The Self-Created Rule of Policy and Other Ways of Exercising Administrative Discretion

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> ...let your own discretion be your tutor: suit the action to the word, the word to the action; with this special observance, that you o'erstep not the modesty of nature.
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> (*Hamlet*, III. ii).

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The exercise of discretion and the capacity for policy-making often travel together. Lawyers do not always notice the relationship because the influence of the judicial process may have led them to believe the shibboleths of the courts that decisions of policy are for the legislature alone to enact. Certainly the profession would agree that the legislature, subject to constitutional limitations, possesses wide discretionary and policy-making powers. But that of course is a subject for examination by political and other social scientists! This same predisposition has even left studies on how judges and juries exercise the undoubted discretion given them to persons, legally trained or not, who often are versed in the behavioural sciences. However, administrative law often has proved to be an upsetting area for the lawyer who finds bodies that are neither courts nor legislature clothed with a goodly share of discretion. And yet, marvellous to behold, much of what these bodies often do in microcosm begins to resemble the functions of legislatures and courts. Consequently, it is not surprising that his experience with the decisions of the latter, when commingled with a penchant for procedure, should have led him to place greater weight on how a tribunal performs its tasks than on the substance of the decision itself. The question that bears some examination, therefore, is the extent to which the law should become more concerned with the interplay of administrative discretion and policy-making and with the access to this process by the individual.

I. Discretion: Adjudication and Subordinate Legislation

At the federal level and now generally as a reflection of its *Administrative Procedure Act*,[1] American law has focused a good deal of attention on the distinction between the "adjudicative"[2] and "rule making"[3] functions of an agency. Because this statute requires different procedures attend the performance of each of these tasks, it may become vital to discover not only what distinguishes in essence one from the other but which function the agency was performing at the time in question. The *Act* itself attempts to define both these expressions,[4] but as recent juris-

[1] 5 U.S.C. § 1001 — 1011.
[2] 5 U.S.C. § 1004.
[3] 5 U.S.C. § 1003.
[4] 5 U.S.C. § 1001(c) and (d).

prudence [5] and commentary [6] in the United States demonstrate this may not always be so easy of solution as one would imagine. Moreover, for one reason or another and despite the authority in an agency to proceed as it chooses by adjudication or rule making,[7] it may prefer to originate and promulgate policies prospective and general in application in the course of an adjudicative hearing [8] or, on the other hand, by rule-making limit the area in which it would otherwise have the authority to adjudicate.[9] Although each function attracts somewhat different procedures to itself, both in substance have the common quality that the agency is exercising a statutory discretion, perhaps one possessed of a great many policy impli-

[5] *N.L.R.B.* v. *Wyman-Gordon Company,* 394 U.S. 759 (1969).

[6] Robinson, *The Making of Administrative Policy: Another Look at Rule-making and Adjudication and Administrative Procedure Reform,* (1970), 118 U. Pa. L. Rev. 485, at pp. 508-512; Bernstein, *N.L.R.B.'s Adjudication — Rule-Making Dilemma under the Administrative Procedure Act,* (1970), 79 Yale L.J. 571.

[7] This choice, given to the agency empowered both to adjudicate and to make rules, was confirmed by *U.S.* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1955) and *F.P.C.* v. *Texaco Inc.,* 377 U.S. 33 (1964). Although both cases were immediately concerned with the ability of particular rules to erode away a portion of the general adjudicative jurisdiction given to an agency, what these cases, in alliance with *S.E.C.* v. *Chenery Corp.,* 332 U.S. 194 (1947), spawned was a quest for the answer to the more basic question: having been given the choice *should* an administrative agency proceed to develop its policies by adjudication or rule-making? Some of the more important investigations of this fundamental issue are to be found in Davis, *Discretionary Justice,* (Louisiana State U. Press, 1969); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards,* (1962), 75 Harv. L. Rev. 863, at p. 1055, 1263; Baker, *Policy By Rule or Ad Hoc Approach — Which Should It Be?,* (1957), 22 Law and Contemp. Probs. 658; Cohen and Rabin, *Broker-Dealer Selling Practice Standards: the Importance of Administrative Adjudication in Their Development,* (1964), 29 Law and Contemp. Props. 691; Peck, *The Atrophied Rule-Making Powers of the National Labour Relations Board,* (1961), 70 Yale L.J. 729; Peck *A Critique of the National Labour Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* (1968), 117 U. Pa. L. Rev. 254; Shapiro, *The Choice of Rule-making or Adjudication in the Development of Administrative Policy,* (1965), 78 Harv. L. Rev. 921; Fuchs, *Agency Development of Policy Through Rule-Making,* (1965), 59 Nw. U. L. Rev. 781; Robinson, *op. cit.,* n. 6.

[8] See, *e.g. N.L.R.B.* v. *Wyman-Gordon Company, op. cit.,* n. 5, and cases subsequent to it such as *N.L.R.B.* v. *Hondo Drilling Company,* 428 F. 2d 943 (1970); *N.L.R.B.* v. *DIT-MCO Inc.,* 428 F. 2d 775 (1970); *American Machinery Corp.* v. *N.L.R.B.,* 424 F. 2d 1321 (1970). See also the articles cited in note 6.

[9] *E.g., U.S.* v. *Storer Broadcasting Co., op. cit.,* n. 7; *F.P.C.* v. *Texaco Inc., op. cit.,* n. 7.

cations. That a tribunal may be given wide discretionary powers in a statute and its regulations raises many of those fears that declaim against socialism and the rising bureaucratic tide. However, the introduction of procedural checks, such as those to be found in the *Administrative Procedure Act*, are only too typical of the lawyer's over reliance on, almost at times an apotheosis of, this method of controlling whatever he puts his hand to. Those who have knowledge of the administrative process are only too able to point to the various ways by which agencies have circumvented these strictures and thrown off some of these procedural restraints.[10] One need only refer to the general statement of policy, released to the public of course, the advisory opinion and the attempt by the agency to compress its past and present practices into a code or guide as examples.[11] It is for these and other reasons that American commentators have begun to call for the introduction of substantive means for channeling and controlling the exercise of discretionary powers.[12]

Canada, it need not be emphasized, also has tribunals on which has been bestowed a great deal of administrative discretion. However, the two general compartments described by the *American Procedure Act* have here been expanded to three under the common law. The difficulty in distinguishing among legislative, administrative and judicial acts, particularly the latter two,[13] will be only too familiar to those who have engaged themselves in the task of determining whether the rules of natural justice apply to the act being performed by a tribunal and whether the remedy of *certiorari* or prohibition lies against this body. However hopeful one may

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[10] Davis, *op. cit.*, n. 7, ch. IV; Fisher, *Rule-Making Activities in Federal Administrative Agencies*, (1965), 17 Ad. L. Rev. 252; Shapiro, *op. cit.*, n. 7, at pp. 923-4; Friendly, *op. cit.*, n. 7, at pp. 1296-7.

[11] See the methods listed by Fisher, *ibid.*, at pp. 253-5. Of course, it must here be emphasized that neither the advisory opinion given to the individual in a particular case [*Woon* v. *M.N.R.*, 50 D.T.C. 871 (1950); *but cf.* new Information Circulars 70-6 and 71-25 of the Department of National Revenue in which there is expressed that an advance ruling "will be regarded as binding upon the Department"] nor the more general policy statement or information bulletin (*Aspinall* v. *M.N.R.*, 70 D.T.C. 1669 (1970); *Pioneer Laundry and Dry Cleaners Ltd.* v. *M.N.R.*, [1940] A.C. 127, at p. 134) can of itself have the binding force of law.

[12] *Op. cit.*, n. 17.

[13] See, *e.g.*, *de Smith, Judicial Review of Administrative Action*, (2d ed., 1968) ch. 2; Molot, *Administrative Bodies, Economic Loss and Tortious Liability*, in Fridman, *Studies in Canadian Business Law*, (Toronto, 1971), at pp. 427-447.

be that some of these distinctions may slowly be disappearing,[14] it is as true here as it is in the United States that whatever label is given to what a tribunal be doing this administrative body is exercising a discretion. And the breadth of that discretion is not likely to be measurable by the referent of its legislative, administrative or judicial quality. Moreover, in Canada as well, one cannot ignore the presence of the same unconventional and less open methods by which officials may influence how they will exercise their discretion. For example, there are the advance rulings and bulletins given by the Department of National Revenue under the *Income Tax Act*, the general policy statements of the Canadian Radio Television Commission in speeches and press releases, and the general guidelines issued by the Treasury Board of Canada.

If the American dichotomy between the adjudicative and rule making functions in the exercise of discretionary power cannot be expressed in exactly the same way in Canada, it is probably fair to say that our legislative act corresponds to American rule making whereas adjudication is represented more closely by the combined forces of the administrative and judicial. All of which leads to the following question: to what extent may a Canadian tribunal possessed of adjudicative powers harken to more general guidelines of a legislative nature as a valid means of limiting the administrative or judicial discretion conferred on it by law? [15]

Firstly, and probably least controversial of all, is the situation where a valid regulation or by-law finds itself operating to some extent in the same sphere as the adjudicative discretion given to a tribunal. As noted earlier, the American decisions have had to concern themselves with that contraction of the area in which an adjudicative hearing might be demanded that a lawful rule could impose. It is not too difficult to understand the grievance felt by an individual who can refer to judicial or administrative discretion in a tribunal and who then finds that valid subordinate legislation has subtracted from that circle of discretion the very sector in which he is particularly interested. These sentiments are perhaps aggravated when this person would have been entitled to have this exercise of adjudicative power accompanied or preceded by a hearing, a procedure that is avoided by the tribunal

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[14] See reference to this evolution in Molot, *Annual Survey of Canadian Law: Administrative Law*, (1970), 4 Ottawa L. Rev. 458, at p. 469; Molot, *Annual Survey of Canadian Law: Administrative Law*, (1971), Ottawa L. Rev. (forthcoming).

[15] See generally, Anisman, *Book Review*, (1969), 47 Can. Bar Rev. 670, at p. 680.

that can refer to the regulation in question as having effectively removed from it the power to adjudicate. Nevertheless, unless one were to deny a tribunal the authority to pass valid subordinate legislation wherever this authority and an adjudicative discretion overlapped, the only general answer to the conundrum that can be given is the one that recognizes the primacy of the former. This, of course, is a consequence perhaps more in tune with Canadian constitutional theory which in recognizing the supremacy of the legislative arm of government gives credence to the paramountcy of rule making over adjudication. For example,[16] the statute constituting the University of Sydney at one and the same time gave the Senate the general discretionary power to "act in such manner as appears to them to be best calculated to promote the purposes of the University"[17] and the subordinate legislative authority to "make by-laws and regulations relating to... all other matters whatsoever regarding the University".[18] A committee of the Senate in the exercise of its adjudicative powers refused a student re-admission to the University and in doing so purported to rely on a Senate resolution. Before concluding that this resolution was not a valid "by-law" or "regulation", the court had occasion to state that although the presence of a rule making power does not of itself cut down the generality of the Senate's discretion, once a valid rule has been enacted there exists

> a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants,[19] but members of the public who come within the sphere of their operation, may be properly called 'by-laws'...[20]

As one might expect, where the regulation or by-law relied upon by a tribunal turns out to be invalid, no longer can the administrative process lean on the theory of "a law having the attributes of generality of operation and binding force upon itself and others".[21] Although attempts to enforce an invalid regulation and the inhibitions created by its very presence may cause a great many

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[16] *Ex parte Forster,* [1963] 63 S.R. (N.S.W.) 723.

[17] *University and University Colleges Act, 1902-1959,* (N.S.W.) s. 14(2).

[18] *Ibid.,* s. 15(1)(e).

[19] Berger, *Do Regulations Really Bind Regulators?,* (1967), 62 Nw. U. L. Rev. 137.

[20] *Ex parte Forster, op. cit.,* n. 16, at p. 731, quoting Lindley, L.J. in *London Ass. of Shipowners and Brokers* v. *London and Indian Docks Joint Committee,* [1892] 3 Ch. 242, at p. 252.

[21] *Ex parte Forster, op. cit.,* n. 16, at p. 731.

practical difficulties for the individual,[22] the law recognizes that without more he is at liberty to act as if it never existed. However, it is where this purported law of general application and the tribunal's exercise of individual discretion intersect that difficulties begin to abound. For to conclude that this "law" has no binding force upon the tribunal or individuals still leaves room for the persuasive or precedential effect it may be given in the administrative or judicial decision that then follows. To refer again to *Ex parte Forster* as illustration, one will note that there in the attempt to exercise its power to "make by-laws and regulations" the Senate passed "resolutions" that were not only misnamed, but had not been approved by the Governor and laid before both Houses of the Legislature as the statute required. Therefore, when the Senate finally came to consider Forster's request for re-enrollment in the courses in question it could not claim that this resolution was the law of the University and hence capable of tying its hands in the matter. It could not, as it attempted to do, authorize a faculty committee to entertain applications from students for re-enrollment, and save for rights of appeal insulate itself against having to decide such questions. Having thereby placed itself in a position almost the converse of that successfully claimed by the Federal Communications Commission in the *Storer* decision,[23] the Senate could not rely on non-existent regulations to interfere with or diminish the adjudicative power bestowed upon it personally by legislation.

However, it must be remembered that this discretion given to the Senate was the very wide one to "act in such manner as appears to them to be best calculated to promote the purposes of the University". In examining the effect to be given to the resolutions of the University Senate, the Court of Appeal had to decide whether a tribunal exercising adjudicative powers could look else-

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[22] *E.g.*, in *Producers Cold Storage Ltd.* v. *The Queen*, June 24, 1968 (Ex. Ct.), aff'd. (1969) S.C.R. vi, officials enforced their interpretation of statutory provisions only to discover after a long period of time that they had erred. There may be posed an unhappy dilemma for the individual who does not want to offend officials on whose good graces he must depend in future dealings and yet whom a legal system based on individualism and the adversary process leaves no choice but to fight. Failure to recognize and pursue its rights at the very outset instead of waiting until thirty-seven years had passed proved a heavy blow indeed to the petitioner. For a discussion of how legal and economic systems based less on free entreprise than even Canada is, see: *Roundtable on Adiministrative Law*, (1970), 22 J. Legal Ed. 363.

[23] *Op. cit.*, n. 7.

where than to valid legislation, principal or subordinate, for general guidelines and points of reference. It is at this level that the legal impact of the invalid regulation on a tribunal's exercise of discretion in individual cases begins to resemble a much more general situation. As we have seen, there may have been the vain attempt to enact a valid regulation: reliance on it by the tribunal as a policy formulation will not protect this body from successful attack if what it "has really done is to make and operate a regulation" [24] that is *ultra vires*. However "the dividing line between the legitimate pursuit of a general policy in a matter of administration and the enforcement of an extra-statutory regulation may be narrow and sometimes difficult to draw".[25] That line had to be drawn in the *Forster* decision, but the more common situation does not raise any plea of statutory regulation. This then leads to an investigation of the extent to which the law will permit a tribunal to have regard to policy guidelines or formulations, whatever form they may take. Of course, that policy may be one that the tribunal must adhere to, a situation represented by a transitional decision [26] in which the "guideline" took the form of instructions by the Secretary of State, which immigration officers, under valid regulations, "shall act in accordance with".[27] An individual asking a tribunal to make a decision that would conflict with or contradict such an instruction is confronted with a well nigh impossible task. But such instructions, on the other hand, may find no legislative sanction at all or be accompanied by permissive rather than mandatory language. How radically does this alter the positions of individual and tribunal concerned is the question next to be examined.

II. The Interplay Between Adjudication and a Tribunal's Pre-existing Policy Role

As a point of departure on this issue it may be well to begin with the *locus classicus* of Lord Justice Bankes, who sought to synthesize the results of earlier decisions and has often assisted the efforts of later courts confronted with similar problems.

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[24] *Magistrates of Kilmarnock* v. *Secretary of State for Scotland*, 1961 S.C. 350, at p. 357.

[25] *Ibid.*, at p. 359.

[26] *Schmidt* v. *Secretary of State for Home Affairs*, [1969] 2 Ch. 149 (C.A.). See also: *Alden* v. *Gaglardi*, [1971] 2 W.W.R. 148 (B.C.C.A.).

[27] Stat. Inst. 1953, No. 1671, s. 30(2).

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.[28]

The two factors the quality or character of which this statement seems to focus upon are the hearing and the rule or policy formulation. Each will be examined in turn, but it should be noted that because of the connotation that in administrative law is enjoyed by the idea of a "hearing" the use of the expression by Bankes, L.J. may be somewhat misleading. The right to a hearing associated with the principles of natural justice and ultimately with the prerequisite of a judicial or quasi-judicial function might seem to limit the occasions when this recited statement of principle would apply. However, as mentioned earlier, a tribunal's exercise of discretionary power in individual circumstances encompasses the executive or administrative act as well as the judicial, and it is for that reason that clarity seemed to demand reliance on "adjudicative" as more expressive of the general function being performed.

If one begins with the situation where the policy adopted beforehand by the tribunal is one which it may lawfully consider during its deliberations, the courts there have generally addressed their minds to the question of whether the presence of that policy has led this body ultimately to refuse to exercise its discretion. In other words, its statutory obligation to consider each individual case before it and exercise its discretion accordingly has been abandoned in favour of following a general rule with no legislative sanction: to that extent it has ignored its statutory mandate. So, where magistrates had earlier resolved to follow in all cases before them a settled policy in the matter of costs,[29] of hearing applications for new liquor licences,[30] and of the renewal of licences of those

[28] *R.* v. *Port of London Authority ex p. Kynoch Ltd.*, [1919] 1 K.B. 176, at p. 184 (C.A.).

[29] *R.* v. *Glamorganshire JJ.*, (1850), 19 L.J.M.C. 172; *R.* v. *Merionethshire JJ.*, (1844), 6 Q.B. 163, 115 E.R. 63.

[30] *R.* v. *Walsall JJ.*, (1854), 24 L.T.O.S. 111.

refusing to take out a full licence,[31] the courts were willing to conclude that there had been a failure to exercise discretion. A similar fate befell the municipality which, empowered to decide upon the sanitary facilities a house-owner should provide, passed, and attempted to enforce, a general resolution calling for water closets in all cases.[32] It becomes clear that, despite certain misleading words of Wightman, J.,[33] it was not the presence of this general resolution during the tribunal's deliberations that mattered so much as its blind enforcement "without reference to the exigencies in any particular case".[34]

From this it follows that the courts at the very least are asking a tribunal to give consideration to the merits of the individual applications before it. If the question before magistrates is one of costs, for example, *mandamus* has been granted against them and if they "have already considered that question, they may make a return, and state that they did consider the matter".[35] Of course, the courts will have little trouble in coming to a conclusion on this question of fact where the tribunal openly states that it cannot make an exception to its policy "even in a most deserving case".[36] In conceptual terms one can understand that in such circumstances the Council acted "on the basis of a preconceived policy or resolution when it should have dealt with the particular case before it".[37] Similarly, when a statute granted the officer in charge of police a discretion of whether or not to take fingerprints from a person in lawful custody, the court was able to conclude that his desire to do so in the face of an instruction issued by the Commissioner that he take fingerprints "in every instance" meant that he had not exercised his own judgment in the individual circumstances of this case.[38] And then there is the recent British Columbia case in

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[31] *R.* v. *Sylvester,* (1862), 31 L.J.M.C. 93, 121 E.R. 1093.

[32] *Wood* v. *The Widnes Corporation,* [1898] 1 Q.B. 463 (C.A.); *Tinkler* v. *Board of Works for the Wandsworth District,* (1858), 27 L.J. Ch. 342; *R. ex rel. Wilson* v. *Holmes,* [1931] 3 D.L.R. 218, at p. 224 (Sask. C.A.).

[33] *R.* v. *Sylvester, op. cit.,* n. 31, at p. 95.

[34] *Wood* v. *The Widnes Corporation, op. cit.,* n. 32, at p. 467.

[35] *R.* v. *Glamorganshire JJ., op. cit.,* n. 29, at p. 174.

[36] *R.* v. *L.C.C. ex p. Corrie,* [1918] 1 K.B. 68.

[37] *Leddy* v. *Saskatchewan Government Insurance Office,* 45 D.L.R. (2d) 445, at p. 457 (C.A.).

[38] *Sernack* v. *McTavish,* 15 Fed. L.R. 381 (A.C.T. Sup. Ct. 1970). On the police as an administrative agency and as public officers with a discretion to exercise, see Weiler, *The Control of Police Arrest Practices: Reflections of a Tort Lawyer in* A.M. Linden, *Studies in Canadian Tort Law,* (Toronto, 1968), 410, at pp. 461-467; Grosman, *The Prosecutor,* (Toronto, 1969), at pp.

which there was discussed the statutory power lying on the Superintendent of Motor Vehicles to suspend or cancel the licence of a driver who in his opinion is unfit to drive or operate a motor vehicle.[38] The defendant's affidavit disclosed that where a licensee had been convicted of impaired driving he was to be subject to a 30-day suspension "in every case". Because the Court of Appeal found that the circumstances surrounding the conviction were never considered, but rather the Superintendent's pre-determined policy governed every case of impaired driving entering his office, it concluded that he never entered into the inquiry required by the *Act* and had thereby exceeded his jurisdiction. These instances fall clearly into the last category of Bankes, L.J. because, as he and others have underscored, it is this tribunal that the evidence establishes has closed its mind to all but its own rule or general policy.

Moving away from this rather extreme position, one may ask whether the professions of a tribunal that it did hold the required hearing, listen to the applicant's submissions and never close its mind to exceptional circumstances will preserve its decision from judicial condemnation. Lord Hewart, in one such case, seemed to rest part of his judgment against the decision of licensing magistrates on the conclusion that even in these circumstances there would "be an abdication of the duty of the justices impartially to consider upon the particular facts the merits of each individual application".[40] This stand appears to conflict with the words expressed in the *Kynoch* case and more recently has been repudiated by Lord Goddard.[41] As the latter points out, the justices "may lay down for themselves a general rule but are bound to consider whether it is applicable to any particular case".[42] It is only too clear that the two Chief Justices differ on the weight each is willing to give the general rule adopted by a tribunal in the course of its decision-making. For once it is admitted that a tribunal may set general rules for its own future guidance, a premise that will have to be further examined, a certain tension invariably will grow up between them and the claim of an individual that they should not

23-25; Barker, *Police Discretion and the Principle of Legality,* (1966), 8 Crim. L.Q. 400; Gandy, *The Exercise of Discretion by the Police as a Decision Making Process in the Disposition of Juvenile Offenders,* (1970), 8 Osgoode Hall L.J. 329.

[39] *Lloyd* v. *Superintendent of Motor Vehicles,* [1971] 3 W.W.R. 619.

[40] *R.* v. *Rotherham JJ. ex p. Chapman,* [1939] 2 All E.R. 710, at p. 714.

[41] *R.* v. *Torquay Licensing JJ. ex p. Brockman,* [1951] 2 K.B. 784.

[42] *Ibid.,* at p. 789.

be applied to his particular circumstances. Because it is not uncommon to find that the individual appearing before an administrative body is there to obtain some benefit or advantage from it, whether that be the elevation of a restricted to a full licence,[43] the granting of an occasional licence,[44] the transfer of a licence,[45] permission to build a dock[46] or amendment of a municipality's by-law,[49] it perhaps is less surprising to find the courts more inclined to conclude that the burden lies on the individual to convince the tribunal that "on the facts of the particular case, there is enough to take it out of the general rule which they (the justices)have laid down".[50] On the other hand, where that rule has been formulated by a body that is empowered to deprive someone of a vested benefit or right only after it or a prosecutor has established the necessary factual foundation, there may be stronger grounds for believing that the courts should be more chary of placing this onus on the individual. This may help to explain why the courts were somewhat less generous to the official who sought to employ a general policy in favour of fingerprinting the complainant[51] or suspending his driver's licence.[52]

Another factor that may bear on the manner in which courts ultimately treat the self-created rule of a tribunal is the nature of the administrative body itself. For example, a Minister of the Crown is more likely than most other officials to have many of his responsibilities associated with matters of high policy and discretion. One would be quite naive to rely on this as a universal, for the reference by Martland, J.[53] to this special attribute can be countered by still other decisions such as *Padfield*[54] where the House of Lords found limits to the discretion exercisable by the Minister of Agriculture, and more recently in a decision of the British Columbia Court of Appeal that refused to interpret the

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[43] *Id.*

[44] *R.* v. *Rotherham JJ. ex p. Chapman, op. cit.*, n. 40.

[45] *R.* v. *Holborn JJ. ex p. Stratford Catering Co. Ltd.*, (1926) 136 L.T. 278.

[46] *R.* v. *Port of London Authority ex p. Kynoch Ltd., op. cit.*, n. 28.

[47] *Ex p. Forster, op. cit.*, n. 16.

[48] *Magistrates of Kilmarnock* v. *Secretary of State for Scotland, op. cit.*, n. 24.

[49] *Re Hopedale Development Ltd. and Town of Oakville*, [1965] 1 O.R. 259 (C.A.).

[50] *R.* v. *Torquay Licensing JJ. ex p. Brockman, op. cit.*, n. 41, at p. 792.

[51] *Sernack* v. *McTavish, op. cit.*, n. 38.

[52] *Lloyd* v. *Superintendent of Motor Vehicles, op. cit.*, n. 39.

[53] *Calgary Power Ltd.* v. *Copithorne*, [1959] S.C.R. 24, at p. 33. See also: *Dowhopoluk* v. *Martin*, [1972] 1 O.R. 311, at pp. 316-7 (High Ct.); *Re Board of Moosomin Unit No. 9 and Gordon*, 24 D.L.R. (3d) 505, at pp. 511-2 (Sask. Q. B.).

[54] *Padfield* v. *Minister of Agriculture*, [1968] A.C. 997.

power in the Minister of Finance to determine "in his absolute discretion" whether a testamentary purpose trust was charitable or not as anything but quasi-judicial in nature.[55] It may be thought that the validity of this factor is in some doubt both because of these contradictory illustrations and because more recent jurisprudence has divided on the merits, one case rejecting a Minister's reliance on pre-existing policy [56] whereas two others found nothing erroneous in his doing so.[57] And yet, these three do not disagree on the fundamental considerations at stake. Mention by Lord Reid that "a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule" [58] finds an even stronger proponent in Willis, J. who rejects the assistance of licensing cases "when considering the scope of a Minister's duties within a statutory framework".[59] However, there seems no disagreement with the proposition that a tribunal, in these cases a minister of the Crown, that has developed such a general rule does not act improperly "provided that the existence of that general policy does not preclude him from fairly judging all the issues" [60] before him: so long as it does not lead him "to refuse to listen at all".[61] And this seems none too different from the manner in which the self-created policies of lesser bodies are treated, a conclusion perhaps borne out by the judgment of Willis, J. who found against the Minister of Agriculture on this point. Never-

[55] *Executors of Woodward Estate* v. *Minister of Finance,* [1971] 3 W.W.R. 645. To be noted also is the attempt by s. 28(6) of the *Federal Court Act,* S.C. 1970, c. 1, to shield the Governor in Council and the Treasury Board from some aspects of judicial review. Certainly one might expect that the former would be even more deeply concerned with policy considerations than individual ministers of the Crown. And yet, however generous to these tribunals the courts are likely to be in deciding whether they refused "to listen at all", it must always be borne in mind that generally it is the *ultra vires* concept that has been used to strike down abuses of discretion and it is this selfsame concept that has permitted courts to escape even more strongly worded privative clauses than is to be found in this provision of the *Federal Court Act.*

[56] *Lavender and Son Ltd.* v. *Minister of Housing and Local Government,* [1970] 3 All E.R. 871.

[57] *British Oxygen Co. Ltd.* v. *Minister of Technology,* [1971] A.C. 610; *Stringer* v. *Minister of Housing,* [1971] 1 All E.R. 65.

[58] *British Oxygen Co. Ltd.* v. *Minister of Technology, ibid.,* at p. 625. See also: *R.* v. *Port of London Authority ex p. Kynoch Ltd., op. cit.,* n. 28, at p. 187.

[59] *Lavender and Son Ltd.* v. *Minister of Housing and Local Government, op. cit.,* n. 56, at p. 878.

[60] *Stringer* v. *Minister of Housing, op. cit.,* n. 57, at p. 80.

[61] *British Oxygen Co. Ltd.* v. *Minister of Technology, op. cit.,* n. 57, at p. 625.

theless, because a Minister is likely to be less accessible to the public than licensing tribunals or local authorities and to have the reasons for his decision more enshrouded by imponderable policy and departmental considerations, it comes as no surprise that the courts are somewhat more disinclined to fault a Minister for refusing "to listen at all".

In common law jurisdictions, which rely so heavily on the judicial process and precedent for their source of law, it is interesting that tribunals as well have imitated the courts to the extent of finding guidelines and rules in their own earlier decisions. The Americans have actively pursued this avenue as a source of "agency law". Though not valid subordinate legislation which without more must be obeyed by the tribunal and members of the public, adjudicated cases do serve as a means of formulating agency policy and, consequently, offer guidelines to what the agency may be expected to do in future.[62] Anglo-Canadian jurisprudence has followed similar lines of reasoning. When the Ontario Municipal Board dismissed an applicant's appeal because it had not brought itself within the principles enunciated in earlier decisions of the Board, the Court of Appeal admitted that this did tend to reduce the scope of the inquiry.[63] However, more importantly, they also offered "reasonable and wise"[64] guidance to the Board and, one might add, to the public at large but without assuming the character of rules with which the appellant must comply before its application would be granted. What is to be assessed is how rigidly and authoritatively a tribunal's earlier pronouncements and decisions are applied to the present case and whether that administrative body has given "due regard to the discretion which each application involves and to the changing and developing circumstances in which the *Act*, as distinct from the decisions, calls for interpretation and application".[65] The general words of Devlin, L.J. echo sentiments

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[62] See: *N.L.R.B.* v. *Wyman-Gordon Company, op. cit.*, n. 5; Friendly, *op. cit.*, n. 7; Robinson, *op. cit.*, n. 6.

[63] *Re Hopedale Developments Ltd. and Town of Oakville, op. cit.*, n. 49.

[64] *Ibid.*, at p. 265.

[65] *Merchandise Transport Ltd.* v. *British Transport Commission*, [1962] 2 Q.B. 173, at p. 186. See also judgment of Devlin, J. in this case, and *R.* v. *Flintshire C.C. County Licensing (Stage Plays) Committee ex p. Barrett*, [1957] 1 Q.B. 350; *R.* v. *Brighton Corp. ex p. Thomas Tilling, Lim.*, (1916), 85 L.J.K.B. 1552, 114 L.T. 800; *R.* v. *Prestwich Corp. ex p. Gandz*, (1945), 43 L.G.R. 97, 109 J.P. 157; Milner, *Planning and Municipal Law*, [1966] Special Lectures of Upper Canada Law Society 77, at pp. 147-9; Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, (1967), 45 Can. Bar Rev. 786, at pp. 819-20.

not confined to the form in which the general policy happens to be expressed: "a tribunal must not pursue consistency at the expense of the merits of individual cases".[66]

III. The Analytical Approach to the Policy Rule

The courts have met the issue of the pre-existing policy or rule on the field of discretion. If, in refusing to listen to the request of the individual applicant for waiver of the policy in a particular case or rejection of it altogether, a tribunal fails to heed "the dividing line between the legitimate pursuit of a general policy in a matter of administration and the enforcement of an extra-statutory regulation",[67] it will then have failed to address its mind to the case before it and exercise the discretion given it by statute. Conceptually, the tribunal has acted without jurisdiction or authority.[68] But it is not difficult to perceive how other doctrine might be brought to bear upon the matter. The applicant to the court for judicial review is complaining that an administrative body has formulated beforehand a policy or rule which it intends to apply to all cases of a similar nature coming before it. To that extent it has not only curtailed the scope of the adjudicative inquiry and the issues with which it will concern itself, but it may also be accused of having prejudged the matter. This reasoning process has led to the claim of bias being raised against a tribunal. If such a claim were to be successful, that would put an end to the capacity of bodies exercising quasi-judicial functions to adopt any extra-statutory rules or guidelines and, carried further, might well prevent these tribunals from even being able to refer to earlier decisions in the course of their reasoning. Not only would such a result play havoc with even the more limited doctrine of *stare decisis* applicable to the administrative process but, more fundamentally, it would destroy what certainty and consistency are

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[66] *Merchandise Transport Ltd.* v. *British Transport Commission, ibid.*, at p. 193.

[67] *Magistrates of Kilmarnock* v. *Secretary of State for Scotland, op. cit.*, n. 24, at p. 359.

[68] See: *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 A.C. 147, where the House or Lords played with the difference between "jurisdiction" and "nullity". Also to be noted are *Metropplitan Life Insurance Co.* v. *International Union of Operating Engineers*, [1970] S.C.R. 425; *Executors of Woodwards Estate* v. *Minister of Finance, op. cit.*, n. 55; Wade, *Constitutional and Administrative Aspects of the Anisminic Case*, (1969), 85 L.Q. Rev. 198.

offered by the presence of these rules and guidelines. As we have seen, the courts have readily accepted the need for the latter; it is therefore not at all surprising that the argument of bias, based on the existence of such policies alone, has been so readily rejected.[69]

In the *Hopedale* case the Court of Appeal referred to the desirability of tribunals' openly stating their guiding policies to the parties.[70] Particularly as pertains to the administrative body exercising a *quasi*-judicial function, the reason for this expectation is clear.[71] If the rules of natural justice are not to be offended, that tribunal must be careful that the hearing held by it affords the individual involved a sufficient opportunity to answer the allegations against him. That of course implies that beforehand he has been given enough information and notice with which to meet the case against him and part of that case may be a pre-ordained policy of the tribunal. As Lord Justice Bankes stated in the course of his much quoted judgment, such a tribunal must still hear the applicant and do so after it "intimates to him what its policy is".[72] More recently, Lord Reid echoed this sentiment or requirement when in demanding that an authority "always (be) willing to listen to anyone with something new to say"[73] he implied that the applicants must be made aware of the policy the effects of which they are seeking to escape. An individual denied adequate knowledge of the policy or rule that a tribunal intends to apply in his case can no more respond to the situation or allegations against him than the person who complains of *ex parte* representations or that materials and evidence on which the tribunal might base its decision and to which he has had no access have not been disclosed to him before the hearing.[75]

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[69] *Boyle* v. *Wilson,* [1907] A.C. 45. See also: de Smith, *op. cit.,* n. 13, at pp. 244-245.

[70] *Op. cit.,* n. 49, at p. 264.

[71] Although the expansion of the situations falling into the category of *quasi*-judicial and the growth of the idea of "fairness" in administrative decision-making *(op. cit., n. 14)* may make it difficult to foresee when an individual is entitled to natural justice and what quality of "fairness" he may lawfully claim.

[72] *R.* v. *Port of London Authority ex p. Kynoch Ltd., op. cit.,* n. 28, at p. 184. See also: *R.* v. *Holborn JJ. ex p. Stratford Catering Co. Ltd., op. cit.,* n. 45, at pp. 280-281; *R.* v. *Torquay Licensing JJ. ex p. Brockman, op. cit.,* n. 41, at p. 788.

[73] *British Oxygen Co. Ltd.* v. *Minister of Technology, op. cit.,* n. 57, at p. 625.

[74] *E.g., Errington* v. *Minister of Health,* [1935] 1 K.B. 249 (C.A.).

[75] *E.g., R.* v. *Ontario Racing Commission ex p. Taylor,* [1971] 1 O.R. 400 (C.A.).

This interplay of discretion, policy and hearing may, of course, be thwarted by legislation that denies the individual any opportunity to present submissions against the rule created by the tribunal for itself. In one recent case [76] the courts concluded that a superintendent was empowered by statute to suspend a licence without any notice or hearing at all. The relationship between these latter incidents and the power of this official to formulate a pre-existing policy for himself was not made the subject of comment, but rather the Court of Appeal was able to escape this possible snare by concluding that the superintendent had misapplied his policy.[77] And yet one is left with a feeling of unease that once a tribunal need not hold any form of hearing there is no way of exercising sufficient control on the manner in which it exercises its discretion and applies its rules and policies. Only a tribunal's own self-restraint and sense of fairness and integrity can accomplish this, and it is worthwhile here to underscore that in the *Lloyd* case, for example, the superintendent did file with the court a very candid and detailed affidavit setting forth the procedures he and his staff had been following. This merely emphasizes how unfortunate it is that procedural solutions, the epitome [78] of which is to be found in the volumes of the *McRuer Report*, should blind us to the more fundamental issues at stake.

Another interesting feature of a tribunal's adoption of a general rule or guideline focuses on the validity of the rule itself rather than on the lawfulness of the manner in which it was applied. Lord Justice Bankes, in referring to the policy having "been adopted for reasons which the tribunal may legitimately entertain",[79] established this as a condition precedent to the implementation of that policy. For example, the courts have upheld as "legitimate" the policy of the Port of London Authority against granting permission to construct docks or wharves on grounds that the Authority is charged with the duty of providing this accommodation; [80] the policy of the Board of Directors under the *Saskatchewan Automobile Accident Insurance Act* requiring all medical bills of claimants be routed to the Medicare Commission for payment; [81] the policy of licensing magistrates in favour of a minimum security of tenure for lessees in applications to them for the transfer

[76] *Lloyd* v. *Superintendent of Motor Vehicles, op. cit.*, n. 39.
[77] *Supra*, p. 320.
[78] Apotheosis might be even more accurate.
[79] *R.* v. *Port of London Authority ex p. Kynoch Ltd., op. cit.*, n. 28, at p. 184.
[80] *Id.*
[81] *Leddy* v. *Saskatchewan Government Insurance Office, op. cit*, n. 37.

of a public-house licence; [82] and the policy of the Secretary of State for Scotland against appointments of chief constables from within the force in question.[83] By now these illustrations will have become recognizable as instances of the doctrine recently revitalized by *Anisminic Ltd.* v. *Foreign Compensation Commission*,[84] which has permitted courts a wide and highly elastic measure of control over the exercise of administrative discretion. As that case, and the precedent relied on by their Lordships, bear out, a tribunal may commit an error of law rendering its decision a nullity where it bases that decision on a consideration outside the purview of the statutory provisions in question or where that decision fails to account for a consideration contemplated by the legislation. Our own situation looks at the former and asks whether the general policy adopted and applied by the tribunal can be described as a consideration that is within the contemplation of the legislative scheme in issue. Thus, the Minister of Housing in exercising planning authority may have and apply a policy with respect to the Jodrell Bank radio telescope when the proposed development is only four miles away,[85] and an education authority may exclude the students of Roman Catholic primary schools from non-Roman Catholic secondary schools where there is not enough room in the latter for all comers.[86] As Lord Denning states in respect of the latter decision, "if the policy is one which could be reasonably upheld for good educational reasons, it is valid".[87]

The Supreme Court of Canada recently has brought into bold relief the relationship between the general policy or rule of a tribunal and the *Anisminic* doctrine.[88] The *Ontario Labour Relations Act* granted the Board a discretion to decide whether "more than 55 per cent of the employees in the bargaining unit are members of the trade union".[89] In certifying a trade union the Board outlined in its reasons the policy it applied to the question of whether an employee was a member of the applicant union and the Board then proceeded to find that the evidence presented to it satisfied

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[82] *R.* v. *Holborn JJ. ex p. Stratford Catering Co. Ltd., op. cit.*, n. 45.

[83] *Magistrates of Kilmarnock* v. *Secretary of State for Scotland, op. cit.*, n. 24.

[84] *Op. cit.*, n. 68.

[85] *Stringer* v. *Minister of Housing, op. cit.*, n. 57.

[86] *Cumings* v. *Birkenhead Corporation*, [1971] 2 All E.R. 881 (C.A.).

[87] *Ibid.*, at p. 885.

[88] *Metropolitan Life Insurance Co. Ltd.* v. *International Union of Operating Engineers, op. cit.*, n. 68.

[89] *Labour Relations Act*, R.S.O. 1960, c. 202, s. 7(3).

the requirements of this policy. Because the Board addressed itself to this self-created criterion rather than to the demands of the statute being applied, the Board erred in law. This was a conclusion not in dispute amongst the various courts, but differing from the lower ones the Supreme Court concluded that the Board "failed to deal with the question remitted to it... and instead has decided a question which was not remitted to it...".[90] None of the courts[91] discussed whether the Board's policy had been blindly applied without listening to the submissions of the applicant,[92] but rather had concentrated their attention on the very applicability of the Board's practice to the case before it. It was the Supreme Court that, in light of the limits placed on the Board's discretion by the *Labour Relations Act,* concluded that this tribunal had allowed its decision to be influenced by a consideration or question not contemplated by the legislation.

This same issue became the essential *point d'appui* for Lord Goddard[93] who having to decide whether licensing justices could lawfully apply a policy against raising restricted licences to full ones was confronted by an earlier decision[94] in which Lord Hewart had agreed to grant *mandamus* in somewhat similar circumstances. Because in the latter the magistrates had only applied their policy after considering the exceptional matters raised by the applicant and after giving him a full and fair opportunity to avert its effects, the later court somehow had to avoid this precedent if licensing justices, and perhaps other tribunals, were to be able to adopt and implement informal rules and policies in their decision-making. Lord Goddard was able to do just that by noting that the earlier court had been concerned with a policy that would have forbade more than two occasional licences being granted to any one organization in a twelve-month period and, more critically, with the application of that policy against the applicant merely because at the dance he wanted to make money from the bar. Instead of

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[90] *Metropolitan Life Insurance Co. Ltd.* v. *International Union of Operating Engineers, op. cit.,* n. 68, at p. 435.

[91] [1969] 1 O.R. 412 (C.A.); [1968] 2 O.R. 37 (High Court).

[92] The reasons for the decision of the Board, quoted at some length by the Supreme Court of Canada, refer to its "long-standing policy" and as well to the submission of the employer that for purposes of interpreting "member" of a trade union in the legislation "the Board *must* look to the constitution" of the union. This, and the fact that the employer did not complain of a denial of natural justice, may serve to explain this omission.

[93] *R.* v. *Torquay Licensing JJ. ex p. Brockman, op. cit.,* n. 41.

[94] *R.* v. *Rotherham JJ. ex p. Chapman, op. cit.,* n. 40.

considering why the occasional licence was wanted and whether it was for the comfort and convenience of the public, very material considerations indeed, the justices had indulged themselves in playing with numbers, which was "bringing into consideration matter [*sic*] outside the Act altogether".[95] To revert briefly to the earlier discussion of the importance of the nature of the tribunal to the question of whether a tribunal's policy has improperly fettered its discretion, one should note that the rejection of licensing cases[96] where ministerial discretion is in play has vital significance. Where "a Minister or large authority" to which Lord Reid makes reference is performing adjudicative functions, be they *quasi*-judicial or purely administrative, the legislation under which it is operating very likely contemplates a much greater panoply of relevant considerations than would be the case where, for example, licensing justices were concerned. It may be pertinent to compare the position of a local governmental authority which under the *Education Act* was confined to "good educational reasons"[97] with the Minister of Housing and Local Government whose planning decision could encompass the efficient function of a radio telescope.[98]

Not too far removed from this situation of the policy or rule that turns out to be an irrelevant consideration to the question before a tribunal was the case where a municipality had contracted with two persons to license no other persons but them under statutory provisions that empowered the council to grant hackney coach and carriage licences in such number "as they think fit". Notwithstanding prior cancellation of this agreement the council continued to apply its terms by refusing to license any other proprietors. The court had little difficulty in concluding that in their attempt to give effect to an agreement which, if it had remained in effect, would have unlawfully inhibited their discretion, the council indirectly was attempting to accomplish the same purpose and had surrendered their judgment to the provisions of an illegal agreement.[99] Also illustrated by this case is the variety of forms

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[95] *R.* v. *Torquay Licensing JJ. ex p. Brockman, op. cit.*, n. 41, at p. 791.

[96] *Op. cit.*, n. 59.

[97] *Cumings* v. *Birkenhead Corporation, op. cit.*, n. 86.

[98] *Stringer* v. *Minister of Housing, op. cit.*, n. 85. See also: *R.* v. *Port of London Authority ex p. Kynoch Ltd., op. cit.*, n. 28, at pp. 185 and 187.

[99] For a recent example of the impact of a valid contract by a local authority on the limits of its discretion see *Dowty Boulton Paul Ltd.* v. *Wolverhampton Corporation*, [1971] 2 All E.R. 277. See also: Rogerson, *On The Fettering of Public Powers*, [1971] Public Law 288.

the policy may take: it may be found in a formal resolution or invalid by-law, an unlawful or unenforceable contract, earlier decisions of the tribunal, or, as often is the case, more casual dress.

IV. Individual Rights and the Policy Rule

It may here be asked how effectively the courts manage to channel this informal method of administrative policy-making past the Scylla of individuated adjudication and the Charybdis of formal rule-making. It has already been noted that by preventing a tribunal from applying a policy as generally and blindly as it might a regulation, the courts have tried to draw a qualitative distinction between the two. It is true that a regulation,[100] like its more informal counterpart, might be found inapplicable to the particular circumstances at hand, but this is far different from the way in which the courts are telling administrators to approach a self-created policy that may only too clearly bear upon the case before them. Unlike the valid regulation which in the absence of repeal binds all, including officialdom as well, the more casual policy or rule can be shunted aside as the tribunal sees fit. It does not apply *per se* to any given situation unless a tribunal wishes it to do so. Moreover, despite the legislative nature characterizing both and leading them to possess more general efficacy than flows immediately from the particularistic judicial, administrative or ministerial act, a regulation is less flexible for still other reasons. Not only must it be able to point to some rather clearly defined rule-making authority in the statutes under consideration, but it is also subject to the subsequent procedural niceties dictated by a variety of statutory instruments legislation. On the other hand, the general policy of a tribunal will find itself only subject to the condition of being relevant to, and within the contemplation of, the empowering statute.

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[100] *Alden* v. *Gaglardi, op. cit.*, n. 26, demonstrates the semantic trap that lies in wait for those that are unaware of the variety of expressions used synonomously with "regulation", on the one hand, and "policy", on the other. Already noted are rules and guidelines that may serve to describe the policies of a tribunal; and by-laws, rules and regulations can also interchange with one another. In *Alden,* the British Columbia *Social Assistance Act*, R.S.B.C. 1960, c. 360, s. 13, provided that the Director had the power to "establish regulations and formulate policies not inconsistent with this Act", and consequently the court concluded that the Director was exercising a subordinate legislative role when he formulated "policies" consistent with the *Act.*

We have already observed that the courts are far from blind to the possible erosion of formal rule-making by the formulation of policy. In the *Kilmarnock* decision[101] the solicitor-general conceded that the statute required the qualifications for the office of chief constable to be set out in the regulations. By concluding that the policy of the Secretary of State against internal appointments did not prescribe such a qualification, Lord Cameron distinguished between a general rule that he could apply or not as his discretion dictated and one that he had no alternative but to give effect to universally. This, of course, is to beg the very question being asked. And His Lordship was perhaps being more candid when he drew attention to the "narrow and sometimes difficult to draw" dividing line between a general policy and an extra-statutory regulation. Nevertheless, the court had little else on which to proceed, short of becoming highly conceptual and perhaps metaphysical in making this distinction, than the conduct of the decision-maker and how in the particular circumstances he perceived the general rule he was applying. Though describing that rule as mere "policy" the Secretary of State did not without more give effect to its demands. If he had thought of it as a universally applicable regulation one hardly would have expected him in his reasons for decision to give grounds for having adopted such a policy and to present additional reasons to the policy itself for his ultimate decision. Similarly in the *Forster* case[102] the University did not simply apply its invalid by-law as if it were valid. Although the Court of Appeal for New South Wales may have strained itself and the facts before it somewhat in characterizing the applicant's appearance before the Senate Committee as a hearing on the merits rather than an appeal, their decision emphasized that the Committee in fact was acting like a tribunal of first instance that did not feel itself bound by the invalid resolution in question. What the courts apparently consider crucial in making this distinction between a general policy and an extra-statutory regulation is whether the tribunal conducts itself in such a way as to convey the impression that it believes itself bound by the general rule in issue, or whether that rule forms but one consideration amongst others which that administrative body can accept or reject at will. Of course, it would be foolish to overlook realities and ignore the important, and on occasion vital, role played by a general policy in the exercise of administrative discretion. In earlier discussion that has been made only too clear.

[101] *Op. cit.*, n. 24.
[102] *Op. cit.*, n. 16.

But neither may the individual be so well protected nor the court so capable of observing the tribunal at work as the foregoing may have led the reader to believe.[103] It will be recalled how great an emphasis the courts placed on the right of the individual to present argument against the application of the policy in his special circumstances. That, classically, flowed from his right to be heard, a right that was thought to arise only if the tribunal was exercising a *quasi*-judicial function. If courts continue to draw their imaginary line between this function and the purely administrative act, it will be readily apparent that in the latter case, whether the individual knows of the existence of a general policy or not, he will be unable to complain of either the tribunal's refusal to listen to him or its failure to make him aware beforehand that it even had a policy it proceeded then to apply. The burden otherwise placed on a tribunal not "to refuse to listen at all" would have significance only where there was some duty cast on that body to hear or listen to the individual in the first place. It is here that one finds the seam binding the right to be heard to the *quasi*-judicial act has begun to rupture. For no longer are all courts as mesmerized by that classical *idée fixe* that saw fairness to all concerned subordinated to a conceptual imbroglio. "Fairness" has become the watchword, and in echoing the sentiments expressed by Davis, J.[104] more than three decades ago more contemporary judges have become ever favourably disposed to divorcing the characterization of a tribunal's function from that body's duty to "act fairly in accordance with the principle of proper justice".[105]

But even this more ample grant of fairness to the individual has its limitations where, for example, it is concluded not to be "required".[106] Beyond these borders neither the common law nor administrative procedure acts grant the right to a hearing before the tribunal that has created for itself a policy it may wish or mean to apply in the case before it. Without this hearing the individual is denied the ability to convince the tribunal of the ex-

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[103] See *supra*, p. 326.

[104] *St. John* v. *Fraser*, [1935] S.C.R. 441.

[105] *Ex p. Beauchamp*, [1970] 3 O.R. 607, at pp. 611-12. See also: *Schmidt* v. *Secretary of State for Home Affairs, op. cit.*, n. 26; *Breen* v. *Amalgamated Engineers Union*, [1971] 1 All E.R. 1148, *per* Lord Denning M.R. dissenting on another point; *In re Pergamon Press*, [1971] Ch. 388; *R.* v. *Birmingham City Justice ex p. Chris Foreign Foods (Wholesalers) Ltd.*, [1970] 3 All E.R. 945.

[106] *Ontario Royal Commission Inquiry into Civil Rights*, (1968) Report No. 1, at p. 213. For an interesting comparison, contrast the reasons of Pennell, J. in *Ex p. Beauchamp, id.*, and *Voyageur Explorations Ltd.* v. *Ontario Securities Commission*, [1970] 1 O.R. 237.

ceptional nature of his particular case and to ask for an exercise of discretion without reference to this policy. This consequence is in marked contrast to the very important factor that contributed to the willingness on the parts of the courts to permit tribunals to adopt and apply extra-statutory policies in the exercise of their discretion. The individual affected, by his representations to the tribunal, could emphasize that its discretion had to be exercised within the context of the specific case before it and its own particular facts and that a less than thoughtful application of its policy might indicate a failure to acknowledge the very presence of this individuated discretion. For it must be recalled that, save where the rules of natural justice or fairness may be said to have been breached, a tribunal's misuse of its own policy in the course of decision-making has found its cure within the realm of *ultra vires* and by reference to the administrative body's refusal to exercise this individuated discretion which alone it was authorized to put into play. Characterizing its function as "purely administrative" or as one guided only by the administrator's own views as to the policy he ought to pursue cannot thereby provide him with an escape-route if his discretionary power is of an adjudicative, non-legislative nature. He remains, as did the Secretary of State for Scotland, enclosed within parameters that forbid him from enforcing "an extra statutory regulation".

But, of course, if there is no hearing and the decision is made without any accompanying reasons to indicate the influence that the tribunal's policy may have played in the result, nothing on the face of the record will contribute a mite to an argument based on this kind of administrative abuse. Earlier discussion presented illustrations of how a hearing helped a tribunal to resist the temptation to conceal the extent to which its mind may have been closed by a general policy or rule. The exemplary candour of officialdom displayed in the *Kilmarnock* and *Lloyd* cases, without further research of a more behavioural nature, offers little evidence of a general pattern amongst tribunals. However, to harp on the evils that attend the failure of a tribunal exercising administrative powers to offer affected individuals a hearing or to be less than honest in signifying how it reached its decision may be to err on the side of asperity and cynicism. Certainly one implication of characterizing the tribunal's function as purely administrative is that this body has only its own policy considerations to bring to bear on the matter. Moreover, by not hearing other parties or disclosing the true grounds for its decision the tribunal also seems to be acknowledging that whatever policy may have been applied

in the situation there can be no doubt of its desire to keep that policy confidential. And one should not forget the influence that confidentiality plays in a court's deliberations. Evidentiary privilege is but one example of this, and the need for secrecy may similarly induce a court to find that a tribunal is exercising an administrative function. In other words, the confidentiality is more likely to be a contributing factor in characterizing the function being performed than a consequence of it. In addition, one cannot be too surprised at the judicial indifference, if not diffidence, towards how the tribunal then performs this function, including the weight it may have placed on a pre-existing policy. As has been stated in the Supreme Court, the administrative decision of the Minister of Agriculture in that case was "to be made in accordance with the statutory requirements and *to be guided by his own views as to the policy which in the circumstances, he ought to pursue*".[107]

V. Administrative Preference for the Policy Rule and Absence of Public Participation

But the interplay of a tribunal's self-created rule and the hearing that an individual should ordinarily be given to urge its inapplicability in his particular case has even wider ramifications than this. For, as Lord Reid pointed out, this hearing also offers the opportunity of "urging a change of policy", or, to be more accurate, of influencing what the content of that tribunal's rule shall be at any point in time. However informal the rule may be, it, like the more legislative regulation or by-law, reflects the presence of a general policy that has been adopted by an administrative body. One does not need to seek far for the reason prompting a tribunal faced with a multitude of cases and required to pass upon the individual merits of each of them to take refuge in certain rules of thumb. In the *Lloyd* case the trial judge,[108] though reversed on appeal,[109] described the forces driving the Superintendent of Motor Vehicles to adopt a general policy suspending the licences of drivers who were convicted of impaired driving. It would be unrealistic to demand that such a preconceived rule be abandoned.

> The sheer volume of the matters to be dealt with, and the entirely commendable motives indicated and objectives sought by the respondent in

[107] *Calgary Power Ltd.* v. *Copithorne, op. cit.*, n. 53, at p. 34. See de Smith, *op. cit.*, n. 13, at p. 171; Reid, *Administrative Law and Practice*, (1971), at pp. 150-151.

[108] [1971] 2 W.W.R. 523.

[109] *Op. cit.*, n. 39.

> the implementation of his policy in this area, justify policy decisions, the administration of which may, in my view and assuming the decisions themselves to be sound, be appropriately delegated to inferiors, which result in no discrimination as between drivers in *consimile casu*.[110]

Although the reference to delegation raises other nice issues of law, a large work-load may leave little alternative to an official such as the Superintendent, but to have subordinates exercise much of the authority given him on his behalf. Whether the adjudicative power be applied by this person or those under his control, there remain to be satisfied administrative efficacy and fairness to the individual. One cannot permit a tribunal to fall prey to the oppressive backlog of cases that at the moment dog the efforts of the Immigration Appeal Board and for the relief of which the courts apparently can offer no solution to those in the queue.[111] At the same time the oft-repeated criticisms of the sentencing process in criminal proceedings leads one to fear possible disparities in the way in which a multitude of cases before a tribunal are treated over time. Besides, to encourage a tribunal to ignore its own past experiences and the knowledge it has been accumulating is far from efficient or in tune with the idea of administrative expertise. It is in response to these problems, and hence as a functional means to a number of ends, that the concept of the general rule or guideline has prospered.

Individual adjudication too may not be so far removed from the arena of policy-making as some would like to believe. We have already observed situations in which administrative tribunals developed precedent for itself through the familiar device of *stare decisis* and, consequently, were able to manifest their policies in a more incremental manner. In other words, a tribunal may have no clearly defined policy in mind when it comes to decide the first few cases in any specific area. At such an early stage in its efforts there may be lacking a sufficiently clear appreciation of what exactly are the problems; only time and observation give an opportunity for acquiring the experience and sensitivity necessary for a more general understanding of what is at stake. Policy formulation can then begin to become a more reasoned, inductive exercise that permits a tribunal to develop the line of precedent most representative of the way it perceives that it and members of the public should conduct themselves in future. And so one finds[112] the Ontario Municipal Board harking back to its earlier

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[110] *Op. cit.*, n. 108, at p. 527.

[111] See: *R.* v. *Dick ex p. Bennett*, [1971] 2 O.R. 441.

[112] *Re Hopedale Developments Ltd. and Town of Oakville, op. cit.*, n. 49.

decisions for guidance in the case presently before it. The Board may not be able to bind its hands in this way, but who can doubt that only the naive would ignore the influence such a policy would have on that body's later actions and decisions. The manner in which an administrative body develops its policies out of the stuff of individuated adjudication and why this may be a good or bad method for doing so are themes that American commentators, particularly those interested in the behaviour of the National Labour Relations Board, have pursued in some depth.[113]

Nevertheless, tribunals can and do formulate policies in the course of adjudication. Whether they do so by reference to principles and guidelines to be found in their own earlier decisions or to a self-confessed policy they announce to the parties at or before the hearing may matter little to how they see their decision-making role. Further, and despite the muted protests of the law, in the course of adjudication they may find little to distinguish in impact between the formal regulation and the more casual rule. In analytical terms this phenomenon has already been noted in the discussion of the *Kilmarnock* case and Lord Cameron's reference to the difficulty in drawing the line between "the legitimate pursuit of a general policy in a matter of administration and the enforcement of an extra-statutory regulation".[114] The similarity between the two is emphasized to an even greater extent when their function has come to be discussed. The need "to confine, to structure, and to check necessary discretionary power" [115] through better definition of standards that guide the exercise of this discretionary power has produced two basic responses. Davis has called upon rule-making or regulations to accomplish this end, whereas Friendly [116] believes that administrative tribunals can also help themselves to reach this goal through adjudication and the promulgation of policy statements. What assumes great importance, therefore, is not the disparate ways in which the law has regarded the processes of rule-making and adjudication, but rather the close kinship between the two in the way they are put into play "to confine, to structure, and to check" the exercise of a tribunal's discretionary power.

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113 Peck, *The Atrophied Rule-Making Powers of the National Labour Relations Board, op. cit.*, n. 7; Peck, *A Critique of the National Labour Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making, op. cit.*, n. 7, Bernstein, *op. cit.*, n. 6.

114 Davis, *op. cit.*, n. 7, at p. 4.

115 *Ibid.*, chaps. III and VIII.

116 Friendly, *op. cit.*, n. 7.

After our earlier discussion of how the courts view the relationship between subordinate legislation and adjudication, it may be asked in turn how the legislative and executive arms of government have addressed themselves to this task. In the United States the *Administrative Procedure Act* requires generally that in the course of rule-making or adjudication an agency must hold a hearing. The hearings, however, differ from one another. Adjudication only requires that "interested parties" be given notice and an opportunity to be heard,[117] whereas in the exercise of its rule-making powers an agency must give "general notice of proposed rule making in the Federal Register" and then permit "interested persons" to make submissions.[118] Clearly, the latter places the more onerous demands on a tribunal, but it also recognizes that the general effects this subordinate legislation is likely to have on many segments of the public at large make it more necessary for it to harken to their views as one important step to the enactment of regulations. Subject to the demands of administrative productivity that cannot be ignored if government and society as a whole are to remain credible, there is also the need for recognizing that the presence of "fairness" in the administrative process and the desire to retain democratic institutions of government introduce credibility into this side of the equation as well. And so American legislation has prescribed what might be described as a form of prior accountability or responsibility on the part of the tribunal for the legislative power it exercises. But adjudication too may have consequences for a great many more people than the parties to the immediate proceedings before the tribunal. This we have already observed in the latter's use of precedent and the National Labour Relations Board's preference for prospective policy-formulation in the course of adjudication, which the Supreme Court approved.[119] And yet the functional similarity of the two processes in their creation and application of policy is not borne out in the less burdensome procedures required of the American agency exercising adjudicative power.

In Canada, common law and statutory attitudes towards subordinate legislation and adjudicative powers treat even more lightly the policy making consequences that tie the two even more closely together than the law is perhaps willing to admit. At common law, only the *quasi*-judicial function, and increasingly now some admin-

[117] 5 U.S.C., § 1004.
[118] 5 U.S.C. § 1005.
[119] *N.L.R.B.* v. *Wyman-Gordon Company, op. cit.*, n. 5.

istrative ones,[120] placed a duty on the tribunal to give notice and hold a hearing. Moreover, members of the public who could ostensibly influence its decision and any policy it might wish to adopt were usually limited to interested parties. Tribunals were made to resemble courts which while restricting those who might make submissions in the cases before them developed and announced their present and future intentions in the form of precedent. Since legislatures and executives could formulate policy without this prior recourse to formal notice and hearing, tribunals fulfilling similar roles were treated much the same. It is perhaps not too difficult to understand why this penchant for characterizing what the tribunal is doing at any particular time seems to flow almost naturally, irresistibly from a simplistic analysis of the basic institutions of government that earlier had produced the separation-of-powers doctrine. The growing willingness of the courts to breach the wall surrounding the *quasi*-judicial function in favour of granting some form of hearing to the person being subjected to a power more administrative in nature has found an echo as well in provincial legislation establishing procedures that tribunals in specified instances must follow.[121] But even here the statutory powers of decision that are made subject to these procedures exclude the authority to enact subordinate legislation.[122] Consequently, one can only conclude that the influence of conceptualism continues unabated: the acts of an administrative body may have immediate consequences for any number of persons, but for society as a whole it is the "ripple effect" flowing from the prospective formulation of policy in the tribunal's decision, rule or regulation that will have the more profound, general and long-term consequences.

However, in the area between adjudication and subordinate legislation there lie other instrumentalities by which tribunals can express their policies and put them into play. We have already noted how a less formal vehicle for expressing this policy, be it in the guise of adjudicative precedent, informal guideline or advisory opinion, is regarded by the courts as not possessing the binding force of statutory regulation. Whether a tribunal has found it necessary or desirable to make and apply policy in this way

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[120] *Op. cit.*, n. 105.

[121] *E.g.*, *The Administrative Procedures Act*, R.S.A. 1970, c. 2; *The Statutory Procedures Act*, S.O. 1971, c. 47.

[122] *The Administrative Procedures Act*, *ibid.*, s. 2(c); *The Statutory Procedures Act*, *ibid.*, s. 3(2)(h).

because it has no power to enact regulations,[123] because it wishes to avoid some of the consequences that attend subordinate legislation,[124] or because it genuinely desires to test a policy that is not yet "ripe for precise articulation",[125] the substance of what is being done should not be ignored unduly in favour of the manner in which it happens to be expressed. That, however, is far from saying that the variety of ways in which a policy may be pronounced does not serve other important objects. Policy statements or guidance rules permit a tribunal to experiment and test hypotheses without having to issue binding regulations or to pursue the time-consuming and uneven course of adjudication. Advisory opinions give individuals who might otherwise run afoul of the statutory scheme a firm indication from the tribunal in advance that their activities will or will not be permitted. The important role played by these various devices for expressing policy have been recognized informally by such tribunals as the Canadian Radio Television Commission which, though possessed of the power to make regulations and to adjudicate in the matter of licenses, has also made its presence felt by way of the more casual policy statement.[126] The Commission does however remain subject to the unusual requirement in Canada that it publish its proposed regulations in advance so as to give interested persons a chance to make representations.[127] Moreover, the Competition Bill that was introduced into Parliament in 1971 [128] and died when the Session ended made express provision for the formulation of guidance rules and advance rulings.[129] By formalizing the procedures and effects that were to precede and follow their issue the

[123] *E.g.*, even if the Ontario Labour Relations Board in the *Metropolitan Life Insurance case, op. cit.*, n. 68, had wished to legitimate their policy by way of subordinate legislation, they, unlike their American federal counterpart, were not given the power to do so by the Labour Relations Act.

[124] *E.g.*, *N.L.R.B.* v. *Wyman-Gordon Company, op. cit.*, n. 5, at p. 764.

[125] Friendly, *op. cit.*, n. 7, at p. 1297. See also Fisher, *op. cit.*, n. 10, at pp. 253-255; Davis, *op. cit.*, n. 7, at pp. 102-103.

[126] See press releases of the Commission dated June 17, 1971, July 16, 1971, and October 13, 1971. These concerned public statements made with respect to extension of television service to inadequately serviced areas of Canada, cable television and self-regulation by advertisers. A more recent example found the Chairman of the Commission making a speech on the Canadian-content regulations, and in his report of its substance a reporter referred "to the rubber chicken circuit in which he (the Chairman) makes speeches which point the way without being specific:" (Toronto Globe and Mail, February 25, 1972, at p. 14, col. 1).

[127] *Broadcasting Act*, R.S.C. 1970, c. B-11, s. 16(2).

[128] Bill C-256, 19-20 Eliz. II (1970-71).

[129] *Ibid.*, ss. 44-45.

Bill no doubt hoped to retain many of their benefits while simultaneously avoiding such disadvantages as extensive and prolonged adjudication proceedings, uncertainty, notice of their contents, how binding they were and the absence of any imput by the public.[130]

But what a startling contrast exists between these methods of formulating policy and subordinate legislation. Adjudication proceedings often allow parties to be heard and to present arguments against whatever policy it is that the tribunal has adopted in the past or intends now to formulate. Even the extra-statutory policy statements of the CRTC still remain subject to implementation, and that in itself may subject these expressions of intent to the hearing requirements of the *Broadcasting Act* and natural justice. Moreover, such statements may well include undertakings to hold hearings, to consult with persons involved and to accept representations before the Commission adopts a final position on the matter.[131] The sections of the Competition Bill that made provision for rules and rulings were even more clear about the way in which the public may influence the ultimate position of the tribunal. For example, the Bill set forth a procedure that would have allowed the public and persons who in the opinion of the tribunal were likely to have a material interest in the draft guidance rules to make representations before they were adopted.[132] Similarly, an advance ruling was to be preceded by a hearing at which the applicant and others appearing to the tribunal to have an interest in the matter could make representations.[133] On the other hand, the substance of any subordinate legislation generally is not subject to any form of hearing or representations. Apparently, the public are thought to be sufficiently protected by the machinery of *ultra vires* and statutory instruments legislation, neither of which offer the individual the opportunity of speaking to the merits or substance of the regulation in issue. Professor Stone, for example, describes

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[130] See explanatory notes accompanying the Competition Bill and tabled in the House of Commons on June 29, 1971, at pp. 66-68. With respect to the desire to give binding effect to these guidance rules and advance rulings it is appropriate to recall the legal consequences of not making statutory provision for such machinery. In footnote 11, there are references to income tax jurisprudence and to bulletins of the Department of National Revenue which purport to make advance rulings binding on the Department. Compare both situations with the British use of "circulars" issued pursuant to some statutory power (de Smith, *op. cit.*, n. 13, at pp. 58-60).

[131] See press releases of the CRTC date May 22, 1970 and February 18, 1971.

[132] *Op. cit.*, n. 128, s. 44(2).

[133] *Ibid.*, s. 45(2).

prompt publication an dready access to regulations as an important control-device:

> yet it is little more than this, and it scarcely touches the question of paramount control of administrative policy-making.[134]

The case for rejecting the kind of hearing contemplated by the *Broadcasting Act* and the Competition Bill is hardly assisted by the *McRuer Report*[135] which not only spoke of the delay and duplication that would attend any requirement for compulsory prior hearings but in addressing itself to the real question of the control of "administrative policy-making" concluded that "extensive consultations usually take place" with persons who will be affected. Unfortunately, no evidence of the extent or efficacy of this procedure is presented. It is therefore useful to compare what this *Report* said with the *Report of the Special House of Commons Committee on Statutory Instruments* which though in the end reaching the same position presented a modicum of data on the amount of consultation that precedes regulation-making.[136] Although the Committee recommended that regulation-makers consult with persons directly affected and with the public at large, no machinery for carrying out this task was suggested, nor could any other inference be drawn but that a more covert and behind-the-scenes form of consultation would continue and it would be the organized groups in society that would likely have the ear of officialdom.

VI. Discretion: The Common Characteristic

It is somewhat unremarkable now to conclude that in formulating and breathing life into its policies a tribunal is exercising but a single facet, albeit a most important one, of the discretionary power conferred on it. As has already been observed, there is available a variety of modalities or instrumentalities by which a policy may be expressed, but all have this in common. Whether the tribunal is acting by means of regulation, the less formal rule or guideline, advisory opinion, or adjudicative order or decision, it is merely selecting a vehicle for indulging in policy-making or planning through the exercise of discretion. It is true, of course, that there are great differences amongst these various methods

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[134] Stone, *The Twentieth Century Administrative Explosion and After,* (1964), 52 Calif. L. Rev. 513, at pp. 524-525.

[135] *Op. cit.,* n. 106, at pp. 362-364.

[136] House of Commons, Third Report of the Special Committee on Statutory Instruments, (1969), ch. 3.

and that they themselves may well be determinative of how a tribunal with freedom to choose elects to proceed. Equally interesting is the manner in which these modalities may happen to interplay: how, for example, a tribunal's informal rule is given substance and impact in an adjudicative proceeding.

But apart from whatever interplay the law is willing to allow, to what extent should the choice of modality be left open? This of course becomes a question of the appropriateness of the instrument used for expressing policy to the particular circumstances in which the tribunal exercising its discretion happens to be operating. It may well be that the legislature or executive establishing the administrative scheme is sufficiently wise and prescient to choose for the tribunal. Then again, it may be thought best to permit this body to choose for itself. By way of illustration, one may ask whether in the *Metropolitan Insurance* case the Ontario Labour Relations Board, if given the choice, would have preferred to promulgate the policy applied by it there in the form of subordinate legislation. And yet, we have a similar body in the United States eschewing such formality in preference for prospective adjudication. The Competition Bill did attempt to make available to its tribunal an array of weaponry for expressing policies. At the same time, however, the Bill saw fit to introduce markedly "judicialized" procedures into the process and to risk thereby the appearance in Canada of the unfortunate American experience.

Nevertheless, the modalities made available to a tribunal or chosen by it for developing policy must be observed against a backdrop of even more basic proportions. The very function of the administrative process and of establishing government-by-tribunal in a particular area cannot help but raise fundamental issues of where the responsibilities of these bodies lie. And ultimately, therefore, the question of modalities will have to measure itself against the tribunal's responsibility for accomplishing the objects which it has been obligated to undertake while at the same time remaining accountable for its conduct.[137]

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[137] See generally Spiro, *Responsibility in Government* (1969).