influence on (inferior) tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

This case is very often cited as a settled law in relation to the effect of breach of natural justice particularly the rule against bias. Prof. H.M.A. Wade rightly pointed out that the observations in Dimes' case were obiter and made with with reference to a determination by a superior court of record. Prof. de Smith and Dr. Rabinstein state positively that bias renders an administrative decision voidable. It is submitted that the view of these authorities requires comment because their view is not in conformity with the wide dicta given by the court. In order to repudiate the views of these two authorities, an attempt has been made on the following grounds:

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1) Ibid: P.241
2) Rabinstein: Jurisdiction and Illegality, 1965 P.303
1. To examine critically the Dimes' case.
2. Distinction between review and appeal.
3. Doctrine of waiver

In the famous case of Dimes v. Grand Junction Canal Co.,¹ the House of Lords set aside Lord Chancellor Cottenham's decree in favour of the Canal Company in which he was a shareholder. It is important to note here after a careful study of the case, it seems that the Lords themselves have said nothing about void and voidable. But Farke L. J., stated that the Chancellor's decision was voidable only.

It is submitted that the House of Lords has decided the case on appeal and not on review. It is a well-established principle of law that where there is a right of appeal on the merit and the disputed decision may be set aside without affecting its essential validity prior to the appeal. In such situation the term 'voidable' can be employed. In Macpherson v. Macpherson,² the Judicial Committee held that there could be no relief after the time for appeal had expired and the petitioner had remarried. In this case the Judicial Committee followed the view of the Dimes' case. In fact, the term 'voidable' may be employed in the context of an appeal provision.

But there is a fundamental difference between appeal and review. When the Superior Court is sitting as a reviewing court,

¹ (1852) 3 H.L.C. 759
² (1936) A.C. 177
the act is ultra vires and void. It is important to note that
the decision given in Dimes' case is peculiar to that case.
The underlying assumption of an appellate proceeding is usually
that an order challenged is within the jurisdiction of the
authority concerned. It is appealed against on the merits
and is valid till reversed on appeal i.e., it is voidable.
but if the proceeding is not an appeal but review, the deci-
sion impugned is ordinarily of an inferior jurisdiction and
void for want of jurisdiction. The same principle can be
supported with the remarks made by Lord Carleton in Gahan v.
Maeingay:

"It must be admitted, that if the judgment were
null and void it would not impede the plaintiff's
recovering; but mere matters of alleged error
(which, if real, would only render the judgment
voidable by the proper judicature on appeal, and
not actually void) cannot at the instance of a
person, bound by the judgment, be a proper sub-
ject of discussion in this court, not possessed
of any direct appellate jurisdiction over the
decisions of sub-commissioners, and proceedings
only in a collateral action, in which such
appellate authority cannot be obliquely assumed".

Therefore, the case of inferior authority acting outside
his jurisdiction and being subjected to review is entirely
different from the Dimes' case, which is more concerned with
the appellate provision. Therefore, Prof. Wade rightly pointed
out that "it is surely time that Parke B.'s obiter dicta were
retired to the museum of antiquities".

1) (1793) 2 H. & C. 360 quoted from McCoal P. 164
2) H.W.A. Wade; Unlawful Administrative Action - Void or
   Voidable (1962) 84 L.Q.R. P.108
In this connection attention should be drawn to the point in the *Dimes* case where the order of the court which was in question was the Court of Chancery, which was a superior court. There is no machinery to subject the decision of a superior court to review so as to examine whether that superior court was acting outside its jurisdiction. In other words the procedure of review is as irrelevant to a decision of the superior court as it was to the Court of Chancery in the *Dimes* case. Therefore the only remedy, if any, available to a party aggrieved by the decision of the superior court is appeal to the higher court, if there be any, against that decision, and a decision appealed against is not void ab initio but valid till reversed on appeal. To this extent *Dimes* case is an authority for this proposition.

The question of void and voidable can be looked into from the viewpoint of remedies like certiorari and declaration. In this connection observation of Prof. de Smith and Rubinstein deserve special attention. According to them, adjudication by one who is disqualified at common law for interest or bias makes the proceeding voidable and not void. They relied on the statement given in *Dimes* case. It has raised the question as to whether the defect of bias goes to jurisdiction as a jurisdictional defect which renders a decision void. In fact it is not

1) ibid P.241
2) ibid P.203
a question whether cartiorari and other remedies are available in case of bias. But if cartiorari issues only on the ground of ultra vires and error of law apparent on the face of the record, and if bias does not come under either of these principles, then on what principle do the courts act while granting cartiorari for bias.

The authorities were divided on the point of void or voidable concept in relation to jurisdictional principle. Prof. Griffith and Street point out,¹ "How ... can the courts reconcile the decision of the House of Lords (Dimes' case) that bias makes a hearing voidable only with a view that it deprives the court of jurisdiction? D.M. Gordon² observes that the idea that bias renders a decision voidable is inconsistent with the notion that interest destroys jurisdiction. He suggests that the revival of 'error in fact' which was a ground for 'writ of error' which rendered a decision merely voidable, as a ground of cartiorari. According to Gordon since cartiorari had replaced the writ of error and taken over its field of operation, it should adopt the principle of error in fact. According to his suggestion cartiorari would issue not on the ground of jurisdictional defect but on the ground of error in fact.

2) D.M. Gordon: Cartiorari and the Revival of Error in Fact, (1928) 42 L.Q.R. P. 521
But error in fact as a ground for the issue of writ of error was a wide concept and was never limited to the field of bias. Prof. Kardley rightly points out that,

"Mr. Gordon relies especially, however, upon Dimes v. Grand Junction Canal Co., in which he maintains that the House of Lords, on the advice of the judges, settled that the proper classification of bias was under the heading of 'error in fact'. The case concerned a public company, which was incorporated, and which had filed a bill in equity against a landowner in a matter largely involving the interests of the company. The Vice-Chancellor granted relief to the company, and Lord Cottenham L.C., on appeal, upheld his ruling. But it turned out that Lord Cottenham was a shareholder in the company to the extent of several thousand pounds. The House of Lords sought the opinion of the judges, and Farke B., speaking for all the judges declared:

'I have to state the unanimous opinion of the judges that, in the case suggested, the order or decree of the Lord Chancellor was not absolutely void, on account of his interest, but voidable only'.

As is pointed out by Mr. Gordon, Farke B., then discusses the writ of prohibition as being a proper remedy if the proceedings had been in an inferior court, but he states that it is unnecessary to consider whether it would go to the Court of Chancery. He continues:

'If no prohibition should be applied for, and in cases where it could not be granted, the proper mode of taking the objection to the interest of the judge would be, in courts of common law, by bringing a writ of error, for error in fact, and assigning that interest as cause of error'.

Thus he was discussing the analogous possibility of quashing orders by writ of error on the ground of bias, which, in such a case, would be a branch of 'error in fact', and he cites cases to illustrate this. But at no stage did he declare that 'error in fact' as such was a ground for prohibition or certiorari, or that bias as a ground for those remedies was a branch of 'error in fact'. In my event the case was purely one of appeal and not review. The House, acting on the advice of the judges, held that Lord Cottenham was disqualified from determining the case, and that
his orders and decrees were reversed, without prejudice to the orders and decrees of the Vice-Chancellor; that the orders and decrees of the Vice-Chancellor appealed against should be affirmed and declared to be unaffected by the orders and decrees of Lord Chancellor; and that the appeal be dismissed. Neither the new Lord Chancellor, Lord Irwin, nor Lords Brougham or Campbell at any stage held bias to be classified as 'error in fact', let alone in that category for the purpose of certiorari proceedings, which were not mentioned. Writ of error has been abolished, and 'error in fact,' a wide concept never limited merely to the field of bias, may be taken to have died with it. 1

The courts have not accepted the suggestions made by Gordon since the publication of his article in 1926. In fact the court issued certiorari in case of bias but did not recognise error in fact as a ground for the issue of certiorari.

Secondly, the test of validity has an important bearing on the availability of the remedies. The necessity to examine this aspect in the light of void and voidable terms is that some judgements2 have raised the issue that defect of bias renders the decision voidable. This minority decisions would radically change the principle of legality upon which English Administrative Law is founded.

The crux of the issue is whether it is desirable, as the advocates3 of 'voidable' appear to wish, to use the concept of voidable for the purpose of judicial control more discretionary.

1) Prof. D.G.M. Kardley : Certiorari and the Problem of Legal Standards: A Reply (1956) 72 L.Q.R. 35 at 40-41
2) Ridge V. Baldwin : (1963) 2 All E.R. 66
3) D.M. Gordon : Certiorari and the revival of error in fact, (1926) 42 L.Q.R. 531 ; Rubinstein : ibid p.208,

Prof. H.W.R. Wade\(^1\) rightly observed that the motive behind the minority opinions is the desire to enlarge judicial discretion. It is said, though it by no means follows, that if the action is voidable the court need quash it only if justice so requires. This would introduce dangerous uncertainty—one might say, palm-tree injustice. Natural justice has for centuries been enforced as a matter of law and not of discretion. But the uncertainties of the period before the \textit{Brighton case}\(^2\) have unfortunately undermined the clear principle that used to prevail. Of the nine judges concerned in that case, five denied that there was a right to a fair hearing. In this situation it is not discretion that is needed but consistency. The right to natural justice should be as firm as the right to personal liberty.

The uncertainty is aggravated by an exceptionally difficult decision of the Privy Council. Its principle is impeccable: failure to give a fair hearing will not (for example) entitle a stranger to treat the dismissal of a chief constable as void unless he himself elects to do so. But for this self-evident truth it invokes the dissenting opinions in the \textit{Brighton case}, which argued that the dismissal was voidable only at the court’s discretion. Yet the Privy Council very properly denies that there is any such discretion as against the chief constable himself. The confusion here seems inextricable.

\(^1\) H.W.R. Wade: Administrative Law 3rd Edn, 1971 P.204-205
\(^2\) Ridge v. Baldwin: (1964) A.C. 40
Another serious objection to holding action voidable is that the litigant is then deprived of what is often his best and sometimes his only remedy, a declaratory judgment.\(^1\)

Further at page 105 Prof. Wade\(^2\) comments, "The cases on natural justice, to be examined later, offer particularly strong proof that administrative action which is irregular and ultra vires is void, not voidable. The House of Lords decided the point expressly in Ridge v. Baldwin, although it had never been in doubt in any of the numerous cases of ultra vires. The authorities are discussed at two places in chapter 5. It is there pointed out that the object of holding unlawful action to be voidable is to give the court discretion to uphold or condemn the action as it feels inclined, and that this policy is full of danger. The courts have never had discretion to decide whether governmental action is lawful or unlawful; the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand. The true scope for discretion is in the law of remedies, where it operates within much narrower limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could

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1) Ibid, p.204
2) Ibid, p.105
be sure that the law would protect him. Another serious consequence would be that the declaratory judgment, a very valuable remedy, would as the law now stands lose much of its efficacy, since it is of use only against action which can be declared to be *ultra vires*, i.e. void *ex initio*.

It is true that judicial discretion play important role in the law, but at the same time it should not be allowed to undermine the Constitutional fundamentals, otherwise the rule of law would become the rule of discretion. Prof. Wade points out that "The courts have never had discretion to decide whether governmental action is lawful or unlawful: the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand". The true scope for discretion is the law of remedies, where it operates within much narrower limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him. Lastly it is well established principle that presence of bias means that the tribunal is the improperly constituted and so that it has no jurisdiction and its decision is void. This fits correctly into the framework of the ultra vires principle which is discussed throughout in this work.

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1) *ibid* P.105 and P.125
2) One the whole question of 'void or voidable' see 83 L.Q.R. 499 ; 84 L.Q.R. 95.
No one can go unnotice the observation of Dr. Rubinstein. He advances the suggestion that the concept of jurisdiction should be separated from the validity. Discussing the Dimes case and the notion that bias goes to jurisdiction, Dr. Rubinstein observed that: "Being voidable, a decision tainted by bias may be invalidated in direct proceedings. The remarkable thing, however, is that in exercising this power of review the courts have not hesitated to declare in unequivocal terms that bias goes to jurisdiction and renders the proceedings void ab initio. The Dimes case notwithstanding, the courts continued to assert their supervisory jurisdiction under this supposedly indispensable pretext. This phenomenon is not really alarming; it attests the point which has repeatedly been made in this book, i.e. that the jurisdictional concept evolved in direct proceedings is far wider than that which serves as a criterion of validity".¹

At page 218-19, the author gives us "a wider concept of jurisdictional subject-matter which can ensure that jurisdiction will not be equated with legality".¹

According to him for the purpose of collateral attack the prima facie relationship between the case and the subject-matter should be made sole criteria. This notion of jurisdiction excludes qualification of absence of bias. Dr. Rubinstein

¹) ibid see P. 203 and 219
says that this should affect the scope of review in direct proceeding. This observation of Rubinstein requires further comments.

He implies that a wider concept of jurisdiction is used in a direct challenge which renders a decision voidable. Obviously the declaration is one of the remedies available in many cases for a direct challenge. Dr. Rubinstein is aware of the problem that "has the court jurisdiction to grant a declaration only with regard to null 'decisions' which are being challenged? Or, to put the same question in a different light, is the declaratory judgement merely declaratory or can it be used, despite its name, to invalidate an otherwise valid decision?" But he does not support his view by case law.\(^1\)

At other times declarations have been withheld (or issued upon other grounds) because the rules of natural justice were not applicable or had not been violated, but again there was no discussion as to whether breach of the rules would have rendered the decision void or voidable, and no suggestion that success in an action for a declaration was dependent upon the decision being void.\(^2\) Even when the courts grant declarations and say expressly that the decision is void, there is never any implication that voidness of the decision is a condition precedent to success of the action.\(^3\) It is unusual to find any serious consideration of the question whether the decision is void or voidable.\(^4\)

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1) Punton v. Minister of Pensions and National Insurance (No. 2) (1964) 1 W.L.R. 336
It is submitted that, in view of the case law study, their view can be repudiated. Courts have uniformly held that the decision of an administrative authority which is vitiated by bias is void and hence a nullity. A clear and modern case is Cooper v. Wilson. A police sergeant in Liverpool had been dismissed by the chief constable and appealed to the watch committee. But the committee's dismissal of the appeal was vitiated by the fact that the chief constable, who was in effect the respondent, sat with the committee throughout its deliberations. On this ground the Court of Appeal granted a declaration that the sergeant's dismissal was invalid. Greer J. followed authority to the effect that "a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void". Scott J., accepted the appellant's argument that the watch committee's proceedings "were all invalid and a nullity", and he said:

"the risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it or even the appearance of such a possibility is sufficient to deprive the decision of all judicial force, and to render it a nullity".

Contd. from p.231

   University of Ceylon v. Fernando (1960) All E.R.631 (P.C.)
4) Ridge v. Baldwin (1964) A.C. 290
5) (1957) 2 K.B. at P.344
6) ibid.
This case shows that the court is as much concerned with appearances as with reality. The court treated the declaratory remedy as a touchstone for the problem of void or voidable.¹ The test is not whether there is real likelihood of bias, but whether a reasonable man would suspect it. Justice must be rooted in confidence.

A tribunal acts without jurisdiction, if it is not properly constituted. If a tribunal consists of members having interest in the case, it has been held to be improperly constituted. In A.V. Justices of Hertfordshire² it was held, that if a court is improperly constituted by participation in the judgement of interested person the whole decision is vitiated and certiorari lies to quash such a decision. In Frome United Breweries Co. v. ⁵ Barth Justices before the House of Lords, Lord Atkinson approving the decision in the above case, said, "I use the word 'any of them' in this connection advisedly, because it was decided in Reg. V. Hertfordshire Justices that if one of the magistrates who heard a case at session be interested in the issue the court is improperly constituted, and an order made in the case would be quashed on certiorari. In such a case it was held to be no answer that there was a majority of the justices presiding in

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¹) Prof. Wade: Unlawful Administrative Action: Void or Voidable? (1968) 84 L.Q.R. P.95
³) (1945) 6 Q.B. 753
⁴) (1926) A.C. 586 at 601
favour of the decision arrived at without reckoning the vote of the interested party, nor was it of any effect that the latter party withdrew before the decision was made, if it appeared that he had joined in discussing the matter with the other magistrates. This case was decided by Lord Denman, C.J., Patteson, Coleridge and Wightman JJs."

In *Hat Bell Liquors Ltd.*,¹ Lord Sumner clearly stated that bias affects the jurisdiction of a tribunal.

The significant change took place in recent years where the courts have clearly interpreted bias in terms of ultra vires. In *B v. Bent Tribunal, ex parte Keda Hotels Ltd.*,² Lord Godiard, while speaking on the principles on which certiorari issues, observed:

"Certiorari is a very special remedy, and when it is sought in order to bring up the order of a judicial tribunal the question which has to be considered is whether or not the tribunal were acting within their jurisdiction. 'Acting within their jurisdiction' is an expression which has been applied to more than one set of circumstances. It is, for instance, applied to a case where it is said that a court is not properly constituted. It may be that the justices or other members of a court are alleged to be disqualified or to have bias in the matter which should have resulted in their not sitting and in those circumstances this court has never hesitated to grant the writ to bring up the order to be quashed because the members of a tribunal had no jurisdiction to give a decision in the case, but it is a very old and definite law that certiorari to quash a proceeding only lies for want of jurisdiction or where the order is bad on its face".

1) (1922) 2 A.C. 128 at 160
2) (1947) 1 All E.R. 448 at 449
In another important decision\(^1\) Lord Goddard, explaining the principle underlying bias, said:

"I pointed out the other day in a case that if certiorari is moved because of the bias of a justice, the bias of a justice, the theory that lies behind is that if a justice is biased, he is, in effect, a judge in his own case, and as no one can be judge in his own case, certiorari will be granted because the justice had no jurisdiction as he was sitting in a matter in which he was interested. So in Reg. v. Grimsby Borough Quarter Sessions, In Parte Fuller (1965) 3 W.L.R. 563; (1966) 3 All E.R. 300 where we applied the same principle as with regard to bias, a case in which it was alleged that matter had been given to the recorder which he ought not to have received. There it was a case of prejudice, and the recorder, if he was prejudiced, would not be sitting as an impartial judge. It all really comes back again to jurisdiction."

In fact, it can be seen that the English courts have not only granted certiorari and prohibition in case of bias but have also issued Mandamus by commanding the inferior court to replace the biased decisions which implies "the biased decision is nullity".\(^2\) Mandamus was granted on the above principle.\(^3\) Prof. de Smith points out that Mandamus is not an appropriate remedy in such cases. But in the light of decisions in Akersdyk and Frome United Breweries Co. v. Betcha Justices, cited above conclusively decided that as a result of the judge being biased the decision of the tribunal is vitiated. It is evident, as

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1) In Re Paddington etc. Rent Tribunal Ex. F. Perry (1966) 1 Q.B. 229 at 237
3) In Re London County Council Ex. F. Akersdyk (1992) 1 Q.B. 190
4) ibid. P. 241 3rd Edn. 1973
Solomon L.J. pointed out in the Paddington Acting List case\(^1\) that the grant of bare mandamus of this character implies a finding that a previous determination is null and void. "The previous order must either be quashed by certiorari or ignored and it is better for it to be quashed".\(^2\) Therefore the view taken by Prof. de Smith in relation to the effect of bias and the relationship of it with Mandamus cannot be supported.

Another aspect of void and voidable can be discussed in the light of Juster clause. We have seen in the Chapter \(-\) III, while considering the jurisdictional theory that the Juster clause expressly excluding review has consistently been held inapplicable where there is voidness through lack of jurisdiction.\(^3\) It is sufficient here to say that non-certiorari clause will not give immunity to an action which is without jurisdiction because of violation of principles of natural justice i.e., bias. Because the court assume that Parliament could not have intended to permit inferior tribunals to act beyond their power.\(^4\) Thus the operation of Juster clause is confined to the action which is within the jurisdiction of the authority. The observation of Lord Diplock in Anisminic case\(^5\) is important. It specifically classifies bias as a defect which goes to the jurisdiction and therefore is impeachable despite a non-certiorari clause.

\(^1\) R v. Paddington Valuation Officer (1966) 1 W.L.R. 380 per Solomon L.J. at p.419; Wade: ibid p.163

\(^2\) Baldwin v. Francis Ltd. (1959) A.C. 663 at 694

\(^3\) Anisminic case (1969) 2 A.C. 147

\(^4\) Wade: (1968) 94 L.Q.R. p.105

\(^5\) (1967) 3 W.L.R. at p.295; Ridge v. Baldwin (1968) A.C.40
Basis of the Rule of Bias in India:

The basis of the rule of bias in India is the common law principle in relation to bias. This principle is recognised by the Indian courts since the establishment of High Courts in India in the year (1861). The writ jurisdiction was confined to the presidencies of Calcutta, Madras and Bombay. Therefore, one has to see the application of the principle of bias in the cases of statutory procedures where the principle is applied and recognised. The case of A.V. Bhola Nath Sen\(^1\) concerned an application to the High Court of Calcutta under S.297 of the Criminal Procedure Code. In this case, a district magistrate who had taken an active interest in investigating a case against a gaoler sat on the trying bench along with the superintendent of the gaol upon whom the accused was alleged to have practised fraud, thereby causing pecuniary loss to the Government. The whole proceedings including the conviction were quashed. The common-law rule of bias was affirmed: 'It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England'.

This case does not give a clear application of the rule of bias and its effect. It merely recognised the English law and its application in India. In Kharak Chand Pal v. Terek Chand Gupta\(^2\) the Municipal Commissioners of Camilla at a

\(^1\) (1876) I. E. R. 2 Cal. 23
\(^2\) (1884)I. E. R. 10 Cal.1039
meeting issued an order under §348 of the Bengal Municipal Act. The accused was tried and convicted before the district magistrate under §184 of the Indian Penal Code and fined Rs.200/- for having disobeyed that order. The Magistrate who tried and convicted the accused was present as Chairman of the Municipal Commissioners at the meeting when that order was passed, for disobeying which the accused was tried and convicted.

It was held in a petition for criminal revision which followed the above proceedings that the conviction was illegal and should be set aside. It was sought to support this decision with reference to the English case of Sergeant v. Dale, which declares that 'by the common law, a judge who has an interest in the result of the suit is disqualified from acting except in case of necessity where no other judge has jurisdiction'. Prinsep J., delivering the judgement, said: 'On these grounds we think that the proceedings before the magistrate must be set aside and the fine, if paid, must be refunded'. This case therefore suggests that the effect of bias is to render a decision illegal and void.

After the commencement of the Constitution, the High Courts and Supreme Court are vested with supervisory powers over the inferior authorities under Articles 32, 136, 226 and 227 of the Constitution. The question of effect of bias remained

1) Act of 1876
2) (1877) L.R. 2 Q.B.D. 568
unsatisfactory even after the commencement of the Constitution. Most of the textbook writers in India have not explained the above issue. Though they recognised the common law rule of bias but were silent about its effect. The great commentator of the Constitution, Basu¹ made contradictory statements. In vol. 1 P.379 he recognises that the rule of bias is related to jurisdiction. In vol. 3 when he explains the effect of the rule of bias, he relies on the Dimes¹ case which is already discussed earlier. According to Dimes case the defect of bias renders the decision voidable and not void. It is very difficult to reconcile the above two statements of the learned author. This contradictory statement made the issue more complicated which makes confusion worse confounded. It has been observed in this work that once the defect of bias goes to the jurisdiction of the authority, it means the tribunal is not properly constituted and hence the determination of the authority is void and not voidable. Many judicial dicta support the view which is fully discussed earlier in the light of English law. It can be seen in the Indian case law pertaining to the rule of bias that the Indian Courts make the foreign cases and concepts the cornerstone of their judgement, but the courts have failed in giving correct guidance in relation to the defect of bias. They simply accepted the common law

¹) Commentary of the Constitution of India, 5th Edn., Vol.1 P.379; 5th Edn., Vol.3 P.683
principle of bias and quashed the determination of inferior
authority on that ground. In a number of decisions the violation of natural justice is recognised as a ground for
invoking judicial review. In evaluating the cases decided
by the Courts in India, a case has been taken to explain the
defect of bias which renders the decision void and not
voidable. Because the Supreme Court of India extended the
concept of jurisdiction in its wider sense with a view to
bring natural justice within its sphere. It can be seen in
Union of India v. Tarachand Gupta1 and Kraipak case2 when they
have extended the frontiers of natural justice in relation to
the concept of jurisdiction, why not the same reasoning be
applicable to the defect of bias. The English courts expressly
state that violation of natural justice results in nullity,3
and explain it in terms of jurisdictional principle. Recent
revolutionary judgement of the House of Lords in Anisminic case
clearly says that the jurisdictional defects may occur even
though the initial jurisdiction to entertain the proceeding
is possessed by the authority. Lord Reid's view in Anisminic
case has been approved by the Supreme Court in Tarachand
Gupta's case.4

1) 1971 A.I.R. 240 558
3) Ridge v. Baldwin (1964) A.C. 40
4) ibid foot note No.1
"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity, but in such cases the word "jurisdiction" has been used in a very wide sense, and 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 enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something when it was required to do so. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive, but if it 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."

We shall examine more cases decided by the Courts of India.

The first case after the commencement of the Constitution is

_Rajaram v. The State._¹ There a police constable had sent a telegram to the Inspector-General of Police charging the Superintendent of Police with obtaining a false statement under coercion from him. The Superintendent of Police framed a charge against the constable of sending a false telegram to the Inspector-General of Police and dismissed him on that charge. It was held that under the circumstances the Superintendent of Police himself was disqualified from acting as a judge, and the order of dismissal, passed by him, being vitiated by bias, should be

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¹ A.I.C.R. 1936 Vin. Fra. 14
should be set aside. Here the court declared that the impugned order was vitiated without explaining whether the order was void or voidable. Haraveni Rao v. State of Andhra Pradesh\(^1\) is clear on this point. In this case the participation of one person in the determination of an inquiry committee, when he had earlier committed himself to the view that each of the petitioners was guilty and liable to dismissal, was held to be fatal to the legality of the committee's conclusion. The Supreme Court held in \(\text{Manahal v. Dr. Prem Chand}\)\(^2\) that the inclusion of an interested person in a tribunal appointed to make inquiry into the alleged misconduct of an accused renders the tribunal improperly constituted. State of Uttar Pradesh v. Mohamed Noon\(^3\) decides the issue in relation to the above point where the respondent was an officiating head constable who had been charged with having forged a letter purporting to select him for training at the Police Training College. He was suspected and departmentally tried under the Uttar Pradesh Police Regulation. The District Superintendent of Police presided at the trial and also gave evidence against the constable, who was found guilty and dismissed. S.R. Das C.J. said:\(^3\)

"... the act of Sri B.N. Bhalla in hearing his testimony recorded in the case indubitably evidences a state of mind which clearly discloses a considerable bias against the respondent ... we find ourselves in agreement with the High Court that the rules of natural justice were completely disregarded and all cannon

\(\text{1) A.I.R. 1956 A.F. 636}\)
\(\text{2) A.I.R. 1957 S.C. 426 (431)}\)
\(\text{3) A.I.R. 1958 S.C. 86 at 94.}\)
of fair play were grievously violated by Shri E.A.
Subba continuing to preside over the trial. Deci-
sions arrived at by such process and order founded
on such decision cannot possibly be regarded as
valid or binding".

These observations of the Supreme Court made it clear
that defects of bias renders the decision a nullity. In fact
S.R. Des J., mentioned different grounds viz., excess of
jurisdiction, violation of natural justice on which an order
may be rendered a nullity. This view of the Supreme Court is
well depicted in Nageswara Rao V. State of Andhra Pradesh.1

The Supreme Court observed:

"The aforesaid decisions accept the fundamental
principle of natural justice that in case of
quasi-judicial proceedings, the authority em-
powered to decide the dispute between the oppos-
ing parties must be one without bias towards one
side or other in the dispute. It is also a matter of
fundamental principle that a person interested
in one party or the other should not, even formally,
take part in the proceedings though in fact he does
not influence the mind of the person who finally
decides the case. This is on the principle that
justice should not only be done, but should mani-
 festly and undoubtedly be seen to be done. The
hearing given by the Secretary, Transport Depart-
ment, certainly offends the said principle of
natural justice and the proceedings and the hearing
given, in violation of the principle, are bad".

The rule of bias has been employed by the Court on many
situation i.e., approving a scheme of nationalisation,2 dis-
missing employee.3 The principle that a biased judge has no
jurisdiction to decide an issue because the tribunal is

1) A.I.R. 1959 S.C. 208 at 222
improperly constituted and proceeding are void is explained in A.F. Razvi v. Divisional Engineer Telegraph. In this case, the court observes that the decision having been arrived at by a disqualified person is no decision in the eye of law even if it happens to be a correct decision in the opinion of the court before which the decision is brought, the same deserves to be set aside because a disqualified person has no jurisdiction to pass even a correct order or record a right decision.

In view of the above case law study it is clear that an order affected by bias is void according to both English and Indian Law, where the bias constitutes the jurisdictional error and renders a decision void.

**Waiver and Natural Justice**:

More recently another controversial point both in India and England, which has assumed importance in administrative law, is the doctrine of waiver and its relationship with the principles of natural justice, especially in regard to the jurisdictional principle. Some critics are of the opinion that violation of natural justice by administrative authorities renders the action voidable because the irregularity can be waived.

1) A.L.R. 1964 Cuj. 139
2) Prof. de' Smith : ibid 3rd Edn. p.
    Reinstein : Jurisdiction and Illegality P.221
    Morrisse : Judicial Control of Administrative Action P.208
They rely on the rule laid down in *R v. Cheltenham Commissioner*¹ and *Done v. Grant Junction Canal Company*.² The Courts themselves have made no such reference, but they have laid down that "it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction".³ It is thought that by waiving a defect, it does not go to jurisdiction. It is submitted that this view cannot be accepted in view of the fact that the question of waiver has certain relevance to the question whether breach of natural justice renders a decision void or voidable.

It has been held that a party may be deemed to have waived his objection to the exercise of jurisdiction on the ground of bias if he has not taken his objection at the earliest opportunity when he has full knowledge of the fact constituting disqualification.⁴ It presumably follows that the party is estopped from denying that the tribunal was acting within its jurisdiction. On the other hand, there are many decisions of the courts which hold that administrative action which violates natural justice is ultra vires and void. This raises a problem; if the effect of bias can be cured by waiver or acquiescence how can it be considered to go to jurisdiction. Thus Dr. Rabinstein points out:

1) (1841) 112 E.R. 1211
2) (1852) 10 E.R. 301
   *R v. Nailsworth Licensing Jt.* (1953) 2 All E.R. 662 at 665
"Want of jurisdiction denotes action taken beyond the sphere allotted to the tribunal by law and, therefore, outside the area within which the law recognizes a privilege to act. Furthermore, want of jurisdiction is regarded as a usurpation of power unwarranted by law. Consequently, it is considered so radical a defect that it cannot be cured by the acquiescence or consent of the parties concerned. Jurisdiction does not originate in the consent of the parties and cannot be re-established, where it is absent, by such consent or acquiescence. Being independent of the parties' behaviour, want of jurisdiction can be raised by any person wherever the resulting act is relied upon.

These symptoms are generally accepted as characterizing want of jurisdiction. Accordingly, as will be seen later, bias cannot be considered as going to jurisdiction since it is a defect which can be waived and which cannot be raised by the person who was 'benefited' by the alleged bias. 1

An attempt has been made to answer the above problem by reference to remedies like certiorari and prohibition. These remedies are issued by the court on the specific grounds namely jurisdictional error and error of law on the face of record. These remedies are discretionary. In a number of cases the courts refuse to issue writ of certiorari and prohibition

1) Rubinstein: ibid P. 184-95 and 202-203.
where the court is not satisfied with the contention of the petitioner seeking the remedy. Thus the court does when the appellant has waived defects not only of bias but defects in jurisdiction of the inferior authority in question. This clearly flows from the rule that the prerogative writs are discretionary. This point was lucidly explained by Channell J. in *R v. Williams Ex P. Phillips*, in the following words:

"A party may by his conduct preclude himself from claiming the writ *ex debito justitiae*, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void, it is true no conduct of his will validate them; but such considerations do not affect the principles on which the courts act in granting or refusing the writ of certiorari. This special remedy will not be granted *ex debito justitiae* to a person who fails to state in his evidence on moving for the rule nisi at the time of the proceedings impugned, he was unaware of the facts on which he relies to impugn them."

It is a fact that the writs of certiorari and prohibition are basically concerned with public order. They give speedy remedy to a person aggrieved by a clear excess of jurisdiction. This is possible only because the court is not, finally determining the validity of the tribunal's order as between the parties themselves but is merely deciding whether there has been a plain excess of jurisdiction or not.


1) (1914) 1 K.B. 608 at 614-15
2) *R v. Alham Bent Tribunal Ex P. Zerek* (1961) 2 K.B. 1 at 11
3) (1963) 1 All E.R. 862 at 866
i.e., total want of jurisdiction and contingent want of jurisdic-
tion was made. So, it was observed in this case that "if
the defect of jurisdiction is apparent on the face of the
proceedings, the order of prohibition must go as of right and i
is not a matter of discretion. In the total want of jurisdic-
tion the tribunal has no jurisdiction i.e., initial jurisdic-
tion, because of the status of parties, subject matter or a
defective composition of the tribunal itself." In such a case
the tribunal has no jurisdiction from the very beginning and
therefore, the party does not waive his right to object to the
want of jurisdiction. In case of contingent want of jurisdic-
tion it is assumed that the tribunal has jurisdiction but
commits a procedural error to which the party does not object,
he subsequently cannot raise the objection to the jurisdic-
tion of the tribunal. The inference may be drawn that bias
comes under the category of contingent want of jurisdiction.
This inference may be wrong because the defect of bias does
not belong to the category of patent want of jurisdiction.
In fact it must come under the heading of latent want of
jurisdiction. It depends mostly on the personal knowledge
of the parties concerned. When the party fails to object at
the proper time, the court assumes that he waives his right
to object. This assumption is a matter of policy. Further,

1) Farquharson v. Morgan (1894) 1 Q.B. 562
we have seen that bias renders a tribunal improperly constituted which is apparently a case of total want of jurisdiction.

The rule of waiver is simply used by the court to withhold a remedy. Even in that the rule of waiver cannot be employed when the defect of bias goes to the jurisdiction, since the jurisdiction cannot be conferred by the consent of parties including the subject matter over which a tribunal has jurisdiction cannot be extended by the parties. The legal principle remains the same in relation to the distinction between patent and latent want of jurisdiction. It is difficult to find any comprehensive formula which can distinguish patent want of jurisdiction from latent want of jurisdiction. If there is no adequate terminology to describe it, it does not mean that the legal precept (defect of bias renders the decision void) cases to be sound.

**Law in India in Relation to the Rule of Waiver:**

After the commencement of the Indian Constitution, the rule of waiver played occasionally an important role. It is proposed here to discuss the rule of waiver in relation to administrative law particularly to the rule of bias which is one of the principles of natural justice. It is already observed that in the English law the defect of bias renders the determination of an administrative authority null and void. The same reason is employed by the courts in India with little variation. The reasoning employed by the courts
in India is that when there is a defect of bias, the court is improperly constituted and improper constitution of tribunal hits the very jurisdiction of the tribunal in adjudicating the proceeding. Therefore it is an error of jurisdiction. Further the court cannot get jurisdiction by the mutual consent of the parties, which is always given under the statute.

The Indian courts apply the rule of waiver not only in case of bias but to other types of jurisdictional defects. The courts in India make a distinction between jurisdictional error and inherent jurisdiction over the subject-matter. The leading case of this point is *Legard v. Bull* 1 decided by the Privy Council. In this case a suit for damages and injunction was filed for the violation of a patent under the Patents and Designs Act.

As per the provision of the Act, the suit must have been brought in the District Court, but in fact, it was brought in the subordinate Judge's court. The suit was eventually transferred from the Subordinate Judge's court to the district court and was heard and decided. The contention of the defendant was that an order for transfer of the suit from one court to another could not be made unless the suit had been brought in a court having jurisdiction. The Judicial Committee accepted the contention and set aside the decree of the District Judge.

1) (1866) 1 A.C. 648
Lord Watson, delivering the judgment, said: 'When the judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process'.

In United Commercial Bank Ltd. v. Their workmen the Supreme Court of India dealt with the question as follows:

"Nor can consent give a court jurisdiction if a condition which goes to the root of the jurisdiction has not been performed or fulfilled. No appearance or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess ... The distinction clearly is between the jurisdiction to decide matters and the ambit of the matters to be heard by a Tribunal having jurisdiction to deal with the same. In the second case, the question of acquiescence of irregularity may be considered and overlooked. When however the question is of the jurisdiction of the Tribunal to make the award ... no question of acquiescence or consent can affect the decision".

The above observations suggest a distinction between want of jurisdiction and excess of jurisdiction. The observation of Lord Denning, in Baldwin and Francis Ltd. v. Patent Appeal Tribunal, is the same. The reasoning suggested by Lord Denning has not been followed both in India and England. Whatever the distinction between want or excess of jurisdiction, both are recognised as grounds to apply for judicial review. Here in India different High Courts follow different

1) A.I.R. 1951 S.C. 230 at P.237
2) (1959) 2 All. E.R. 433 at 448 For Lord Denning.
terminology like want or excess or inherent jurisdiction. In Madhav Rao V. Surya Rao the Full Bench of Madras High Court held that the fact that the petitioner did not object to the jurisdiction of a Deputy Registrar of Co-operative Societies did not preclude him from questioning that jurisdiction which went to the root of the matter. In Barkat Ali V. Custodian General of Evacuee Property of India the Rajasthan High Court observed:

"... this is a case where lack of jurisdiction is patent and the mere fact that no objection was taken before the Custodian or the Custodian General would not disable the applicant from raising the point before us. The matter would have been different if the question of jurisdiction would have depended upon the allegation and proof of certain facts. In that case, if no objection had been taken, we would not have heard the applicant."

The Supreme Court in Arunchalam Pillai V. N/S Southern Railway Ltd. held that, in a petition under Art. 226 for a writ of certiorari to quash certain orders, the High Court acts rightly in following the petitioner to urge a plea which goes to the root of the matter although the petitioner has submitted to the jurisdiction of the authority whose jurisdiction is being questioned by the new plea.

1) A.I.R. 1954 Mad. p.103
2) A.I.R. 1954 Raj. 214 at 216
Devinder Singh V. D. Sec. cum Settlement Commr. A.I.R. 1964 Pudh. 291 at 296 per A.I.R. Khanna J.
3) A.I.R. 1960 S.C. 1191 See Namklal V. Dr. Prem Chand
A.I.R. 1957 S.C. 425
The objection to the rule of bias is treated as going to the root of the matter by the Supreme Court of India. It is therefore submitted this reasoning is sound for the application of the rule of waiver in relation to the doctrine of bias. Because "it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction." 1

But where there is no question of jurisdiction there may perhaps be an effective application of waiver. The courts in India and in England left the point open. It can be seen from the opinions of the High Courts in India where a distinction is made between patent want of jurisdiction and latent want of jurisdiction. It is respectfully submitted that when there is a question of the jurisdiction of a tribunal on the ground of bias such distinction becomes inadequate to solve the problem because the impugned action hits the jurisdiction of a tribunal on the basis that such tribunal is improperly constituted. Therefore, in conclusion it may be said that the right of a petitioner cannot be waived when he challenges the jurisdiction of a tribunal on the ground of bias. Consequently the existence of jurisdiction cannot be waived.

The Right to a Hearing:

It is proposed here to discuss another controversial issue viz., breach of the Audi Alteram Partem rule and its effect. Would the decision reached without a hearing make it void or voidable? This has been described as a 'new question which had suddenly begun to complicate administrative law'.

In this context it is necessary to examine how the private law concepts like void and voidable are imported in the public law. A brief sketch of it will help us in examining the exact scope of the terms void and voidable and its relation with the principles of natural justice and jurisdictional principle discussed in the earlier chapters.

In certain areas of the law a distinction between void and voidable transactions is well established. A void contract, for example, has no legal consequences where as a voidable contract binds both parties unless and until repudiated by the party entitled to do so. Similarly the law distinguishes between void and voidable marriages.

"A void marriage is one that will be regarded by every court in any case in which the existence of

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1) Director of Public Prosecutions v. Head (1969) A.C.83 per Lord Denning
Ridge v. Baldwin (1964) A.C.40 per Lord Evershed & Lord Denning

PP. 334-67 and 373-77.
the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.1

The validity of voidable contracts and marriages is not open to question by the world at large, unlike that of void contracts and marriages. It is, however, agreed on all hands that the validity of a decision reached in breach of natural justice is not open to question by all the world.

An attempt has been made here to show, in the light of [jurisdictional principle that there are only two aspects: void and valid.

The term "voidable" has been imported from the law of contract into the realm of Administrative Law. In contract law it has a definite meaning. In England a minor's contract is voidable at his option. A contract is voidable when there is a vitiating element like fraud, undue influence, coercion and misrepresentation. The term is also used in matrimonial jurisprudence. In this context 'void' has a settled meaning because such a contract or marriage is not binding on the parties. Voidable means both parties are contractually bound but one of them is empowered to disclaim his obligation. Here Fundamental

difference between private law and public law in the context of void and voidable is that, in public law an authority has to act within the limit prescribed by the statute. Beyond that its action will be declared as ultra vires. In private law, the law recognises certain acts between the parties as valid if they are according to the prescribed provisions of law. It means that such acts or transactions are binding on the parties concerned. If their transaction is not according to law, i.e., Contract Act, it is void. Therefore, Prof. Wade points out that,

"There is no comparable situation in relation to the exercise of statutory powers by public authorities. In that field the distinctions which matter and which the courts have been using in a clear-cut fashion for centuries, are between acts which are authorised by the statute and acts which are not; between acts which are intra vires and acts which are ultra vires; between acts which are valid and acts which are void; between acts which the court will grant and acts which it will not; and between persons to whom the court will grant a given remedy and persons to whom it will not. Between none of these antonyms is there a halfway house. In the host of decisions on the validity of governmental acts the term 'voidable' has, until just recently, never been called upon to play a significant role. A typical instance of its appearance is the opinion of Chief J. quoted earlier, which dismisses the distinction 'void or voidable' as irrelevant". 1

Many of the rules of English administrative law are based on the analogy of rules governing judicial decisions. According to the traditional rule laid down in the Marshalsea case, 2 that a judgement is void only if made without jurisdiction. It is

2) (1612) 10 Co. Rep. 68b quoted from Arinstein; Jurisdiction and Illegality 1965 F. 66-67
to be noted here that the courts have not applied the rule in a consistent manner. The uncertainty reaches its climax over the rule of natural justice.

A brief history will indicate that breach of those rules was attacked through the means of writ of error before the prerogative writs were developed. For certain purposes breach of natural justice was treated as an error in fact which renders the decision voidable and not void. After the abolition of writ of error in the nineteenth century, the very concept of error in fact came to be forgotten. The only two grounds namely jurisdictional defect and error of law on the face of record were recognised for the issue of certiorari in the middle of the Nineteenth century.

It became a very difficult task to fit the natural justice concept into one of the grounds mentioned above. Breach of those rules did not appear on the face of record and therefore like jurisdictional defect but unlike error of law on the face of record, it could be proved by affidavit. For these reasons there was considered to be no alternative to analysing breach of the rules of natural justice in jurisdictional terms. This conclusion is wrong not only in the old cases but the modern cases also in the sense that breach of natural justice renders the decision void. The confusion started about the term void.

because the word 'void' has been used very often loosely as a
synonym for 'defective' thus including the concept 'voidable'.
Terminology has become more precise in modern cases but the
judges are still sometimes guilty of lapses. One can fear that
if words like 'void', 'voidable' and 'nullity' can be used
loosely, no reliance can be placed on more ambiguous words
such as 'bad', 'invalid' or 'irregular'.

The very significant fact is that judicial inconsistency
is not confined to questions of terminology. The judges may
hold that a particular defect renders a decision void in some
circumstances, and voidable in others. The explanation is that
such findings will influence the outcome of different types of
litigation in different ways, and the vagueness of the void-
and voidable dichotomy tempts the judges to manipulate the
distinction arbitrarily in order to meet the different require-
ments of justice caused by the different facts of each indivi-
dual case.

In this context Prof. Wade rightly observed that:

"A new question has suddenly begun to complicate
administrative law: the question whether an un-
lawful governmental act is void or voidable. The
courts have for centuries been quashing or other-
wise condemning administrative acts which were
unauthorised by law and therefore ultra vires;
and have commonly described such acts as void.
But never, until recently, have they relied upon
any contrast between acts which were void and
acts which were voidable. They have always pre-
viously inquired whether acts done in the exer-
cise of administrative power were intra vires or
ultra vires, valid or void. Now, however, the
courts profess to have discovered a hybrid creature: a voidable administrative act. This is a new animal in the legal bestiary, and its pedigree is altogether questionable. By pursuing it on a free rein, judges have been able to propound new doctrine which would make for reaching changes in the law. These changes, it will be submitted, would not only substitute new and worse rules for old and better rules on a number of matters: they would also gravely weaken the principle of legality which is the sheet-anchor of the citizen’s right to resist unlawful acts of government.\(^1\)

It has been observed in the thesis that the courts are primarily concerned with administrative illegality. The court can interfere where administrative action is ultra vires i.e., unauthorised by law. When the action is intra vires even if it is wrong, the court cannot interfere. In this rule, error on the face of record is an exception. Here the Court can quash the order even if the action is intra vires. In this context it can be said that cases of error of law apparent on the face of record come under the category of exceptions to the above rule. Therefore it is treated as voidable, a rule described by Prof. Wade as ‘one awkward piece of doctrine which makes a complication’.\(^2\)

Here it is to be noted that this is an exception to the principle that an action within the jurisdiction is not subject to review even if the action is wrong. We have seen that the

1) H.W.R. Wade: Unlawful Administrative Action - Void or Voidable (1967) 63 L.Q.R. 499
2) ibid P.519. This aspect is discussed in Chapter IV of the thesis.
judges have attempted to force 'error on the face of record into the frame work of jurisdictional error'.\(^1\) An Indian court in *Krishnaswamy v. Mahalal Miniani*\(^2\) stated that 'errors apparent on the face of record are treated as error of jurisdiction for the purposes of quashing by issue of certiorari'. Thus Falles C.B. makes the same point with an unmistakably Irish Syllogism: \(^4\) 'As certiorari undoubtedly lies where a conviction is bad upon its face and as the jurisdiction of the King's Bench to bring up and quash on certiorari a record from an inferior court is limited to cases of want of jurisdiction, a conviction bad on its face is undoubtedly one made without jurisdiction'.

Voidable means that action is legally valid in the first instance, and remains valid if the court does not intervene. Dr. Aminstein\(^5\) says, 'voidable acts are those that can be invalidated in certain proceedings; these proceedings are especially formulated for the purpose of directly challenging such acts. Appellate proceedings constitute the classical instance of such a method or review. In such proceedings the disputed decision may be set aside or modified without affecting its essential validity prior to the appeal'. He further

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1) *Anisman case* (1967) 3 W.L.R. 362 at F.396 per Lord Diplock.
2) (1948) 2 M.L.J. 589
4) Aminstein : *Jurisdiction and Illegality*, 1965 F.93
5) Ibid F.5
says that: "On the other hand, when an act is not merely voidable but void, it is a nullity and can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon. In other words, it is subject to 'collateral attack'.

Prof. Kelson states, 1 in order to challenge the above distinction, that a norm is always valid, it cannot be null, but it can be annulled". "Nullity", in common usage is, according to this view "only the highest degree of annulability and the case of absolute nullity lies beyond the law". Kelson supports this statement by the following argument:

"The decision made by the competent authority that something that presents itself as a norm is null ab initio because it fulfills the conditions of nullity determined by the legal order, is a constitutive act; it has a definite legal effect; without and prior to this act the phenomenon in question cannot be considered to be null. Hence, the decision is not 'declaratory', that is to say, it is not, as it presents itself, a declaration of nullity; it is a true annulment, an annulment with retroactive force. There must be something legally existing to which the decision refers. Hence, the phenomenon in question cannot be something null ab initio, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it null ab initio. Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e. something legally existing".

Prof. Wade 2 points out that while making the statement, Dr. Rubinstein has not supported it by any authority. Prof. Wade

1) General Theory of Law and State p.161
2) A.W.R. Wade (1967) 83 L.Q.R. p. 520
observed that, 'In administrative law the one clear class of acts which can be invalidated only in certain proceedings are acts which while not ultra vires, show error on the face of the record. These might without abuse of language be called voidable. But even then the word would supply no distinct or valuable concept. Certiorari to quash for error on the face of the record has been in use for over two centuries without needing its assistance'. In order to substantiate his argument, he says\(^1\) that, "there is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what was void must be treated as valid, being now by law unchallengeable. It is fallacious to suppose that an act can be effective in law only if it has always had some element of validity from the beginning'.

The judicial committees seems to be using the word void in an absolute sense and voidable in the sense of a valid act capable of legal consequences. Thus they speak of 'the verbal distinction between whether it is truly a 'nullity', that is, to all intents and purposes, of which any person having a legitimate interest in the matter can take advantage or whether it is 'voidable' only at the instance of the party affected'.\(^2\)

1) H.W.N. Wade (1967) 22 L.Q.R. P. 512
2) (1967) 2 All E.R. 162 at 169.
Prof. Wade points out that, "the meaning of 'void' is relative rather than absolute; and the court may in effect turn void acts into valid ones by refusing to grant remedies. There is no absurdity in this. The absurdity lies rather in supposing that 'void' has an absolute meaning independently of the court's willingness to intervene".

It is therefore necessary to examine case law for further discussion on this aspect and its relation with the problem of breach of natural justice (right of hearing) whether it is void or voidable. A fresh controversy cropped up by the decision of the Privy Council in **Bryansah v. Fernando.**

In the unanimous opinion in this case the distinction as regards to void or voidable plays a prominent and highly mystifying role. The new technique of voidable creates lot of confusion in the administrative field, particularly in relation to natural justice, when the principle that violation of natural justice renders the action void. Sometimes judges also find the use the term void attractive, despite the established rule. This adaptation of the new word voidable may be because of the fluctuating content of the rule and to the drastic effect of holding such decision to be void. The followers of the voidable concept feel that there will be chaos in the administration if every action could be challenged collaterally. This fear has no sound foundation. In a number

1) (1967) 2 All E.R. 152
of cases, even in old ones, the court declared that breach of natural justice resulted in nullity. Prof. Wade stresses the danger involved in the new technique. He observes: "Verbal confusion has often helped the law to advance, but at the same time it creates danger. The abuse of language which led to administrative functions being called 'judicial' (or, more vaguely, quasi-judicial) for the purposes of certiorari of natural justice is an outstanding example; it enabled the judges to assert jurisdiction over unlawful administrative acts in a most useful manner, but eventually it threw the law into confusion when the paradoxical sense in which the term was used came to be forgotten."¹ In *Duravappu v. Fernando*,² the Minister of Local Government made an order dissolving the municipal council for incompetence. The mayor sought to have the order quashed on the ground that no opportunity was given to the council to be heard in defence. The Judicial Committee held that the order in question was subject to the requirement of a hearing. The rule of hearing was also applicable for the reason that the effect of the order was to deprive the council of its property. In this case, the Privy Council seems to follow the term void or voidable as interpreted by Lord Evershed in his dissenting opinion in *Ridge v. Baldwin*.³ The careful analysis of these cases clearly shows that though the Privy Council followed the reasoning of Lord Evershed in relation to

2) (1967) 2 All Ed. R. 182
3) (1964) A. C. 40
void or voidable. The purpose for which the term was employed by the Privy Council was different from that in *Ridge v. Baldwin* case. The Privy Council has applied the term void or voidable in relation to the right of third party and for this purpose they preferred the reasoning of Lord. *Bersch*. The Privy Council entirely agreed with the decision in *Ridge v. Baldwin*, holding that the principle of right to hearing was applicable.

The Privy Council observed that Lord Reid and Lord Hodson in *Ridge v. Baldwin* had held that the Watch Committee’s action was a nullity in a wider sense. It is respectfully submitted that this is not so. In fact there was no issue of the right of third party in *Ridge v. Baldwin* case. Their Lordships in this case simply demonstrated the law of England which was reaffirmed in that case. The decision in *Duryappah v. Fernando* departed from the well established rule. It shows reluctance to play the traditional role of the court to supervise the inferior authority when there is violation of natural justice. Even if the action is voidable the court can issue writ of certiorari when there is an error of law on the face of record. It is already mentioned that the courts have permitted on many occasions to aduce further evidence to prove a breach and have held that a failure to give a hearing to the interested parties constitutes a jurisdictional error and renders the decision a nullity. It is a well recognised principle that a public authority which acts unlawfully by violating the principles of
natural justice is acting outside its power because it is violating the implied conditions which Parliament is taken to have imposed.

It is clear from Lord Selborne's remark that 'there would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice'.

This view is followed by Lord Reid in *Ridge v. Baldwin*. He said: 'Time and time in the cases I have cited it has been stated that a decision given without regard to the principle of natural justice is void and that was expressly decided in *Wood v. Wood*. In *James Begg's case*, which arose in 1615, it was said: 'And although they have lawful authority either by charter or prescription to remove anyone from the freedom (of the corporation) and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without hearing his answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the party'.

In Dr. Bentley's case, decided in 1722, Bentley had the act of cancellation of his degree by the University of Cambridge declared a nullity because of the failure of the University to give him a hearing. In *Ridge v. Baldwin* the court summarised

2) [1874] 9 L.R. 101
3) (1615) 11 Co.Rep. 93(b) 99(a).
4) [1874] 9 L.R. 190. This case is cited with approval *Ridge v. Baldwin* [1864] A.C.F. 40
the law in the following passage:

"In all the cases where the courts have held that the principles of natural justice have been flouted, I can find none where the language does not indicate the opinion held that the decision impugned was void. It is true that the distinction between void and voidable is not drawn explicitly in the cases, but the language used shows that where there is a want of jurisdiction as opposed to a failure to follow a procedural requirement the result is a nullity. This was, indeed, decided by the Court of Exchequer in Wood v. Wood where, as here, there was a failure to give a hearing".1

Lord Hodson at page 136 in the above case says that, "The Watch Committee in failing to give a hearing to the appellant acted without jurisdiction". In Naradana Mosque Trustees v. Nalimud,2 the Judicial Committee again held that the Minister had no jurisdiction to make an order taking over the school until he gave the parties notice of the charge against them, and lastly in the Anisminic case,3 there is an express inclusion by Lord Reid and Lord Pearce of the breach of either principle of natural justice in the category of jurisdictional error. There is a clear awareness of the alleged distinction between void and voidable decisions. Thus Prof. Wade states that the House of Lords has made it perfectly clear that nullity is the consequence of all kinds of jurisdictional error. Although this merely confirms long-established law, it should help to

1) (1964) A.C. at p.136
2) (1967) A.C. 13
3) (1969) 2 A.C. 147
resolve the tangle caused by paradoxical suggestions that action
in excess of jurisdiction may be voidable as opposed to void.\textsuperscript{1}

As Lord Reid observed: "there are no degrees of nullity".\textsuperscript{2}

According to Prof. Wade\textsuperscript{3} voidable is a meaningless term in
this context. Lord Wilberforce said in the Anisminic case:
"There are dangers in the use of this word (nullity) if it
draws with it the difficult distinction between what is void
and what is voidable, and I certainly do not wish to be taken
to recognise that this distinction exists or to analyse it if it
does".\textsuperscript{4} The real value of this case is truly fundamental to our
administrative law. The significant feature of this case is
that it ought to obviate this confusing and unnecessary exercise.
In this context Anisminic must rank with Ridge \textit{v.} Baldwin as the
'Magna Carta of natural justice'\textsuperscript{5} and as a landmark in the de-
velopment of administrative law in accordance with the requirement
of contemporary society.

In India it is perhaps self-evident that the application
of natural justice must depend to a great extent on 'the facts
and circumstances of that case, the framework of the law under
which the inquiry is held and the Constitution of tribunal or
body of persons appointed by that purpose'\textsuperscript{6} In an important
decision on natural justice, the Supreme Court of India observed:

\begin{itemize}
\item 1) H.W.R. Wade: Constitutional & Administrative Aspects of
Anisminic case (1969) 26 L.R. 198 at P. 212
\item 2) (1969) 2 W.L.R. at P. 169
\item 3) (1967) 48 L.R. 499 at P. 612-13
\item 4) (1969) 2 W.L.R. at P. 204
\item 5) C.K. Allen: Law and Order 1965, 3rd Edn. P. 342
\end{itemize}
"The concept of natural justice cannot be put into a strait-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably." 1

The observation in Rameshadas Advani's case that the duty to act in a judicial spirit should be super-added by the statute to make the function a quasi-judicial function is no longer good law. As observed by Shah J. in State of Orissa V. Binapani Devi, 2

"Duty to act judicially would arise from the very nature of the function intended to be performed, it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of the power". This view of Shah J., is in harmony with the current trend of decisions in England as disclosed by the ruling of the House of Lords in Ridge V. Baldwin. 3 On the basis of this and other decisions Basu, J., has concluded in Rameshada V. District School Board 4 that "the proposition that quasi-judicial obligation may arise only where there is express requirement under the relevant statute, enunciated in Rameshadas Advani's" 5

2) A.I.R. 1950 S.C. p.222
3) A.I.R. 1967, S.C. 1269
4) (1964) A.C. 49
5) A.I.R. 1965, Cal. 397
6) Ibid
case no longer exists. Now that Lord Holdsworth’s gloss has been rejected by the House of Lords in *Ridge v. Baldwin* and by our Supreme Court in *R.B. Chemical Company’s case.*

The statement of Lord Atkin in *R v. Electricity Commissioner* followed in the *Kausaldas Advani case* is unchanged. It is the exposition of the term quasi-judicial, administrative action and the application of the principles of natural justice that has changed.

Once it is established that the rule of natural justice (right to hearing), is applicable to the administrative action irrespective of the fact whether action is judicial or quasi-judicial or executive, it follows that a breach of it results in voidness. In India, in the earlier cases the courts seemed to have considered the acts done in breach of *audi alteram partem* as acts done ‘illegally in the exercise of undoubted jurisdiction’ as distinguished from errors of jurisdiction. Thus Mr. Justice V. Ayyar J., while speaking on the character and scope of certiorari in *Hari Vishram v. Ahmed Bhanu,* observed:

“(1) Certiorari will be issued for correcting errors of

| 1) | R v. Legislative Committee of the Church Assembly (1928) | K.B. 411 per Lord Holdsworth C.J. |
| 2) | A.I.R. 1970 | S.C. 1789 |
| 3) | A.I.R. 1994 | K.B. 171 |
| 4) | More cases on this point |
|   | Anglo American Direct Tea Trading Co. v. Their Workman | A.I.R. 1963 | S.C. 574 |
|   | Shivaji V. Union of India, A.I.R. 1960 | S.C. 606 |
|   | State of Assam V. Bharat Kala Mandir, A.I.R. 1967 | S.C. 1763 |
| 5) | A.I.R. 1963 | S.C. 233 |
jurisdiction as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) Certiorari will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard or violates the principles of natural justice.

In subsequent cases, however, the courts have held that an order of quasi-judicial authority, given in violation of the principles of natural justice, is really an order without jurisdiction—the category of such cases being described as procedural ultra vires.

Natural Justice and Speaking Order:

The courts, in India, are expanding the scope of natural justice (right to hearing) from another direction. For the purpose of fair hearing, in the absence of specific provision in a statute, the courts are insisting that a decision of an administrative authority must be accompanied by reasons.

This is another field where the law is not settled. We have already seen in Chapter IV that in the absence of specific

1) Ujjambal V. State of Uttar Pradesh, AIR 1962, S.C. 1621
    per S.K. Das, J. at 1629;
    Sinha Govindji V. Deputy Controller of Imports & Exports,
    Madras S.C., Petition 397 and 306 of 1960 dated 23-3-1961
    cited in AIR 1962, S.C. 1621
provision for a speaking order, the courts in India are insisting that the inferior authority should give reasons for its determination. There is no general rule of English law that reasons must be given for administrative decisions.\(^1\) The same is true of India law. Here it is proposed to examine whether giving reasons is a requirement of natural justice. This is a matter of great importance. It enables the court to quash the order if reasons are not sufficiently given in a fair hearing. It is now recognised that in all fairness it does require that unless the court insists upon reasons being stated, it is handicapped in asserting its control over the error on the face of record. In England the entire matter was considered by the Frank Committee. The Statutory reform followed the report by the enactment of the Tribunals and Inquiries Act 1958. Section 12 provides for giving of reasons by these bodies if so required by the parties; similarly Section 8(b) of the Administrative Procedure Act 1946 of U.S.A., requires that decisions must be accompanied with reasons.

The crux of the problem is that in the absence of specific provision, is giving reasons a requirement of natural justice and whether the failure to give reasons render the decision void as a violation of natural justice. To give reasons is a safeguard against arbitrary power. The court must see that

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the administrative authorities should not act arbitrarily but must act within the law. Subba Rao J., in \textit{H.P. Industries v. Union of India}, observed:

"In the context of a welfare State, administrative tribunals have come to stay ... but arbitrariness in their functioning destroys the concept of a welfare State itself ... The least that a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made..."

After the judgement of \textit{Ridge v. Baldwin} the law is totally changed in India in relation to functions of authorities and ambit of natural justice. It has been pointed out earlier that after the \textit{Kraipak's case} the distinction between quasi-judicial and administrative function has become thin. By this view when there is an issue of determination of a case, the administrative authorities must act in a quasi-judicial manner. In fact in \textit{State of Orissa v. Biswanath}, the Supreme Court has gone so far as to hold that any order involving civil consequences would have to be passed consistently with the rules of natural justice. According to the majority judgement in \textit{Ridge v. Baldwin}, a violation of natural justice renders the decision void. The same view is followed in the \textit{Anisminic case}. The observation in \textit{Anisminic case} has been approved in \textit{Tarachand Gupta's case}.

The Supreme Court observed:

"It has sometimes been said that it is only where a

1) A.I.R. 1966 S.C. 671 at F.674-75
2) A.I.R. 1967 S.C. 1229
3) A.I.R. 1971 S.C. 1568 at 1566
tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and 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 enquiry in question, but there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of enquiry which of such a nature that its decision is a nullity.

We can fairly say that the courts both in India and England extended the concept of jurisdiction so as to bring the rules of natural justice in its ambit. These decisions have a tremendous influence in enlarging the scope of natural justice. Consequently the corresponding change may be required to give reasons for the determination of the administrative authorities. In the recent judgement in Union of India v. K.L. Cooper, Justice Beg was inclined to the view that in the case of administrative order (as distinguished from quasi-judicial), even in the absence of the statute imposing a duty to give reasons, a minimum requirement of just and fair treatment, required that the person affected ought to be informed of the reasons for the action. We can go a little further and say that 'convenience and justice are not often on speaking terms'. But an administrative authority cannot be expected to act as if it were a court of law, and justice must be reconciled with the practical needs. That matters is substance and not form. It is submitted that the observation made by Justice Beg will lay the foundation of future law in relation to speaking order and natural justice.

1) A.I.R. 1974 S.C. 57
2) Lord Atkin (1943) A.C. at 626
3) Re H.K. (an infant case) (1967) 2 Q.B. 617