

JUDICIAL REVIEW OF UNIVERSITIES — THE VISITOR AND THE VISITED

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The University visitor is a truly remarkable figure in English law. Described by one writer as “redolent of monarchical paternalism in an isolated unworldly community of scholars”¹ this once remote figure has become prominent again because of judicial decisions and academic writings which have been mostly descriptive rather than critical of his allegedly exclusive jurisdiction in University disputes.² Now the visitor is about to exercise his jurisdiction in a New Zealand university (apparently for the first time³) and a critical examination of the visitor’s potentially far-reaching powers in the local context is clearly needed. For although the caselaw on the visitor is mostly both dusty and clouded one clear point to emerge from the case is that the courts feel jurisdictionally barred from reviewing any matter which they consider to be within the purview of the visitor. Thus if, as some university officials believe. . . “the visitor has almost whatever powers he chooses to exercise”⁴ the courts would indeed be emasculated. Fortunately the cases do not go that far. At the same time, however, there has been no marked judicial tendency to openly contract the limits of the visitor’s traditionally awesome power. For example Megarry V-C recently described the visitor as “. . . a valuable institution for contemporary society, and one which ought to be supported and maintained” (see *Patel v Bradford University* [1978] WLR 1488, 1500). Surprisingly such judicial acceptance of the visitor has been accepted with equanimity and even approbation by most recent writers.⁵

Yet unquestioning deference to such an archaic institution would seem inappropriate in a period of creativity in administrative law and in a time when the courts are in the process of unshackling old limitations on their

¹ A. Samuels “The Student and the Law” (1972) 12 JSPTL 252, 260.

² See especially J. W. Bridge “Keeping Peace in the Universities: The Role of the Visitor” (1970) 86 LQR 531; W. M. Ricquier “The University Visitor” (1978) 4 Dalh LJ C47; T. G. Mathews (1980) 11 University of Queensland L.J. 152; P. M. Smith “The Exclusive Jurisdiction of the University Visitor” (1981) 97 LQR 160 and R. J. Sadler “The University Visitor: Visitatorial Precedents and Procedure in Australia” (1982) 7 University of Tasmania Law Review 2.

³ See the correspondence of 28 June 1982 from the Solicitor-General, D. P. Neazor, to the Association of University Teachers (AUT) published in (1982) 77 AUTNZ Bulletin. In 1974, however, the Governor-General declined to act as Visitor in a dispute concerning the History Department at the University of Waikato—this information was provided by the Registrar of the University of Waikato in correspondence of 18 June 1982 to the author.

⁴ Stated in correspondence of 23 June 1982 from the Registrar of Victoria University to author. Compare this attitude with attitudes revealed in a survey conducted of 300 Registrars in the United Kingdom in which no Registrar suggested that the powers of the Visitor were important to a study of contemporary University government—discussed in G. C. Moodie and R. Eustace “Power and Authority in British Universities” (London, 1974) at pp.40-41.

⁵ *Supra* fn 1; Bridge at p.544-551; Ricquier at pp.683-684; Sadler at pp.30-31.

right to review. Modern circumstances require a modern, revitalised theory of visitatorial jurisdiction and one which leaves the way open for judicial review of University action when appropriate. Redefining the visitor's role may involve unrepentantly rejecting anachronistic judgments and dicta; but, it is submitted, such an exercise would provide the visitor with a role more in keeping with the spirit, if not the letter, of the old caselaw.

The traditional role of the Visitor

Historically the visitor originated in common law as an ecclesiastical functionary concerned both to supervise the administration of a church or a religious foundation and to prevent and correct offences in those foundations. Eventually certain lay charitable corporations known as eleemosynary corporations also came into being for the purpose of distributing charity. Such corporations (as hospitals, schools, and colleges) were established by a private founder and became liable to visitation and control either by the founder and his heirs, or by a person designated by the founder as Visitor. It can be noted though that any civil corporations (such as municipal or commercial corporations) which were created for purely secular or temporal purposes were not subject to visitation and consequently fell under the full jurisdiction of the courts.

Thus whereas the colleges of the ancient Universities of Oxford and Cambridge were eleemosynary corporations of a private nature for the promotion of learning and support of people engaged therein, the Universities themselves were civil corporations created for the temporal purpose of administration and coordination of the colleges' activities. The colleges were therefore subject to visitatorial jurisdiction; the Universities were subject to the courts.

The locus classicus of visitatorial jurisdiction in University disputes is the judgment of Sir John Holt CJ in *Philips v Bury*.⁶ In that case the Chief Justice firstly distinguished the two types of corporations described above and then declared:

“. . .the office of Visitor by the common law is to judge according to the statutes of the College, to expel and deprive upon just occasions and to hear appeals of course. And from him and him only the party grieved ought to have redress; in him the founder have reposed so entire confidence that he will administer justice impartially that his determinations are final and examinable in no other court whosoever”.⁷

Numerous subsequent cases concerning disputes within the Oxbridge Colleges made essentially the same points.⁸ The Founder of a College had the right to do with his property and goods as he wished. If he vested charity in persons who were to receive the benefit he then had the right

⁶ 1 Ld Raym 5; Lord Holt CJ was in fact dissenting from the majority in the Court of King's Bench but his judgment was later upheld by the House of Lords in Show 35.

⁷ *Ibid.*, at 8.

⁸ The old cases are canvassed in detail by the writers enumerated supra fn 1. See especially Bridge and Smith. See also R. Pound "Visitatorial Jurisdiction" (1936) 49 Harv. L. Rev. 369.

to make them subject to private laws of which a designated visitor should be the judge. Moreover the visitor had the responsibility for the internal management of such a private institution and the visitor's powers ranged from hearing appeals against expulsion to exercising the power of expulsion itself. In such matters the visitor's jurisdiction was final and exclusive and no action with respect to such matters could lie in the courts.

In the C19th Sir Richard Kindersley V-C delivered an important and oft-cited judgment of which the tenor was a strong reaffirmation of the orthodox view of visitatorial jurisdiction. However in one crucial sentence, not yet fully explored by the courts, the learned judge offered a means of escape from the visitor's grip. The case of *Thomson v University of London* concerned the disputed award of a Gold Medal in Law (which was clearly an internal matter) and Sir Richard Kindersley V-C in the course of his judgment declared:⁹

“ . . . Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus of the institution is properly within the jurisdiction of the Visitor and only under the jurisdiction of the Visitor, and this Court will not interfere in those matters: but when it comes to a question of right of property, or rights as between the University and a third person *dehors* the University or, with regard, it may be, to any breach of trust committed by the corporation, that is the University, and so on, or any contracts by the corporation, not being matters stated to the mere management and arrangement and details of their domus then indeed this Court will interfere.”

Thus any questions of property, or of trusts, or of rights of persons outside the University or most significantly, of contracts not involving the management or detail of the domus would be questions within the province of the courts.¹⁰ The opportunity was now open for Courts to assert control by, for example, categorising an appropriate University dispute as contractual and thereby claiming jurisdiction. Such categorisation would not be too difficult. For instance it is clearly possible for the courts to find a contractual relationship between a student and his University—assuming the student has paid his fees and signed his matriculation declaration.¹¹

⁹ (1864) 33 LJCh 625 at 634.

¹⁰ For illustrative cases on questions of trusts see *Green v Rutherford* (1750) 1 Ves Sen 462; on questions involving persons outside of the University see *Ex p Davison* (1772) 1 Cowp 319 as set out in *R v Grundon* (1735) 1 Cowp 315, 319; on contract see *R v Dr Windham* 1 Cowp 377. The list of exclusionary questions would not be exhaustive—e.g. *quaere* any questions of breach of natural justice discussed in text. (But see *Herring v Templeman* [1973] 2 All ER 581 (affd on different reasoning [1973] 3 All ER 569)).

¹¹ See two English cases reported, regrettably, only in the London Times: *Sammy v Birbeck College* The Times 3.11.64 (also (1964) 108 Sol Jo 897) and *D'Mello* The Times 17.6.70 (a fuller judgment is reported in the NCCL's Report on "Academic Freedom and the Law" (London, 1970 at pp.64-65)). In Canada the question of any contractual relationship between student and University was left open by Spence J in the Canadian Supreme Court in *King v University of Saskatchewan* (1969) 6 DLR 120, 128 but such a relationship has been accepted in both *Langlois v Rector and Members of Laval University* (1974) 47 DLR 674 and *Governors of Acadia University v Sutcliffe* (1978) 85 DLR 115. In the USA it has been accepted in such cases as *Anthony v Syracuse University* (1928) 231 NY Supp 435 and discussed in "Academic Freedom" 81 Harv L. Rev 1045, 1145-1197 (author unknown). The contractual analysis of University disputes has however been criticised on policy grounds by Bridge *supra* fn 1 at 548-549.

This could mean that University authorities are contractually bound by implication to provide proper tuition and to employ professional skill and competence in the assessing of examinations (see *Sammy v Birbeck College*¹²) But the courts have been somewhat unimaginative and have neglected to seize the opportunity. Thus in *Thorne v University of London* [1966] 2 QB 237 a claim in negligence for misjudging a student's papers was smartly dismissed on the sole ground that these matters fell within the exclusive jurisdiction of the visitor and outside the jurisdiction of the court. Perhaps judicial reticence to review such matters is appropriate; but unquestioned submissiveness to an allegedly exclusive visitatorial jurisdiction surely is not.

Yet if anything the more modern English authorities have expanded rather than restricted the ambit of the visitor's jurisdiction. In *R v Dunsheath ex p Meredith* [1951] 1 KB 127, 132 Lord Goddard CJ suggested, obiter, that not only did the visitor have jurisdiction over the traditionally defined area of an election to a fellowship but also over the previously undecided area of ". . . whether a particular person is a fit and proper person to be appointed and retained as a teacher at a University". Similarly in *Patel v Bradford University* (supra) Megarry V-C asserted that the visitor's exclusive jurisdiction was not confined, as previously thought, *ratione personae* to persons who are members of the University but rather was founded *ratione materiae* to all questions of "disputed membership". Thus he concluded ". . . it is much a function of a visitor to determine what persons lawfully have or ought to have become members of the corporation as it is to determine whether a member has or has not lawfully been removed".¹³ And so the implication from that learned judge's reasoning was that not only could a person in the applicant's position seek visitatorial adjudication (as a student seeking readmission) but that an applicant rejected for admission could apparently also apply. The old authorities had not even obliquely hinted at that.

The Need for a New Reality

The modern New Zealand University is eleemosynary in the sense that it is established for the promotion of learning,¹⁴ but nevertheless it is radically different from the Oxbridge Colleges in which visitatorial jurisdiction took root. Entirely new reasons would therefore be needed to justify the retention of ancient visitatorial powers. As Powell J recognised in the U.S. Supreme Court in *National Labour Relations Board v Yeshiva University* 63 L.Fd 115, 138 "[t]he university of today bears little resemblance to 'the community of scholars' of yesteryear. Education has become big business. . .".

¹² *Ibid.* Compare though *Thomson v University of London* supra, fn 9.

¹³ [1978] 1 WLR 1488 at 1497 (Affd 1979 1 WLR 1066).

¹⁴ See, for example, s.3(1) University of Canterbury Act 1961. The empowering Acts which established the four universities of Auckland, Victoria, Canterbury and Otago in 1961 and Massey and Waikato in 1964 gave them essentially the same constitution. For the sake of simplicity illustrative examples will generally be taken from the University of Canterbury Act 1961.

In the times of *Philips v Bury* (supra) the Oxbridge College was a small closed community of learned men, which had been established by a benevolent founder for the purpose of promoting learning. Enjoying a stipend from the Founder's bounty they agreed as members of the College to be bound by the Founder's private laws.

The present New Zealand University however has a vastly expanded membership which includes undergraduates¹⁵ and the university is a public institution "founded" or established by statute for the public purpose of higher education. The university is founded to large extent by the government through recurring quinquennial grants (distributed by the University Grants Committee) and it unquestionably is public rather than private in its nature. Prima facie it should therefore be subject to public scrutiny in the courts.

This conclusion is reinforced when other changes in the university are considered. The Oxbridge Colleges had an essentially religious base with common ideals and values. This is in marked contrast to the modern New Zealand university which by its first empowering statute was prohibited from administering any religious test¹⁶ and which in the present day has quiet incoherent and disparate goals and values. Similarly the Oxbridge College was authoritarian in both structure and spirit whereas the modern university is essentially democratic with both staff and occasionally students participating in decisionmaking.¹⁷

Frequently the old cases explained that the Visitor was the person best equipped to interpret the statutes and regulations of the eleemosynary corporation as he had a familiarity with them not enjoyed by the courts.¹⁸ This argument had some validity when the visitor was a bishop administering provisions of an essentially charitable foundation and it had some validity even in later years when the common visitor was the Lord Chancellor as representative of the Crown. However in New Zealand it could not seriously be contended that the Governor-General as Visitor of the universities has more expertise in interpreting Acts of Parliament than does the High Court.¹⁹

For all these reasons it is not surprising there are numerous dicta in

¹⁵ Ibid. s.3(2). In former times only the scholars amongst the undergraduates were members (see *Patel v Bradford University* supra at 1500); and as recently as 1969 Harman J described undergraduate membership of a University as "unusual" (in *University of Essex v Ratcliffe* "The Times" 27.11.69). The expansion in membership means the Visitor's potential jurisdiction has become much more formidable.

¹⁶ See s.14 New Zealand University Act 1879. Also s.12 University of Otago ordinance 1869 (now a schedule to the University of Otago Amendment Act 1961).

¹⁷ See AUT report "University Government and Organisation" (1965) and Report of Committee on University Government (1972). See also, for example s.6(2)(h)-(j) University of Canterbury Act 1961.

¹⁸ See for example *Att-Gen v Talbot* 3 Atk 663, 675 R v *Bishop of Ely* 5 T.R. 475, 477. (More recently see *R v Dunsheath Ex p Meredith* [1951] 1 KB 127, 134.)

¹⁹ See, for example, *Graeme-Evans v University of Adelaide* (1974) 6 SASR 302 in which Wells J construed s.12 University of Adelaide Act 1972 in order to determine the eligibility of a graduate as an undergraduate representative of the Council. No reference was made to s.20 of the same Act appointing the Governor as Visitor and the procedure of originating summons was described as "entirely appropriate" (at 303).

Commonwealth decisions expressing doubts whether the Visitor's powers remain unabated.²⁰

As Dickson J said in his dissenting judgement in the Supreme Court of Canada *Re Harelkin and University of Regina* (1979) 96 DLR (3d) 14 at 33, "...one might well question the practical relevance of this English institution to a modern Canadian University"; and it is perhaps significant that despite the statutory provisions for a Visitor the respondent University in that case did not even attempt to argue that exclusive jurisdiction lay with him.

The New Zealand Position

The key but somewhat obscure provision in all empowering statutes of the six New Zealand universities is to the effect that:

"the Governor-General shall be the Visitor of the University and shall have all the powers and functions usually possessed by Visitors".²¹

The history of this statutory provision is interesting. Prior to the establishment of autonomous universities in 1961 the powers of the Governor-General as Visitor of the University of New Zealand were different from the powers of the Minister of Education as Visitor of the four constituent universities within the federated system.

The Visitor to the governing university of New Zealand was clearly in a subordinate position to the Council. It was stated in s.17 of the New Zealand University Act 1870 (and in subsequent enactments for the University until 1961) that the Visitor: "...should have authority to do all things which appertain to Visitors in such manner as shall from time to time be directed by the Governor with the approval of the Council of the said University". Within the constituent Universities the Minister of Education was given powers equivalent to those now granted to the Governor-General as Visitor in the 1961 Acts.²²

Although in the light of the 1961 enactments it is impossible to argue that the Governor-General is still a mere agent of the University Councils this previous express limitation on his powers is of some interest when considering what the visitor's "usual" powers were then assumed to be.

However in the only judicial consideration in New Zealand of visitatorial jurisdiction Turner J held in *Bell v University of Auckland* [1969] NZLR 1029 that his area of jurisdiction was that prescribed by Sir Richard Kindersley V-C in *Thomson v University of London* (supra).

In *Bell's* case a lecturer brought an action against the respondent University alleging breach of contract of employment. He argued that by

²⁰ See, for example, dicta of Halse Rogers J in *Ex p King; Re University of Sydney* (1944) 44 S.R. (NSW) 19 at 43 and in *Ex p McFayden* (1945) 45 S.R. (NSW) 200 at 205; also dicta of Brossard J in *R v Royal Institution for the Advancement of Learning ex p Fekete* (1969) 2 DLR (3d) 129 at 138. cf the views of Lord Goddard in *R v Dunsheath ex p Meredith* [1951] 1 KB 127, 133 to the effect that statutory incorporation of a visitor does not affect visitatorial jurisdiction.

²¹ See, for example, s.5 University of Canterbury Act 1961 (Note s.5 Lincoln College Act provides that the Minister of Education shall be the Visitor of the College).

²² See, for example, s.4 Canterbury University College Act 1933.

virtue of certain notices and letters it was an express contractual term that his application for promotion would be determined by the Promotions Advisory Committee of the University Council but that in fact it was determined by the Education Committee. The University moved to strike out the statement of claim on the basis that the jurisdiction of the Court had been taken away by statutory provision for a Visitor.

The applicant submitted in response that the office of Visitor was a purely ceremonial position but this argument was firmly rejected by Turner J. His Honour held that if the issue in dispute had been one which “traditionally” lay within the exclusive province of the Visitor he would have declined jurisdiction and he accepted as authoritative cases such as *Thomson v University of London* (supra) and *R v Dunsheath ex p Meredith* (supra). Nevertheless Turner J seized on the tantalizing dicta of Sir Richard Kindersley V-C in the former case and held that questions of contract of employment could conceivably remain in the domain of the courts notwithstanding the appointment of a Visitor. On this basis his Honour refused to strike out the statement of claim although he did acknowledge that at a later stage of the trial no course of action might be disclosed.²³

The judgment is of some significance. As suggested before, the exception of contractual questions, if developed, could drastically whittle away the Visitor’s traditional powers, which Turner J did in fact suggest were extant. The contractual exception had certainly been recognised in the old caselaw but only in the limited context of a contractual dispute between the University and some person outside the University. Here Turner J was hinting that the arguably internal question of a promotions dispute between the university and one of its members could also be classified as contractual with the consequence that the Visitor’s exclusive jurisdiction was thereby ousted.

This decision which has already been followed by several Canadian courts²⁴ may point the way to New Zealand courts breaking the stranglehold of the old caselaw. Certainly in the early case of *Tubbs v Auckland University Council* (1908) 27 NZLR 149 which concerned the summary dismissal of a Professor—an issue which under many authorities should have fallen under the purview of the Visitor—Denniston J also determined the dispute on a contractual basis without averting to the existence or jurisdiction of the Visitor.

Confirmation that the Visitor in New Zealand enjoys a rather more confined role is provided by two other decisions on the interpretation of university legislation. Under traditional caselaw one of the Visitor’s primary functions was the interpretation of the University’s empowering legislation and internal statutes (see, for example, *Attorney-General v Stephens* (1737) 1 Atk 358). Yet in *Clifford v University of New Zealand* [1945]

²³ In fact the plaintiff’s action was subsequently unsuccessful. Information to this effect was kindly provided by the Registrar of the University of Auckland.

²⁴ *Re Webb and Simon Fraser University* (1978) 83 DLR (3d) 244, 246-247; *Riddle v University of Victoria* (1978) 84 DLR (3d) 164, 165 (affd [1979] 3 WWR 289), and see also *McWhirter v University of Alberta* (1976) 63 DLR (3d) 684, 716. Note that Bridge op. cit. suggested Turner J’s approach was inconsistent with the category of cases represented by *R v Dunsheath ex p Meredith*.

GLR 396 the issue concerned the correct interpretation of two clauses in an internal statute of the respondent university relating to the Bachelor of Laws degree; the court however proceeded to analyse closely the provisions of the statute without mentioning the Visitors existence. (Indeed the result of the case was that the Court awarded mandamus compelling the respondent to admit the enrollment of the applicant student). Similarly in *University of New Zealand v Solicitor-General* [1917] NZLR 353 the Full Court of the Supreme Court considered the interpretation of a provision in the empowering New Zealand Universities Act 1908 concerning the respective powers of the Senate and Board to make statutes and regulations. Again, no reference was made to the Visitor's jurisdiction and the court noting that by Act of Parliament the Senate was "the sole judge" of an emergency (which thereby increased the Senate's powers) announced at 360:

"[t]he Governor in Council is not a Court of Appeal to determine whether such emergency has arisen, although he is the authority to consider whether the particular statute or regulation is one to which he should give his approval or sanction".

This comment, although not directly relevant to the question of visitatorial jurisdiction, does lend some weight to the view that the Governor-General is not necessarily the proper body to determine all University questions.

Further questions arise as to the role of the Visitor in New Zealand when consideration is given to internal University legislation. It must be remembered that the Visitor's powers are limited by Act of Parliament to those "usually" possessed and that the powers of the Visitor in New Zealand are therefore subject to University conventions and perceptions. Thus any indication, in either the empowering or the internal legislation which suggest that the University is subject to judicial review rather than visitatorial review are of some relevance because one of the former arguments in favour of visitatorial jurisdiction was the view that the Founder of the University College intended his creation "to be free of all foreign suits" (*Dr Patrick's* case 1 Lev 65, 66).

However s.1 of the University of Otago Ordinance 1869 (which was the original empowering legislation for the University of Otago and is now a schedule to the empowering 1961 Act) provides that the University shall:

". . . answer and be answered unto in all Courts of New Zealand".

Otago's Disciplinary Regulations also provide Part VIII, reg.7 that:

"[n]othing in these regulations is intended to exclude the jurisdiction of the courts to review any decision of any disciplinary body established by the Students Association, of the Provost, of the University Discipline Board or of the University Council".

Similarly regulations at Canterbury University make provision for a high University official to perform a function which in olden times clearly belonged to the Visitor. These regulations provide that:

"[w]here in any case it is shown to the satisfaction of the Vice-Chancellor that hardship has been or will be caused to any student by: . . . (ii) a misinterpreta-

tion of these or any other regulations by an authorised member of the University staff; . . .the Vice-Chancellor may make such provision as he thinks fit for the relief of such hardship”.

This function of interpretation of internal legislation in the event of dispute traditionally belonged to the Visitor.²⁵

Obviously not too much weight can be attached to such slight provisions (which could in any event be attacked on the grounds of vires) but the provisions do show that the Visitor is not perceived to enjoy the full panoply of his traditional powers. His “usual” powers may not be that extensive.

The University as a Statutory Body

As previously discussed the statutory basis of University action clearly distinguishes modern Universities from those of former times. This must affect the question of visitatorial jurisdiction. If an Act of Parliament is regarded as “the law of the land” then dicta can be cited from cases such as *R v St. Johns College* to the effect that:

“[t]he Visitor is made by the founder and is the proper judge of the private laws of the Colleges, he is to determine offences against those laws. But where the law of the land is disobeyed the court will take notice notwithstanding the Visitor. . .”²⁶

Occasionally it is said that statutory incorporation makes no difference to the question of visitatorial jurisdiction but Commonwealth cases, particularly from Canada, belie the truth of that. For if the University dispute derives from the exercise of a statutory power, it must then enter the public law arena. Thus in *King v University of Saskatchewan* the Supreme Court of Canada considered a request for mandamus from a student who alleged a breach of natural justice in the conduct of University bodies which had determined his appeal from a Departmental refusal to award him a law degree. The judge at first instance had accepted the University’s submission that the granting of degrees was essentially a domestic matter within the Visitor’s jurisdiction; however the Supreme Court adopted the view of the Saskatchewan Court of Appeal that the applicant’s immediate aim was the enforcement of statutory public duties and that such duties were quite capable of being enforced by mandamus.²⁸ In a similar vein Weatherston

²⁵ It was also of interest that at the University of Canterbury a Mediator has been appointed to resolve, inter alia, disputes “between a member of the academic staff and the administration.” That is also a matter which would fall within the Visitor’s traditional jurisdiction.

²⁶ 4 Mod 233 at 241. See also *R v Bland* 7 Mod 355 at 356.

²⁷ *R v Dunsheath ex p Meredith* (supra). See also Sir Henry Winneke’s decision as Visitor in *R v University of Melbourne ex p Simone* [1981] V.R. 378.

²⁸ (1969) 6 DLR 120, 124-125 [Further Canadian cases indicating that the prerogative writs are potentially available to students against the University are *Re Polten and Governing Body of University of Toronto* (1976) 59 DLR (3d) 197 and *Re Schabas and Caput of University of Toronto* (1975) 52 DLR (3d) 495]. In Australia see similar dicta in *Ex p King Re University of Sydney* (supra) 19 at 31 and 43 as discussed by the High Court of Australia in *R v University of Sydney ex p Drummond* (1943) 67 CLR 95.

JA of the Ontario Court of Appeal recently asserted in *Re Paine and the University of Toronto* (1982) 131 DLR (3d) 325, 329 that “[t]here can be no doubt that the University of Toronto is a statutory body amenable to certiorari”.

Canadian courts have however encountered difficulties in determining whether action taken by a University body which is not specifically established by the empowering Act of Parliament but rather by University discretion or regulation can be regarded as subject to judicial rather than vistatorial review.²⁹ In New Zealand however the provisions of the Judicature Amendment Act 1972 (as amended in 1977) extend over a fairly wide area of public activity. For example, s.3 (as amended) defines a “statutory power” to include a power or right conferred under “the rules or bylaws of any body corporate”. The ready accessibility of remedies under this Act should encourage judicial review.

Nevertheless some University activity may still fall outside the purview of the Act. For instance one must speculate whether an application for review would be the appropriate method of review for a Departmental decision given that Departments are not expressly created either by Act of Parliament or by internal University legislation. In such circumstances, however, an applicant could still seek either an ordinary injunction or some declaratory relief under the Declaratory Judgments Act 1908. It might still however be necessary to establish a “public” non-domestic aspect to the dispute so as to avoid the argument it belonged to the private domestic jurisdiction of the Visitor. However any significant action affecting students or staff could be seen as aspects of the University’s public duty to provide instruction (*Riddle v University of Victoria* [1979] 3 WWR 289, 331). The Visitor’s role could thus be viewed as a residual one in the manner described later in this article.

Judicial Review of the Visitor

There are an abundance of dicta stating that any decision of the Visitor is final and subject to no appeal (see for example, *Philips v Bury*, supra); but such dicta do not concern the power of the courts to review on any of the traditional public law grounds. The Visitor is a statutory official with limited jurisdiction and is therefore as subject to judicial review as any other statutory official. This was noted by Megarry V-C in *Patel v Bradford University* [1978] 1 WLR 1488 at 1499, when he held that the Visitor can “. . . give a decision which apart from any impropriety or excess of jurisdiction is final and will not be disturbed by the courts”. The old authorities also recognised that the Visitor had both defined boundaries of jurisdiction and compellable duties and there are numerous instances where prohibition and mandamus have been granted against him.³⁰ Anomalously it seems certorari does not lie against the Visitor³¹ and in New Zealand particular problems must arise with any prerogative remedy lying against the

²⁹ Compare *Vanek v Governors of University of Alberta* (1976) 57 DLR (3d) 595, with *Re Elliott and Governors of University of Alberta* (1973) 37 DLR (3d) 197.

³⁰ See Bridge *op. cit.* pp.544-545 and Smith *op. cit.* at pp.650-651.

³¹ See S. A. de Smith “Judicial Review of Administrative Action” (4th ed) p.386

Governor-General. However, a declaration does lie against the Governor-General and in practice such a remedy would be as useful as a coercive one. Moreover s.4(2) Judicature Amendment Act 1972 provides that if on an application for review the applicant is entitled to a declaration that a decision is invalid then the court may instead of making such a declaration set the decision aside. Conceivably this power could be available against the University Visitor.

The old authorities also established that a Visitor's jurisdiction is reviewable on the grounds of breach of natural justice.³² As a breach of natural justice is now generally regarded as a jurisdictional error³³ this provides the justification, if any were needed, for arguing that the Visitor's decisions may be reviewed for jurisdictional error in the broad sense. The possibility of such wide-ranging review is in itself an indication that the Visitor can no longer be adequately viewed as the exclusive adjudicator of university disputes.

Judicial Attitudes in Reviewing University Action

Being a statutory body the university should, in principle, be open to attack on any of the administrative law grounds—e.g. *ultra vires*, jurisdictional error, breach of natural justice, fraud, or the as yet undefined ground of mistake of fact. It is submitted that the existence of the Visitor should no longer be regarded as a jurisdictional restriction on the court's power to award relief, but should at most be a factor to be weighed by the court in exercising its discretion to grant or withhold relief. Nevertheless the courts would still be expected to evince considerable reluctance in interposing in university disputes. In former times the reasons advanced for such unwillingness ranged from the floodgates argument to the undesirability of distracting "learned men from their studies" and of wasting their time (see *Attorney-General v Talbot*³⁴).

The reason given today however for judicial restraint is essentially one of respect for university autonomy. Thus the Supreme Court of Canada has propounded the view that because the Legislature has accorded a large measure of autonomy to the universities it is the duty of the courts to similarly attribute it by restraint in the issue of prerogative writs (see *Kane v Board of Governors of the University of British Columbia* (1980) 110 DLR (3d) 311, 321 and *Re Harelkin and University of Regina* (1979) 96 DLR (3d) 14, 57). Thus in the latter case it was said that the scheme of university legislation presupposed the solution of domestic disputes within the university. However a judicial warning has also been given that it does not follow from the fact of university autonomy that the university is immune to applications of *ultra vires*; the University must still operate

³² See Sadler *op. cit.* at pp.23-28.

³³ See generally *Anisimic v Foreign Compensation Commission* [1969] 2 All ER 208, 213; compare though *South East Asia Fire Bricks v Non Metallic Mineral Products Manufacturing Employees Union* [1980] 2 All ER 689, 692.

³⁴ 3 Atk 663 672 and 676. See also reasons of expedience given in *St. Johns College v Toddington* 1 Keny 440, 460 and *Exp Wrangham* 2 Ves June 607, 619. (If however, it is thought the Visitor provides a speedy means of redress the experience of the University of Waikato should be considered—see (1982) 77 AUT NZ Bulletin).

within the limits (albeit broad) of the empowering Act (*Clark v University of Melbourne* [1978] VR 457, 463).³⁵

Another reason why the courts may be hesitant to review is because of the courts awareness of the special needs and nature of university activity. Thus special tolerance has been accorded to Universities in the matters of delegation of judicial discretion (*Ex p Forster the University of Sydney* [1964] NSW 1000, 1009) and of bias (*King v University of Saskatchewan* (1969) 6 DLR (3d) 120, 131 and *Re Paine* (1982) 131 DLR (3d) 325, 331).

Indeed lack of intimate knowledge of university functioning may result in unrealistic judicial decisions. For example, in *Herring v Templeman* [1973] 3 All ER 569 Russell LJ considered that a hearing was not needed at the level of the academic board in a case concerning exclusion for unsatisfactory academic performance. He reached this conclusion on the ground that the board could only make recommendations to the Governing Body. Yet in reality the effective decision maker would almost certainly be the academic board because of the fact that in universities there is a de facto system of internal hierarchical control. Ideas flow upwards and are by convention rarely disturbed by the highest governing body.³⁶

Sometimes the subject matter of the dispute is regarded as inappropriate for judicial review. There is always judicial reluctance to review private disciplinary proceedings and this is equally true of university disciplinary proceedings.³⁷ For obvious reasons there is also considerable reluctance to interfere in matters of academic judgment and evaluation (see U.S. Supreme Court decision of *Board of Curators of University of Missouri v Horowitz* 435 US 78, 55L Ed 3d 124). It has been said that “[t]he context of educational societies involves a special factor which is not present in other contexts—namely the relation of tutor and pupil”; (*Glynne v Keele University* [1971] 2 All ER 89, 95 per Pennycuick V-C). Thus the educational process is not seen as suited to adversary proceedings given that a university teacher is meant to occupy “roles of educator, adviser, and friend” (*Board of Curators of University of Missouri v Horowitz*, supra at 90). For this reason it is occasionally stated to be “wholly undesirable” that an educational society should be fettered by natural justice” (see *Ward v Bradford Corporation* 1972 LGR 27, 37 per Phillimore LJ). And it is therefore sometimes said that University bodies must be masters of their own procedure (see *University of Ceylon v Fernando* [1960] All ER 631, 638 and *Herring v Templeman* (supra at 587)). Considerable trust is also placed in the “good sense and wisdom” of University decision-makers (see *Ex p Forster Re University of Sydney* (supra at 1008) and *Re Schabas et al and Caput of University of Toronto* (1975) 52 DLR (3d) 495, 526).

³⁵ Reversed on other grounds [1979] VR 66.

³⁶ For discussion of this phenomenon see Lord Ashby's Joan Woodward Memorial lecture “University Hierarchies” (Imperial College, 1976) and see D. Christie “A Problem of Jurisdiction and Natural Justice” (1974) 37 MLR 324.

³⁷ Discipline was once described by Lord Keynon CJ as “the soul” of the University in *R v Chancellor of the University of Cambridge* 6 TR 89, 106. See also Lord Campbell CJ in *Exp Death* (1852) 18 QBD 647, 658. In a non-University context see a recent example of this judicial reluctance in *R v BBC exp Lavelle* “The Times” 8.7.82.

Even so it is salutary to remember that in administrative law there is no such thing as an unfettered statutory discretion. Thus any statutory discretion whether it be admitting a matriculated student to a particular course of study (*Ex p Foster* supra at 1006) or assessing professional competence (*R v Askew* 4 Burr 2185, 2188) or dismissing a Professor (*Re the University of Saskatchewan and MacLaurin* [1920] 2 WWR 823 at 827) must necessarily be exercised bonafide for proper purposes and not in an "arbitrary, capricious or biassed way".

Students and Natural Justice

Even when the obstacle of visitatorial jurisdiction has not been raised, student applicants have been notably unsuccessful in any allegations of breach of natural justice. Often their failure is attributable to the judicial attitudes noted above. Yet with student applicants there is sometimes an additional unvoiced reason for declining a remedy which is not present with applications for review by academic staff—this is the feeling that universities still act in loco parentis and therefore have authority to deal with students as they think fit unfettered by procedural requirements.³⁸ This feeling can manifest itself in several ways. For instance the requirements of natural justice can be minimised to the point of extinction if the court happens to believe that an applicant trainee teacher "would never make a teacher" (*Ward v Bradford Corporation* supra per Lord Denning at 35); similarly the requirements can in effect be nullified altogether if the court in its discretion denies a remedy to the student because it feels the penalty is "intrinsically a perfectly proper one" (*Glynne v Keele University*, supra at 97).³⁹ The assumption occasionally seems to be that students lose certain rights on entering the University gates.

However, even *Glynne's* case is authority for the proposition that the rules of natural justice do apply when a fundamental power such as suspension is being exercised. Other cases, however, also illustrate that the requirements may be minimal. Thus it was held by the Privy Council that even where credibility of witnesses was essentially the issue in disciplinary proceedings prior to suspension, a fair hearing could be given without crossexamination (see *University of Ceylon v Fernando*, supra).⁴⁰ It has also been held that an academic board's decision to exclude a student from

³⁸ See D. C. Holland "The Student and the Law" (1969) Current Legal Problems 61, at pp.66-69.

³⁹ This is a significantly different test from the still controversial view that a discretionary remedy may be refused if the same result would have been reached after a full hearing (see *R v Senate of the University of Aston ex p Roffey* [1969] 2 All ER 964, 975). A paternalistic view towards students is evidenced in other cases e.g. *Brighton Corporation v Parry* [1972] L.G.R. 576, 588. In the USA the New York Supreme Court, Appellate Division, has upheld the University's dismissal of a student on the ground "she was not a typical Syracuse girl" in *Anthony v Syracuse University* (1928) 231 NY Supp 435.

⁴⁰ [1960] All ER 631. Their Lordships did however hold at 641 that the objection would have been "more formidable" if the student had requested crossexamination and been denied it. (Such a procedural burden may seem unfair but has been suggested in other cases e.g. *Glynne v Keele University* [1971] 2 All ER 89, 96). On the denial of crossexamination in other jurisdictions see *Re Schabas et al and Caput of University of Toronto* (1975) 52 DLR (3d) 495, 508 and *Bluett v Board of Trustees of University of Illinois* 134 NE 2d 635, 637.

a Teachers College need not be preceded by an oral hearing if there have been written submissions (see *Brighton Corporation v Parry* 1972, LGR 576, 586).⁴¹ It has similarly been held that legal representation is not necessarily a prerequisite in disciplinary proceedings leading to expulsion (see *Ex p Bolchover* "The Times" 6.10.70).

Generally one would expect the requirements of natural justice to be more rigorous when the University deals with disciplinary rather than academic matters. Spence J said in *King v University of Saskatchewan* supra at 129, "[i]t is difficult to conceive of a situation which would have the representatives of a law school faculty confronting the representatives of a student in a trial of an issue as to whether a degree should be granted". Yet as Megarry V-C has correctly pointed out the judgments in *King's* case do reveal that natural justice does apply to a decision to exclude for inadequate academic performance although in the particular circumstances of that case the requirements happened to have been met (see *Leary v National Union of Vehicle Builders* [1971] Ch. 34, 52). Similarly the Supreme Court of Canada in *Re Harelkin* (supra) has indicated that questions of academic performance do not preclude elementary natural justice (including the right to personal audience and the opportunity to contradict prejudicial statements); though the court was clearly influenced in this case by a statutory provision requiring the relevant University committees "to hear and decide".

Although in some circumstances it may be said that a student's examination or assignment is his or her "hearing" on academic performance, the situation is different if the University decisionmakers on exclusion do not limit themselves to questions of academic performance. Thus in *R v Senate of the University of Aston Ex p Roffey* (supra) it was held that natural justice was applicable because the decisionmakers took into account extraneous personal matters on which it was only fair to hear the student's views.

The final issue to be briefly discussed in this context is the legal basis on which a student can be said to be entitled to natural justice.⁴² As mentioned previously there is now slender authority to suggest that upon matriculation a student's relationship with the University becomes contractual. If this is correct, then contract as a traditional foundation for the requirements of natural justice would afford such a basis.

However, a more substantial peg on which to hang natural justice would be that of simple status. The empowering Acts of Parliament in New Zealand make a student a "member" of the University⁴³ and it could be argued that this membership gives a type of position akin to an "office". Thus at the very least a student could not be deprived of this position without a hearing. This becomes more obvious when it is recognised that in some areas Universities enjoy a virtual monopolistic control

⁴¹ On the rejection of the need for an oral hearing see also *Re Polten* (1976) 59 DLR (2d) 197, 216 but compare *Re Harelkin and University of Regina* (1979) 96 DLR (3d) 14, at pp.21-22, 34 noted in text.

⁴² For debate on this question see H. W. R. Wade [1969] LQR 468; J. F. Garner [1974] 90 LQR 6 and reply H. W. R. Wade [1974] 90 LQR 157. S. A. de Smith 1974 C.L.J. 23 Consider also cases noted supra fn 11.

⁴³ See, for example, s.3(2) University of Canterbury Act 1961 and supra fn 15.

over acquiring qualifications and that in disciplinary or exclusionary proceedings a student's future livelihood and reputation are at stake.⁴⁴

Indeed although the empowering Acts of Parliament do not provide procedural steps for University Disciplinary Committees (which could as suggested in *Re Schabas and Caput of University of Toronto* (supra) indicate they enjoy broad procedural freedom) the Universities in their internal legislation have generally been meticulous in providing procedural protection for students in their Disciplinary Committees.⁴⁵ Thus the fairness of the universities may mitigate any harshness in the caselaw.

Staff, Dismissal, Tenure and Natural Justice

To date the law of employment of academic staff in New Zealand has been in a quiescent state and there is virtually no caselaw. However the prospects of academic redundancy are no longer inconceivable in New Zealand⁴⁶ and the issue of procedural protection for staff may become an acute one. Again assuming that the Visitor is not a jurisdictional obstacle the Courts will have to determine the extent to which public law principles should be applicable to the University.

The law is clear when an employer terminates a contract of employment in a pure "master-servant" relationship. In brief an employer may dismiss his employees for whatever reason he thinks fit subject only to the requirement that he give the requisite period of notice or wages in lieu thereof. No hearing need be given and because of the personal nature of a contract of employment specific performance is generally not available as a remedy. However when the employer is a public body deriving its powers from statute it must exercise its powers in accordance with public law principles—e.g. it must act bona fide with the purpose of carrying out the objects of the statute. Moreover if the employee may be described as an officeholder in possession of a status which is removable only for cause then the public body must comply with the principles of natural justice before removing that status—even if the statute or regulations are silent on the question. This means, in effect, that if the rules of natural justice are not observed then the employee will be reinstated to his former position at least until the rules are properly observed.⁴⁷

The difficulty has always been to determine who qualifies as an officeholder. The perplexity of the question is seen in an important Privy

⁴⁴ This was judicially noted in *Herring v Templeman* [1973] 3 All ER 569, 582. (In another context New Zealand Court of Appeal has indicated that the rules of natural justice apply when a body possesses a monopoly over a certain type of work—*Stininato v Auckland Boxing Association* [1978] 1 NZLR 1).

⁴⁵ See, for example, the Disciplinary Regulations, at the University of Canterbury which provide inter alia, for legal or other representation. The Rules of Procedure of the Disciplinary Committee further provide, inter alia, for cross-examination and state that the Committee may adopt such new procedure under the Rules as it thinks fit provided that the procedure complies with the requirements of natural justice. Some regulations are however less favourable to the student—see for example Lincoln College's Disciplinary Regulations which expressly exclude legal representation.

⁴⁶ See (1982) AUTNZ Bulletin p.1.

⁴⁷ For a fuller discussion of the principles and cases see M. R. Freedland "The Contract of Employment" (O.U.P. 1976) at p.278-292.

Council opinion concerning the dismissal of a University Professor. In *Vidyodaya University of Ceylon v Silva*⁴⁸ the Privy Council determined that a Professor and Head of Department who was dismissed under a statutory provision requiring cause was merely in a master-servant relationship with the University so that natural justice did not apply. It is perhaps not surprising that Lord Wilberforce in *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278, 1295 stated he would not follow Silva's case and declared at 1244 that a pure master-servant relationship could only exist where "there is no element of public employment or service, no support by statute, nothing in the nature of an office or status which is capable of protection". (A later case, *Stevenson v United Road Transport Union* [1976] 3 All ER 29 ruled that natural justice may apply in any situation public or not, statutory or not, if cause needs to be shown before dismissal.)

The New Zealand statutory provisions do not expressly require cause as a precondition for dismissal.⁴⁹ Nevertheless, any dismissal derives from the exercise of a statutory power by a public body and this in itself differentiates academic employment from private employment. In *Riddle v University of Victoria* (supra) it has been said that the entering into the contract and the performance and termination of the contract are all aspects of the University performing its public duty to provide instruction; and in *Burns v Australian National University*⁵⁰ it was said that questions of appointment and dismissal are fundamental to the University functioning as a statutory body. The former case also noted that the employment of academic staff was quite different from the more "mundane" function of employing maintenance staff; and the latter case similarly noted that Professors in a University are likely to hold other important positions on University bodies and committees so as to distinguish them from mere employees. When combined with the arguments of possession of a status akin to tenure, the importance of academic freedom and the consequences of dismissal (all discussed below) such comments are strong support for the need of natural justice. And the latest Canadian case *Re Paine and the University of Toronto* (supra) suggests that the element of public employment and support by statute means natural justice must be observed before academic employment is terminated.⁵¹

⁴⁸ [1965] 1 WLR 76. Noted by S. M. Thio (1965) MLR 475.

⁴⁹ The only express limitations on the power of dismissal are found in s.36(1) University of Victoria Act 1961 and s.18 University of Waikato Act 1963 (as amended) which require a recommendation from the Senate or Academic Board respectively as a precondition to the Council exercising its power to remove staff. This would only be true of the other Universities if the decision to dismiss could be described as "an academic matter" e.g. s.36 University of Canterbury Act 1961.

⁵⁰ (Unreported) Federal Court of Australia, 27th April 1982 per Ellicott J. The decision was subsequently reversed on appeal by the General Division of the Federal Court of Australia on 8th October 1982. The basis for reversal was the finding by the appellate court that the professor in question had been dismissed under terms of a contract rather than "under an enactment" within the meaning of that expression in s.3 of the Administrative Division (Judicial) Review Act 1977 (Australia).

⁵¹ Consistent with this approach is the recent decision of the Ontario High Court of Justice in *Re Ruiperez and Board of Governors of Lakehead University* (1982) 130 DLR (3d) 422.

Many of the cases from the Canadian jurisdiction in this area have concerned the question of tenure.⁵² Tenure is important because it confers a property like “status” on the recipient who then approximates more an “officer” than a mere “servant”. Further, if it could be argued that the notion of tenure necessarily qualifies the statutory discretion to dismiss then tenured academic staff could be dismissed only for cause and a hearing would be required prior to such dismissal. (Equally one could not be divested of tenure itself without a hearing.)

In New Zealand however, there is no provision in either empowering or internal University legislation to provide a legal source for tenure and the Universities do not seem to make express contracts for unqualified tenure. Instead there is a widespread understanding that once a staff member has successfully graduated from any probationary appointment for a fixed term then the University has in fact granted meaningful “tenure” to the appointee. Thus the pervasive belief in tenure derives mostly from custom and past practice.⁵³ If tenure therefore has a legal basis it would usually have to be as a term implied into a contract of employment.

Perhaps tenure can be seen as so essential to University functioning that it must be an implied term. Certainly Ellicott J in *Burns v ANU* (supra) vigorously supported such an idea when he stated at p.23 that “[i]t is vital to the fulfilment of the University’s functions as an independent educational institution committed to the search for truth that the tenure of its professional staff be free from arbitrary attack. I can think of no principle more basic to the existence of a University in a free society”. On appeal the Federal Court of Australia expressed complete agreement with that view.

Contrary to such support for tenure are some early Canadian cases. For instance the notion that tenure for life could arise from either an understanding or from an express statement in correspondence from the University President was described as “startling” by Orde J in *Craig v Governors of University of Toronto*.⁵⁴ The court there felt that if an understanding of service for a life-time was binding on the University then the principles of mutuality would mean it was equally binding on the lecturer who would be unable to leave without the University’s consent. This was described as absurd and the court declared that any custom or usage, however general or long established in its operation, could not have

⁵² See the valuable discussion on this by D. M. Mullan in “Canadian Academic Tenure and Employment: An Uncertain Future” (1982) 7 Dalh. LJ 72 and in unpublished papers “The Modern Law of Tenure” (Conference Proceedings, Dalhousie University, 1975) and in “Tenure: Employment for Life or Uncertain Future” (Conference Proceedings, University of Victoria, 1980). Tenure is taken by Mullan to mean the right to employment at University until retiring age unless the University establishes cause—cause meaning essentially moral turpitude, misconduct and incapacity; quare financial necessity.

⁵³ A practice noted for example in the University of Canterbury Information Handbook for Staff which provides that appointment subject to three months notice has “never in the past resulted in any insecurity of tenure”. (On the question of whether a provision in a University handbook can be incorporated into the contract of employment see *Wheeldon v Simon Fraser University* (1971) 15 DLR (3d) 641).

⁵⁴ (1923) 53 OR 312. The case has subsequently been followed. See for example *Smith v Wesley College* [1923] 2 WWR 195.

the force of law so as to override the University's statutory power of dismissal.

This finding is of special significance. For in New Zealand it is arguable that tenure (either as an implied or express contractual term) is rendered somewhat worthless by the statutory power conferred on the University to appoint ". . . upon such notice, as it thinks fit".⁵⁵ No private contract can fetter the exercise of a statutory discretion. Thus in *De Groot v University of Victoria*⁵⁶ Barker J held that a contract with a non-academic member of staff which provided for "permanent appointment" was ultra vires the then existing statutory provision which provided for an unqualified power of dismissal.

However although custom and understandings (and perhaps even express contractual terms) might not be able to create tenure with its necessary incident of security from dismissal such customs or terms must surely create a status similar to tenure so that natural justice is required.

This argument is strengthened if it is conceded that academic freedom is an implied purpose of the empowering University legislation and that the promotion of academic freedom must therefore qualify any statutory discretion including that of dismissal.⁵⁷

Certainly academic freedom has been described by the Australian Federal Court as "the very principle upon which the University is founded" (*Burns v ANU*, supra, at p.23), and by the United States Supreme Court as a principle "of transcendent value to all of us and not merely the teachers concerned" (*Keyishan v Board of Regents* (385) US 589, 603, 17 L.Ed. 2d 629, 640). It would seem then that the protection of academic freedom may be an implied statutory object and that any dismissal without the pursuance of natural justice would therefore be contrary to this object.

A final argument in favour of natural justice is the serious effect of dismissal on a University lecturer's future livelihood. As was pointed out in *Smith v Wesley College* [1923] 3 WWR 193, 202 University lecturers have a highly specialised expertise and training which means they have few opportunities for suitable alternative employment. Given that academic staff are not covered by any award under the Industrial Relations Act 1973 it would seem obvious that, at the very least, the procedural protection of natural justice is required.

The New Role of the Visitor

The judicial activity displayed in the area of natural justice raises again the central question of the role and power of the Visitor within the University. As noted previously it has been judicially accepted in New Zealand in *Bell v University of Auckland* (supra) that the Visitor is more than a "ceremonial functionary", and it must therefore be accepted that

⁵⁵ See, for example, s.18(b) University of Canterbury Act 1961 (as amended). See also discussion of F. M. Brookfield "Tenure in the Universities" [1981] R.L. 64.

⁵⁶ (Unreported) Supreme Court, Wellington 12.12.77 A385/75.

⁵⁷ Academic freedom has been defined as "that aspect of intellectual liberty concerned with the peculiar institutional needs of the academic community" in "Academic Freedom" (1967) 81 Harv L. Rev. 1045, 1048 (author unknown).

he does possess some real power—although he has yet to exercise it.⁵⁸ The problem of course lies in defining the boundaries of that power because even the staunchest advocates of visitatorial jurisdiction would not claim that his once impressive jurisdiction has remained unabated. Thus, in *Patel v Bradford University* Megarry V-C described the once fundamental power of inspection at the visitor's initiative as "obsolescent".⁵⁹ Likewise the once important visitatorial power of expulsion of University members must also be regarded as obsolescent in view of the empowering University legislation appointing the Councils to have "entire management" of the University. As stated in *Re Wilson* it is inconceivable that the Visitor is intended to be "ruler over those who are appointed to govern".⁶⁰ Similarly the once important visitatorial function of supervision of the administration of the property of the foundation must be regarded as severely qualified in light of the statutory powers accorded to the Minister of Education in this area.⁶¹

It is apparent that a new theory of visitatorial jurisdiction needs to be devised whereby the spirit of the old caselaw is adapted to the reality of modern circumstances. This is not difficult if it is remembered that the essential feature of visitatorial jurisdiction was its private domestic nature. Thus when it was held that the Visitor was competent to interpret the statutes of a College it was contemplated he would be interpreting private legislation of a founder and not "the law of the land" discovered in Acts of Parliament.

In the present day the University with its statutory origin will be involved in many disputes of a public or contractual nature which, for reasons discussed above, are more appropriately dealt with by the courts. However within the University there exist many internal customs, conventions, rulings, regulations which are not so obviously justiciable and it is in dealing with these matters that the Visitor could still retain a valuable residual function as a quasi-ombudsman. Thus if after exhausting all formal internal procedures a member of the University felt a legitimate grievance about a purely internal decision he could apply to the Visitor for review. The Visitor would not act as a court of appeal from

⁵⁸ A Royal Commission into the University of 1880 had reported that the office of visitor of the University and the University Colleges "should not be of a merely honorary nature, but should be brought into connection, in some degrees with the general system of education in the colony" (see J. C. Beaglehole "The University of New Zealand: an historical study, Wellington, 1957 at p.137). Also if an office is purely ceremonial it would probably be so specified in the empowering legislation. (See the provision for the office of Chancellor of the University of Canterbury in s.25(3) University of Canterbury Act 1961.

⁵⁹ [1978] WLR 1488 at 1493. The power is described in *Phillips v Bury* 4 Mod 106, 122. However this "obsolescent" power does in fact seem to have been recently invoked in South Australia. See Sadler *op. cit.* at p.20.

⁶⁰ (1885) 18 NSR 180, 197. The wide powers of a governing body are seen for example, in s.17 and s.34(3) of the University of Canterbury Act 1961. The importance of such powers in the context of visitatorial jurisdiction was also acknowledged in *Ex p. McFayden* (1945) 45 SR (NSW) 200 at 205. Note though that statute accords the Governor-General some influence over appointments to the governing body. See, for example, s.6(2)(c) University of Canterbury Act 1961.

⁶¹ See, for example, s.51 University of Canterbury Act 1961.

that decision (see *University of Melbourne v Simone* [1981] VR 378, 387); nevertheless the Visitor could in appropriate cases review the matter in the light of University practice and the principles of good administration. Where necessary he could give advice or make recommendations to the University's governing body which, it could be expected, would accept them. (The Governor-General would not of course necessarily exercise these functions in person but as is proposed with the Visitation determination at the University of Waikato he could delegate them to appropriate persons.)⁶²

One could speculate about the matters which might fall within the Visitor's competence. If for instance correspondence from a Head of Department led a staff member prior to appointment to believe he was to take over the Headship or if a student was admitted in error to an Honours course by a member of the Department, it is then possible that the Visitor could recommend that the Department should not act inconsistently with their previous representations or actions, despite the fact that no question of estoppel could be successfully raised in a court of law. Indeed there are innumerable hypothetical disputes concerning the "management of the domus" which would be appropriate solely for visitatorial decision—for example, if a student wished to challenge whether he fell within the purview of an Academic (or Professional) Board ruling, or if a staff member wished to challenge a refusal to promote him alleging that philosophical differences with the Head of Department led to a negative recommendation, or if a Department wished to challenge a decision to disestablish a lecturing position.

On such internal matters the Visitor would enjoy a jurisdiction upon which the courts would not wish to trespass. Consistency with the tenor of the old common law would thus be attained.

The most recent judicial authority in Australia supports this view. In *Murdoch University v Bloom* [1980] WAR 193, the defendant had been employed under a contract of service whereby he was entitled to twelve months sabbatical leave of study and travel as approved by the Vice-Chancellor (unless the Senate had otherwise directed). When however the defendant submitted his study leave programme for approval the Vice-Chancellor, without any Senate direction, informed him that approval had been granted for six months only. The defendant applied to the Visitor for a declaration of entitlement to twelve months leave—firstly on the basis of his contract of service and alternatively on the basis that the decision of the Vice-Chancellor was harsh and unjust and contrary to Senate resolutions. The plaintiff University argued that neither of the defendant's claims was within the jurisdiction of the Visitor. The Full Court of the Supreme Court of Western Australia was required to consider this argument. The Court proceeded to distinguish rights enjoyed under the law of the land (such as rights under contract) and matters of an intra-mural nature. Thus the Court held that the defendant's first claim for a

⁶² Ricquier—op. cit. p.628 and Sadler—op. cit. p.21 note the acceptability of delegation. The delegates for the determination at the University of Waikato are a retired Judge and a senior academic—"The Christchurch Press" 7 September 1982. It would seem to be always desirable that at least one of the delegates was a person fully aware of the spirit and workings of the universities.

declaration was essentially a claim for a declaration of right concerning the common law question of contractual construction. Burt CJ said, at 198 “[i]t is not a matter which relates to the management of the house and it is not a matter in difference which can be resolved by the application of the law of the house”. The majority therefore held the first claim for a declaration was outside the Visitor’s jurisdiction. However the second claim was unanimously held to be within the Visitor’s jurisdiction and therefore outside that of the courts; for the second claim concerned the manner in which the Vice-Chancellor had exercised his jurisdiction. This was truly a domestic or internal matter.

It is suggested that Bloom’s case provides a neat illustration of the modern visitatorial jurisdiction. However, the picture has been a little blurred by the recent judgment of Sir Henry Winneke in the exercise of his visitatorial jurisdiction in *University of Melbourne v Simone* (supra). In that decision Sir Henry Winneke indicated that if an Act of Parliament was the foundation instrument of a University it could impose a duty which fell within the exclusive purview of the Visitor provided that the duty was merely of a domestic nature. However it is doubtful what value, if any, a Visitor’s decision enjoys as a precedent in future judicial determinations; and it is submitted that when an Act of Parliament is in issue then any duty under it would fall within the province of the courts—although domestic characteristics may be influential in the courts declining a discretionary remedy.⁶³

Thus it is contended that the University should be regarded as simply another statutory body (albeit one with special characteristics) and that any issue of public law or contract should therefore be justiciable. However if an issue of purely domestic administration arises it is then that the Visitor would become the appropriate forum for complaint. In this way the Visitor could be seen as providing additional rather than lesser protection for University members and a Visitor awakened from slumber would indeed be a welcome guest.

⁶³ Though see *R v Dunsheath ex p. Meredith*, supra fn 20.

